



Office
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du Canada

Canadian
Transportation
Agency

DETERMINATION NO. R-2021-172

November 22, 2021

APPLICATION by the Canadian National Railway Company (CN) pursuant to subsection 98(2) of the *Canada Transportation Act*, SC 1996, c 10 (CTA), for Canadian Transportation Agency (Agency) approval to construct certain railway lines associated with a new satellite intermodal terminal, including the realignment and extension of the existing mainline tracks, collectively to be known as the CN Milton Logistics Hub (Project).

Case No. 16-00458

INTRODUCTION

- [1] CN filed an application (Application) with the Agency on January 22, 2016. CN seeks Agency approval, pursuant to section 98 of the CTA, to construct railway lines.
- [2] More specifically, CN seeks Agency approval to construct various railway lines between mileage points 39.50 and 36.86 of CN's Halton Subdivision. Collectively, the railway lines that CN wants to construct and operate would create a new intermodal terminal, located within the Town of Milton, Ontario, to be known as the Project.
- [3] CN's Application includes, and incorporates by reference, the Environmental Impact Statement (EIS) that CN filed with the Canadian Environmental Assessment Agency (CEA Agency) on December 7, 2015, pursuant to the *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 66 (CEAA 2012).
- [4] The Application was preceded by several key events. To understand this Determination, it is important to understand the background to the Application. Those background events took place, more or less simultaneously, both at the Agency as well as at the CEA Agency starting in 2015.

BACKGROUND

- [5] At the start of the proceedings, CN had taken the view that the construction of the subject railway lines was exempt from Agency approval under subsection 98(3) of the CTA, which sets out the railway lines that a railway company may construct without Agency approval. The Agency resolved that issue in Decision No. 144-R-2015, dated May 13, 2015.
- [6] In that decision, the Agency identified the railway lines within the Project that were exempt from Agency approval, in addition to the railway lines that were not exempt. The Agency also found in that decision that Agency approval under subsection 98(1) of the CTA is required for the construction of the extension of the mainline and Service Tracks 1 and 2. The construction of these railway lines are not within the scope of the exemption provided for under subsection 98(3) of the CTA as they are longer than 3 km. Agency approval was also required to construct Tracks 5 and 6, as they would be located outside of 100 m of the centre line of an existing railway line, the New Mainline Track. All of these lines of railway are more specifically set out on CN preliminary Diagram 01-SK-01 filed on April 20, 2015.
- [7] As previously stated, CN filed the Application with the Agency on January 22, 2016. On December 1, 2016 the Agency appointed the undersigned as the Agency Panel to determine the Application.
- [8] The Project is also subject to a federal environmental assessment. That assessment also began in 2015. The environmental assessment was not conducted by the Agency. It was conducted by the CEA Agency. Some of the key steps in that assessment process included:
- On May 22, 2015, the CEA Agency determined that CN would be required to submit an EIS related to the Project;
 - On July 20, 2015, the CEA Agency issued its final *Guidelines for the Preparation of an Environmental Impact Statement (Guidelines)* to CN. These Guidelines were specific to the Project;
 - On July 20, 2015, the Minister of the Environment (Minister) determined that the environmental assessment would be conducted by a review panel (Review Panel);
 - On December 7, 2015, CN submitted an EIS for the Project to the CEA Agency. The EIS is an extensive collection of documents and technical reports.

- [9] The key background events continued into 2016, after CN filed the Application. These events now involved both the Agency and the CEA Agency acting jointly:
- On December 6, 2016, the Minister and the Chair of the Agency disclosed the final version of the *Agreement to Establish a Joint Process for the Review of the Milton Logistics Hub Project (Agreement)*. This Agreement had been previously published in draft form on the Registry to allow anyone who wished to read it and comment on it to do so;
 - The Review Panel was required, pursuant to section 43 of CEEA 2012, to hold a public hearing. The Agency elected to conduct a public hearing as part of its determination pursuant to section 98 of the CTA. Among other things, the Agreement set out how the Agency and the CEEA Agency would conduct their respective public hearings jointly, at the same time;
 - On December 6, 2016, the Minister announced the names of the three people who would form the Review Panel to conduct the environmental assessment. The three-member Review Panel included the same person that the Chair of the Agency had appointed, a few days previously, to conduct and to determine the Application on behalf of the Agency. The purpose of this appointment was to allow the Agency Member to participate in the environmental assessment and to collect information and evidence necessary for the Agency approval, if any, of the Project pursuant to the CTA.
- [10] The joint process to review the Project included an extensive, detailed and comprehensive public exchange of Information Requests and answers to the Information Requests with CN in 2017 and 2018. The public hearing followed in parts of June and July 2019 in Milton, Ontario.
- [11] From the perspective of the Review Panel, the environmental assessment of the Project came to an end, at least practically, on January 27, 2020, when it presented its Report to the Minister.
- [12] The environmental assessment of the Project under CEEA 2012, reached an important milestone on January 21, 2021, when the Minister issued the Decision Statement, allowing the Project to proceed to the next approval steps.
- [13] All of the information gathered during the joint proceeding is publicly available on the Registry established by the Impact Assessment Agency. This information includes, but is not limited to, the Application, the EIS, the Agreement, the Terms of Reference for the

Review Panel, the Information Requests and CN's answers to the Information Requests, the written evidence filed at the public hearing, the transcripts of the oral evidence given at the public hearing, the Report of the Review Panel, and the Minister's Decision Statement.

- [14] With the receipt of the Ministers' Decision Statement on January 21, 2021, the Agency's consideration of the Application, including all of the evidence on the record and the evidence gathered at the public hearing, could resume.
- [15] A chronology of certain key events in this file is set out in an appendix to this determination.
- [16] In determining whether to grant the section 98 authorization for which CN has applied, the Agency must decide:
1. whether the location of the railway line is reasonable taking into consideration the requirements for railway operations and services and the interests of the localities that will be affected by the railway lines; and
 2. whether the Crown met its duty to consult with Indigenous peoples who may be affected by the Project, and whether the concerns and interests of Indigenous groups have been appropriately accommodated.

DETERMINATION

- [17] For the reasons set out below, the Agency finds that the location of the proposed railway lines is reasonable taking into consideration the requirements for railway operations and services and the interests of the localities that will be affected by the line. Pursuant to subsection 98(2) of the CTA, the Agency therefore approves CN's Application subject to the conditions discussed below.

PROJECT OVERVIEW

- [18] CN already operates a railway line in the vicinity of the Project. The existing railway line traverses Milton generally in a north-south direction. The railway line has been in existence for more than 100 years. CN identifies this railway line as the CN Halton Subdivision. That railway subdivision begins at a point called CN's Bayview Junction in Burlington, Ontario. It runs north through Milton to Georgetown, Ontario before turning east through Brampton, Ontario and then to Toronto, Ontario. The CN Halton Subdivision

ends at a point called CN's Doncaster Junction in Toronto. The Canadian Pacific Railway Company also operates a mainline of railway, which traverses Milton, generally in an east-west direction, essentially parallel to Ontario Highway 401.

- [19] CN's Project is to construct and operate a new intermodal terminal including the realignment and extension of the existing mainline tracks. The terminal would provide facilities for the transfer of containers between railcars and trucks, including some temporary container storage. The Project is forecasted to handle approximately 350,000 containers annually at the start of operation and 450,000 containers annually at full operation. The intermodal containers would be used to transport finished products, such as appliances, furniture, household goods, automotive parts health care products and food products.
- [20] The Project will be located adjacent and parallel to CN's existing mainline railway corridor on properties entirely owned by CN. The Project will be built on approximately 400 acres of the 1,000 acres of CN-owned land adjacent to CN's Halton Subdivision.
- [21] The extent of the realignment and extension of the mainline are within CN's property and are bounded by Derry Road to the north and 2nd Sideroad to the south. The Project components will generally be bounded by Britannia Road to the north, First Line to the east, Tremaine Road to the west, and Lower Base Line to the south.
- [22] To accommodate the Project and facilitate rail operations, CN's existing mainline will be realigned eastward by a maximum distance of 98 m from the centre line of the existing mainline between Ash station and a point south of Lower Base Line. The realignment of the existing mainline will occur on CN property.
- [23] The Project also requires the extension of the second mainline from Ash station (mileage point 39.50) to a point south of Derry Road (Mile 36.86). No new property will be required to accommodate this double-track extension as it will remain within CN's property, allowing for continued mainline rail movement along the existing corridor.
- [24] The Project also involves the construction of six yard tracks parallel to the mainline. These tracks will support the intermodal operation, including tracks to accommodate the loading and unloading of intermodal railcars (pad tracks) and tracks to hold and switch railcars (service tracks). As designed, the six yard tracks are estimated to total

20,510 m of new yard trackage constructed on CN-owned property, as follows:

- Service Track 1 – 4,614 m;
- Service Track 2 – 5,261 m;
- Service Track 3 – 2,552 m;
- Pad Track 4 – 2,623 m;
- Pad Track 5 – 2,680 m; and
- Pad Track 6 – 2,780 m.

- [25] Two intermodal work pads will be located adjacent to the three pad tracks. Each of the two work pads will measure approximately 65 m wide by 2,000 m long and will serve as the hard surface areas designated for loading and unloading activities, and temporary container storage.
- [26] Work pads will also be used for the temporary storage of containers that have been unloaded from trains while those containers are awaiting pick-up by truck, or that have been delivered by truck and are awaiting being loaded onto a train for another destination. Containers are either stored in stacks on the pad, or stored on a parked chassis (wheeled storage) awaiting pick-up.
- [27] Truck access to the Project will be through a CN-owned, approximately 1.7-kilometre-long, private-access road off Britannia Road. The access road will include a new two-lane overpass to enable truck access over the CN mainline and yard tracks, which will accommodate trucks entering and exiting the Project. The access road will be located entirely on CN-owned land.
- [28] Stormwater runoff from the Project, including the work pads, access roads, parking areas, gate area and administration building, will be collected and conveyed through a network of storm sewers and drainage swales to two stormwater management ponds before draining into Indian Creek or Tributary A. Further, a series of grassed swales will be provided between the yard and gate/administration building to collect, store, treat and convey storm runoff from the work pads and yard tracks to the stormwater management ponds. Oil grit separators, which capture litter, coarse sediment, some nutrients, oils and greases (hydrocarbons), will be provided for the administration building and gate area.

- [29] An 8-MVA transformer will be installed near the administration building. Any electrical lines crossing the work pads or yard tracks will be installed underground while lines in other areas will be installed above ground. On-site power generators will be used as back-up power sources in the event of a power failure.

REGULATORY FRAMEWORK

- [30] The Agency must determine the Application that CN submitted pursuant to subsection 98(2) of the CTA, which states:

The Agency may, on application by the railway company, grant the approval if it considers that the location of the railway line is reasonable, taking into consideration requirements for railway operations and services and the interests of the localities that will be affected by the line.

- [31] Subsection 98(2) directs the Agency to focus, first and foremost, on the location of the railway line or lines that are the subject of the application. Ultimately, the Agency must decide whether that location is or is not “reasonable.” In making that determination, the Agency must take into account two general areas of consideration: first, the requirements for railway operations and services and second, the interests of the localities that will be affected by the subject railway line or lines.

- [32] Parliament did not define any of the words or the terms used in drafting subsection 98(2). There is no statutory definition of what constitutes “railway operations and services.” There is equally no statutory definition of a “locality” or “the interests of the localities.” Similarly, the CTA does not provide for any regulation to be drafted to assist the Agency in making its determination of an application filed under subsection 98(2). It follows, therefore, that Parliament has granted the Agency a broad discretion in carrying out its determination of any such application. The Agency is an independent statutory administrative tribunal. As such, the Agency exercises that broad discretion under subsection 98(2) within the four corners of the jurisdiction and powers granted to it by its enabling statute, the CTA.

- [33] In exercising that broad statutory discretion, the Agency benefits from the judicial consideration of section 98. The Federal Court of Appeal (FCA) judicially considered subsection 98(2) on two occasions in 1999.

[34] The first decision, *Canadian National Railway Co. v Canadian Transportation Agency*, 1999 FCA A-46-99, addressed the scope of subsection 98(2), namely whether it applied only to the construction of “branch lines” of railway to use the wording of the analogous statutory provisions previously in effect or whether it also applies to the construction of any lines of railway, such as those to be constructed within an existing railway right-of-way or within an existing railway yard. In that decision, the FCA affirmed that the CTA has jurisdiction to approve, or not approve, the construction of railway lines within a railway yard and concluded that “to interpret the term ‘railway line’ as being only a line between termini leads to illogical results”.

[35] That decision, at paragraph 12, also provided guidance on the meaning of the term “interest of the localities affected by the line”:

The purpose of section 98 is to provide regulatory oversight over the location of railway lines, including railway lines in yards, having regard to the interests of affected localities. Here, the Act is concerned with balancing the requirements for railway operations and services as advanced by the railway company, with **the effect of the physical co-existence of railway lines in proximity to localities**. This is not economic regulation [emphasis added].

[36] The Agency will therefore have regard to the effect of the physical co-existence of the railway lines in proximity to the localities. When considering and weighing the interests advanced by the many different representatives who speak on behalf of the localities, the Agency will consider the extent to which those various interests relate to the physical co-existence of the railway lines in proximity to the localities.

[37] The second decision, *Sharp v Canada (Transportation Agency)* (CA) [1999] 4 FC 363 (Sharp), further defined the scope of subsection 98(2). In that decision, the FCA found that the Agency did not have to consider whether the proposed railway line was “needed,” when deciding whether the location of the line or lines was reasonable. The Court held: “There is no needs test implied in a consideration of the reasonableness of the location of the line”. Moreover, the FCA clarified the reason the Agency did not have to address the need for the line by stating: “The need for the line will be presumed by reason of the application made by the railway company”. This last comment bears repeating, the application filed under subsection 98(2) of the CTA is, itself, proof of the need for the construction of the subject railway lines.

[38] That decision also provided guidance on the meaning of the term: “the requirements of railway operations and services.” The FCA stated that those words similarly do not refer to “need” but refer “only to those requirements that will enable the railway company to provide service to its customers”:

Nor do the words “taking into consideration requirements for railway operations and services” suggest that the need for the line is a relevant consideration for the Agency. In the context of a location decision, “requirements for railway operations and services” **refers only to those requirements that will enable the railway company to provide service to its customers.** It does not refer to the need for the line. In this case, the Agency considered the efficient use of existing equipment, infrastructure and rail crews, as well as operational requirements including track grades to allow carriage of the amount of traffic offered. These are the types of matters contemplated by the words “requirements for railway operations and services” [emphasis added].

[39] When considering the evidence on the record related to the requirements for railway operations and services in the context of the Project, the Agency will have regard to those requirements that will enable the railway company to provide service to its customers.

[40] This is not the first time the Agency has been required to determine an application filed by a railway company pursuant to section 98 of the CTA in the specific context of the proposed construction of railway lines to create an intermodal terminal. Since the aforementioned decisions of the FCA, the Agency has issued a number of such determinations; in each case, the Agency found that the location of the railway lines to create an intermodal terminal was reasonable:

- 570-R-1999 (CN Edmonton Intermodal Terminal)
- 50-R-2011 (CN Calgary Intermodal Terminal)
- 231-R-2011 (CP Regina Intermodal Terminal)
- 96-R-2012 (CP Edmonton Intermodal Facility)
- 85-R-2013 (CSX Valleyfield Intermodal Terminal)

[41] Four of those five intermodal terminal projects (excluding the CSX Valleyfield Intermodal Terminal) were also subject to an environmental assessment. Under the statutory regime in effect at the relevant times, the environmental assessment was conducted by the Agency itself, and not by the CEA Agency, or its predecessors. In the Agency determinations, some of the concerns that the representatives of the localities identified

as “interest of the localities to be affected by the line” included a number of concerns that are also often addressed as part of an environmental assessment, such as wetlands, wildlife, truck traffic, transportation of dangerous goods, noise, vibration, and lighting. In each of those four previous determination subject to environmental assessment, the Agency found that the construction and operation of the intermodal terminal would not result in any “significant adverse environmental effects” within the meaning of the *Canadian Environmental Assessment Act*, S.C., 1992, c. 37.

- [42] A full understanding of the regulatory framework applicable to the CN Application also requires a consideration of subsection 98(3) of the CTA as it establishes a class of railway lines, the construction of which is exempt from Agency review. Subsection 98(3) of the CTA provides that Agency approval is not required for the construction of a railway line within the right-of-way of an existing railway line or within 100 metres of the centre line of an existing railway line for a distance no longer than 3 kilometres.
- [43] The scope of that statutory exemption can be significant; for example, in another case involving an intermodal terminal, that is Decision No. 376-R-1999 (St. Lawrence & Hudson Railway Company’s Lachine container terminal), the Agency found that the proposed expansion of an existing intermodal terminal, in its entirety, fell within the scope of the exemption at subsection 98(3) of the CTA. In that case, no Agency approval was required to construct the line.
- [44] The scope of the statutory exemption arose in the context of the within Project before the subject Application was filed with the Agency in 2016. A question arose whether the entire Project fell within the scope of the exemption from Agency approval. On May 13, 2015, the Agency determined, in Decision No. 144-R-2015, that while the construction of some of the railway lines forming part of the Project was indeed exempt, the construction of other lines was not. The decision held that CN required Agency approval under subsection 98(1) of the CTA to construct “the extension of the mainline and Service Tracks 1 and 2, as they are longer than 3 km, and for Tracks 5 and 6, as they would be located beyond 100 m of the centre line of an existing railway line”.
- [45] A proper appreciation of the scope of section 98 of the CTA benefits from an understanding of some of the other provisions of the same statute that are relevant, either directly or indirectly, to the construction of railway lines and to the assessment of whether the location of the lines to be constructed is reasonable.

- [46] Section 5 of the CTA sets out the National Transportation Policy of Canada, which mentions that the national transportation system should, among other objectives, makes the best use of all modes of transportation:

It is declared that a competitive, economic and efficient national transportation system that meets the highest practicable safety and security standards and contributes to a sustainable environment and makes the best use of all modes of transportation at the lowest total cost is essential to serve the needs of its users, advance the well-being of Canadians and enable competitiveness and economic growth in both urban and rural areas throughout Canada. Those objectives are most likely to be achieved when

(a) competition and market forces, both within and among the various modes of transportation, are the prime agents in providing viable and effective transportation services;

(b) regulation and strategic public intervention are used to achieve economic, safety, security, environmental or social outcomes that cannot be achieved satisfactorily by competition and market forces and do not unduly favour, or reduce the inherent advantages of, any particular mode of transportation.

....

- [47] Part III of the CTA is entitled "Railway Transportation" and includes section 95 of the CTA, which, like section 98 of the CTA, is relevant to the construction of railway line. Section 95 of the CTA lists some of the general corporate powers a railway company may exercise in the construction or operation of its railway. Subsection 95(1) of the CTA gives railway companies some exceptional powers. A railway company may:

(a) make or construct tunnels, embankments, aqueducts, bridges, roads, conduits, drains, piers, arches, cuttings and fences across or along a railway, watercourse, canal or road that adjoins or intersects the railway;

(b) divert or alter the course of a watercourse or road, or raise or lower it, in order to carry it more conveniently across or along the railway;

(c) make drains or conduits into, through or under land adjoining the railway for the purpose of conveying water from or to the railway;

(d) divert or alter the position of a water pipe, gas pipe, sewer or drain, or telegraph, telephone or electric line, wire or pole across or along the railway; and

(e) do anything else necessary for the construction or operation of the railway.

- [48] These powers must be exercised in accordance with the other provisions of the CTA and all other federal laws. Moreover, subsections 95(2) and 95(3) state, generally, that a railway company shall do as little damage as possible in the exercise of these powers and, specifically, that if a railway company does divert something like a watercourse or a road that it shall restore it as nearly as possible to its former condition or shall put it in a condition that does not substantially impair its usefulness.
- [49] Parliament gave the Agency jurisdiction to hear and to resolve complaints from members of the public concerned over railway noise that they considered to be unreasonable. Section 95.1 of Part III of the CTA, which was added to the statute in 2007, addresses public reaction to the noise and vibration that necessarily results from the construction and operation of a railway. Section 95.1 requires a railway company to cause only such noise and vibration as is reasonable. Section 95.3 empowers the Agency to receive, investigate and resolve complaints over railway noise and vibration.
- [50] In regard to railway noise and vibration complaints, the Agency established in Decision No. 35-R-2012 the analytical framework for deciding whether a railway company is complying with its noise and vibration obligations at section 95.1 of the CTA. Making a parallel with jurisprudence of courts of civil jurisdiction on nuisance law, the Agency determined that the first step in considering an application filed under section 95.1 consists of determining whether there is noise and/or vibration, which constitute substantial interference with the ordinary comfort or convenience of living, according to the standards of the average person (substantial interference). In the affirmative, the Agency must then balance the noise and/or vibration against the criteria set out in section 95.1 of the CTA to determine whether, in that context, the noise and/or vibration is reasonable. If the Agency concludes after this balancing exercise that noise and/or vibration is not reasonable, it may order corrective measures. In examining whether substantial interference was caused in that case, the Agency considered the nature, the duration and frequency of the noise/vibration.
- [51] There are a number of intermodal terminals in Canada operated by a number of federally regulated railway companies in Canada. Since 2007, the Agency has received a number of complaints related to railway noise arising in a number of different situations. That said, when CN submitted the Application in 2016, the Agency had never received a complaint related to noise from the operation of an intermodal terminal.
- [52] On May 29, 2017, the Agency found in Decision No. LET-R-21-2017 that the noise levels caused by CN's intermodal operations at Transcona Yard constitute substantial interference, and that CN had failed to comply with its obligation to only cause such noise

as is reasonable within the meaning of section 95.1 of the CTA. The Agency directed CN to show cause why the Agency should not order CN to incorporate infrastructure modifications to accommodate departing trains within the confines of the yard.

- [53] Sections 113 to 115 of the CTA establish a railway company's statutory level of service obligations and subsection 113(4) of the CTA provides that a railway company and a shipper may agree on the manner in which the railway company will fulfill these obligations to the shipper. Sections 113 to 115 of the CTA are referred to as "common carrier" obligations. One of the purposes of these provisions is to enable the Agency to establish the level of service a railway company must provide to its customers, if competition and market forces fail to do so.
- [54] The Agency's powers under section 116 of the CTA are broad enough to authorize the Agency to make orders affecting practically all aspects of a railway company's business and operations where necessary to remedy a breach of its level of service obligations. This includes the power to require a railway company to acquire property and the power to make orders respecting the allocation of cars or motive power.
- [55] One example of the extent of these common carrier obligations, under essentially identical statutory provisions, and the significant powers of the Agency to impose those obligations on a railway company, is the decision of the Canadian Transport Commission, one of the Agency's predecessors in *Prince Rupert Grain v CN, Reasons for Decision*, WDR 1984-02, dated January 13, 1984. One of CN's customers built a high throughput export grain terminal elevator at Ridley Island at the Port of Prince Rupert. The Commission ordered CN to construct a railway yard to handle the railway hopper cars travelling into and out of the grain elevator. The railway yard, which included elevator tracks as well as a railway receiving and departure yard, was constructed adjacent to CN's mainline of railway and, as directed by the Commission, at CN's expense. CN did not own the land on which the railway yard was constructed and operated; the decision ordered CN to acquire an interest in the land.

Constitution Act, 1867

- [56] Some members of the public who appeared at the public hearing to oppose the Project expressed their dissatisfaction with the fact that CN was a federally regulated railway company. Some questioned whether CN ceased to be federally regulated when, in the 1990s, it evolved from a federal Crown Corporation to a private company owned by

shareholders. The answer is found in the *Constitution Act, 1867*. Its privatization notwithstanding, CN remains a federally regulated railway company and the Application it filed in 2016 remains subject to Agency jurisdiction under section 98 of the CTA.

[57] The *Constitution Act, 1867*, at sections 91 and 92 respectively, defines the legislative powers assigned to the federal and provincial legislatures in Canada. Since the Confederation, railway companies operating in Canada are subject either to federal or to provincial jurisdiction. In either case, the *Constitution Act, 1867* states that those legislative powers are exclusive: federally regulated railway companies are subject to the exclusive legislative jurisdiction of Parliament; provincially regulated railway companies are subject to the exclusive legislative jurisdiction of the province in which those companies operate. The key provision of the *Constitution Act, 1867* is section 92.10, which provides:

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

10. Local Works and Undertakings other than such as are of the following Classes:

(a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:

(b) Lines of Steam Ships between the Province and any British or Foreign Country:

(c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

[58] According to the language of section 92.10, a railway company, which operates entirely within a given province, is considered a “local work” and is thereby subject to provincial legislative authority. Also according to the language of section 92.10, when read in conjunction with section 91.29, a railway company whose operations extend beyond a provincial or national boundary is subject to federal legislative authority. As mentioned, section 91 of the *Constitution Act, 1867* sets out the matters that are subject to exclusive federal legislative jurisdiction.

- [59] Subsection 92.10(c) empowers Parliament to declare a work to be a work for the general advantage of Canada and therefore subject to federal jurisdiction. In the *CN Commercialization Act*, SC 1995, c 24 Parliament, among other things, declared CN to be a work for the general advantage of Canada.
- [60] CN is a railway company operating in most provinces of Canada and across many provincial boundaries and across the border into the United States. In addition, it has been declared to be a work for the general advantage of Canada. It is not disputed, therefore, that CN is subject to the legislative jurisdiction of Parliament. By extension, it is subject to the CTA and to the jurisdiction of the Agency.

CEAA 2012

- [61] The Agency's public hearing into CN's Application, which was held as part of the "single-window" public hearing of the Review Panel, conducting the EA, ended in July 2019. However the Agency was only able to render its determination under section 98 of the CTA in the second half of 2021 to comply with section 7 of the CEAA 2012, which provides:

A federal authority must not exercise any power or perform any duty or function conferred on it under any Act of Parliament other than this Act that could permit a designated project to be carried out in whole or in part unless

- (a) the Agency makes a decision under paragraph 10(b) that no environmental assessment of the designated project is required and posts that decision on the Internet site; or
- (b) the decision statement with respect to the designated project that is issued under subsection 31(3) or section 54 to the proponent of the designated project indicates that the designated project is not likely to cause significant adverse environmental effects or that the significant adverse environmental effects that it is likely to cause are justified in the circumstances.

- [62] From a practical perspective, once the public hearing ended in July 2019, section 7 of the CEAA 2012 required the Agency to put its consideration of CN's Application "on hold" until the Minister's Decision Statement was issued in January 2021. To proceed, the Agency was required under section 7 of the CEAA to wait for the Governor in Council's order finding that the Project was "justified in the circumstances." Such a

statement was issued on January 10, 2021. In contrast, had it been determined that the Project was not justified in the circumstances, the Project would be terminated and, as set out in section 7 of CEAA 2012, the Agency would not have had any jurisdiction to continue to determine the CN Application filed under subsection 98(2) of the CTA.

- [63] Once the Minister's Decision Statement was issued, the Agency then also had to address a number of distinct legal issues raised over a period of months by one of the parties to the proceeding. The disposition of each of those various issues by the Agency, in accordance with the rules of procedural fairness, unavoidably delayed Agency preparation of the within Determination.

PRELIMINARY MATTERS

- [64] The Regional Municipality of Halton, the Corporation of the City of Burlington, the Corporation of the Town of Halton Hills, the Corporation of the Town of Milton and the Corporation of the Town of Oakville (together referred to as "Halton"), adopted a common position and participated jointly in this proceeding, including before the Review Panel.
- [65] Following the issuance of the Minister's Decision Statement, Halton raised a number of legal issues, all of which relate to Issue 1 of this Determination, namely whether the location of the railway lines is reasonable. These preliminary matters arose from:
- Halton's letter dated February 15, 2021, asking the Agency to reconsider its Decision No. LET-R-8-2021 dated February 12, 2021, not to reopen the record of this proceeding under section 98 of the CTA;
 - The pleadings the Agency received from Halton and from CN between April 27, 2021 and May 12, 2021, in response to Agency Decision No. LET-R-29-2021 dated April 13, 2021, in which the Agency allowed CN and Halton to file additional, limited submissions;
 - Halton's letter dated May 25, 2021, expressing its disagreement with a procedural direction issued by the Secretary of the Agency on May 14, 2021; and
 - Halton's letters dated June 22, June 28 and September 1, 2021, asking the Agency to reopen the record of this proceeding and to compel CN to produce documents it filed with the US Surface Transportation Board regarding to a proposed merger with a railway company in the United States.

- [66] On January 21, 2021, the Minister issued the Decision Statement pertaining to the environmental assessment of the Project conducted by the Review Panel pursuant to CEAA 2012. On January 22, 2021, both CN and Halton separately filed unsolicited additional submissions, with the Agency, as part of the section 98 determination.
- [67] On February 12, 2021, the Agency issued Decision No. LET-R-8-2021, in which it decided not to reopen the record as it found that ample opportunity had been provided to make submissions, arguments, and respond to those of other interested parties, and that the Agency's record of the section 98 proceeding, contains the information, evidence, and arguments required to allow it to determine the application before it. Accordingly, the Agency held that it would not have regard to the submissions dated January 22, 2021 from CN and Halton.
- [68] By letter dated February 15, 2021, Halton requested the Agency to reconsider Decision No. LET-R-8-2021. On February 23, 2021, the Agency issued Decision No. LET-R-13-2021, providing CN with an opportunity to respond to Halton's request.
- [69] On March 1, 2021, CN filed its answer and on March 5, 2021, Halton filed its reply.
- [70] On April 13, 2021, in Decision No. LET-R-29-2021, the Agency allowed CN and Halton an opportunity to file limited additional submissions.
- [71] In Decision No. LET-R-29-2021, the Agency stated that it was not giving either CN or Halton an opportunity to: 1) remake the arguments that have already been made; 2) introduce any evidence that could have been submitted prior to the end of the public hearing; 3) recast or refine evidence or argument that is already on the record. The Agency stated that it would not have regard to any evidence or arguments in the future submissions of either CN or Halton that relates to any matter that CN or Halton knew of, or ought to have known of, prior to the end of the Review Panel's public hearing on July 19, 2019.

Pleadings filed between April 27, 2021, and May 12, 2021

- [72] On April 27, 2021, CN and Halton both filed submissions in response to Decision No. LET-R-29-2021. On May 4, 2021, CN and Halton, on behalf of itself and Conservation Halton, both filed their answer. On May 11, 2021, Halton filed its reply while CN filed its reply one day late on May 12, 2021.

[73] On May 14, 2021, the Agency, by way of a procedural decision, notified CN and Halton that it had accepted CN's reply and placed it on the Agency's record of this proceeding. The Agency noted that CN's delay in submitting its reply was brief and that CN had made a request to extend the timeline to respond. While Decision No. LET-R-29-2021 had provided CN and Halton with the opportunity to reply, the Agency accepted CN's explanation that it had made an error and that the Agency accepting CN's late reply would not unduly prejudice Halton.

Decision No. LET-R-29-2021

[74] In its submission dated April 27, 2021, Halton alleges that the Agency's directive to allow limited additional submissions improperly limits the scope of submissions to information that arose post hearing. Halton claims that this limitation is unreasonable given that the Review Panel was prohibited, by the terms of the Agreement, to make findings on the matters that are relevant to the Agency's deliberations of CN's Application, that is the reasonableness of the location of the proposed railway lines. Halton also argues that, while the Agency's directive provides an opportunity to comment on matters that arose after the completion of the Review Panel process, reference to information that was before the Review Panel is inevitable and necessary.

[75] CN argues that the joint process was established to create a Review Panel for the purposes of CEAA 2012 and for the Agency "to hear comments from the localities and responses by CN concerning the location of the railway lines." The process was designed to create a single window through which all the relevant facts and submissions required for the Agency's deliberations under section 98 would be gathered. CN submits that the Terms of Reference for the Review Panel specifically required it to take into account both requirements for railway operations and services and the interests of localities that will be affected by the line. CN indicates that Halton had the opportunity to make submissions throughout the Review Panel process and did take advantage of that opportunity. CN submits that while section 5.29 of the Terms of Reference permits the Agency to "conduct investigations and request additional information," it does not require it to do so.

[76] The Agency agrees that the Agreement provided a single window to satisfy the dual purposes of conducting an environmental assessment pursuant to CEAA 2012 and to gather information relevant to its section 98 determination. Section 2.1.2 of the Agreement provided that the process was intended to allow "the Canadian Transportation Agency to hear comments from the localities and responses by CN concerning the location of the railway lines taking into consideration requirements for

railway operations and services and interests of the localities that will be affected by the lines consistent with the CTA.” Both CN and Halton fully participated in the Review Panel process and provided extensive submissions, both prior to and at the public hearing, on those criteria. While the Agreement specified that the determination of the section 98 issues would be reserved to the Agency (and would not, therefore, be made by the Review Panel), during the Review Panel process, both CN and Halton provided their views on the reasonableness of the location of the railway line and those views form part of the record before the Agency that informs the Agency’s deliberation.

- [77] In Decision No. LET-R-29-2021, the Agency provided CN and Halton with the further opportunity to make submissions regarding matters that arose following the completion of the Review Panel process. While the Agency reiterated its position taken in Decision No. LET-R-8-2021 that the Review Panel process had provided sufficient opportunity to provide submissions, the Agency found that the significant amount of time that had elapsed since the Review Panel closed its record warranted providing the parties with the opportunity to provide submissions.
- [78] In the Agency’s opinion, more than sufficient opportunity had been provided to CN and Halton to present their views on the Application before the Agency. The Agency therefore rejects Halton’s argument that Agency Decision No. LET-R-29-2021, improperly limits the scope of the additional submissions.
- [79] In its submission dated April 27, 2021, Halton argues, in effect, that the Agency should not accept the findings of the Review Panel. Halton indicates that the Agreement establishing the joint process does not dictate nor establish any specific procedures for the Agency’s determination under section 98 of the CTA. Halton states that the CTA provides no basis for the Agency to compromise its independence or otherwise fetter its discretion by accepting without “reconsideration” conditions imposed by another authority under another act such as the Minister under CEAA 2012, in particular where the ability of those conditions to mitigate harmful adverse environmental effects is, in Halton’s view, seriously in doubt.
- [80] CN is of the view that that the information before the Review Panel and in its report are relevant considerations for the Agency in making its section 98 determination. In CN’s submission, it is not necessary nor reasonable in all the circumstances of this case for the Agency—which actively participated on the Review Panel and contributed to its report—to engage in the wholesale re-evaluation of the analyses and determinations of the Review Panel. On the contrary, CN argues that the Agency can have confidence in the

rigour and outcomes of that process, including all of the information received and taken into account by the Review Panel relevant to section 98, and can rely on them in making its own determination.

- [81] The Agency notes that the Decision Statement was issued pursuant to CEAA 2012, which requires identification of environmental effects and consideration of their significance and the identification of measures to address them. Where mitigation measures are not identified to address the significance of environmental effects, CEAA 2012 required the Governor in Council to consider whether the project is justified in the circumstances. In accordance with subsection 52(4)(a) of CEAA 2012, the Governor in Council decided, on January 20, 2021, that the significant adverse environmental effects that the Project is likely to cause are justified in the circumstances.
- [82] The Agency does not agree that it is required to defer to the environmental assessment's findings in considering the reasonableness of the location of the railway line, as seemingly proposed by CN in its submissions. The Agency also does not agree that it should disregard the report of the Review Panel, as seemingly proposed by Halton. The Agency notes that the Review Panel was required to gather information and evidence concerning, among other things, railway operations and interests of the localities and that it did so. While the Agency will note the Review Panel's findings, the Agency is not required under section 98 to reassess their significance as environmental effects. Instead, pursuant to section 98 of the CTA the Agency will review and consider those findings to determine what relevance, if any, as part of its consideration of whether the location of the line is reasonable.
- [83] Not all matters that the Review Panel identified in its report as environmental effects of the Project necessarily constitute "an interest of the localities affected by the railway lines," although there may be some overlap in some cases. Similarly, not all of the "interests of the localities" determined by the Agency are necessarily environmental effects of the Project, although there may be some overlap. The process for the joint review of the Project under CEAA 2012 and under the CTA resulted in a record that contained a lot of information and evidence, with some of it being partly, fully or not at all relevant to either the environmental assessment of the Project under CEAA 2012 or the Agency's determination of whether the location of the line is reasonable under the CTA or both. Ultimately, it is within the Agency's authority to assess what in the information, evidence and submissions gathered by the Review Panel, and which part of the Review panel's report, is relevant to the Agency's determination of whether to authorize the construction of the railway lines in this proceeding, and to give each of these

elements the weight, if any, the Agency considers appropriate. For all these reasons, the Agency does not need, contrary to what has been argued by Halton, to set aside and reconsider the findings of the Review Panel.

[84] Halton further argues that, in Sharp, the Federal Court of Appeal (FCA) concluded that section 98 of the CTA does not require an assessment of need for the project. CN argues that a consideration of the demand (or need) for a railway service, and the requirements for railway operations to deliver a needed railway service, is not outside the purview of the Agency.

[85] In Sharp, the FCA considered an appeal of a determination by the Agency authorizing the construction of a railway line by CP to an industrial facility in Prentiss, Alberta. That facility was already served by a railway line owned and operated by CN. The appellant opposed CP's Application given her concerns about the adverse environmental effects of a second railway, as well as public safety and land use. The appellant argued that a second line of railway to the facility was not necessary as CP's access to the facility could be facilitated by railway interswitching or by an Agency order for running rights over CN's existing railway line, such that CP's section 98 application should be rejected.

[86] The FCA rejected the proposition that section 98 requires an assessment of the need for the railway line. It found it significant that section 98 of the CTA requires the Agency to consider the reasonableness of the location of the railway line, not its construction. It stated that "[i]n the context of a location decision, 'requirements for railway operations and services' refers only to those requirements that will enable the railway company to provide service to its customers. It does not refer to the need for the line." The FCA indicated at paragraph 13 that section 98 reflected a trend towards deregulation, that is reflected in the National Transportation Policy as stated in section 5 of the CTA. It said:

To read into subsection 98(2) a needs test would ignore the policy that competition and market forces are the prime agents in determining whether a line of railway should be constructed and would impose a form of economic regulation when it is not necessary to serve the transportation needs of shippers. This would be contrary to the national transportation policy.

[87] In terms of its record, the Agency notes that the Agreement states that should the Minister allow the Project to proceed, the Agency will "make a determination in accordance with section 98 of the CTA, taking into account the information described in section 2.1.2 and the record of the environmental assessment." Therefore,

the Agency's record consists of CN's Application, the evidence on the joint record of the proceeding, the Review Panel report, the Order in Council, and the Minister's Decision Statement.

- [88] In considering CN's Application, the Agency need not, therefore, undertake an assessment of whether or not the Project is needed. While it is open to the Agency to determine that a location of a railway line is not reasonable, "[t]he need for the line will be presumed by reason of the application made by the railway company." However, in considering whether the location of the railway lines is reasonable, the Agency will critically assess the extent to which the proposed location of the project will enable CN to provide service to its customers. The Agency agrees with Halton that the Agency is not required, per Sharp, to make a finding of the need for the Project; the Agency otherwise rejects Halton's submissions related to, or trying to extrapolate from, the Sharp decision.
- [89] In its submission dated April 27, 2021, Halton argues that the Agency's record is incomplete given that the Review Panel, as part of its environmental assessment of the Project, excluded from consideration several matters that could be characterized, according to Halton, as "interests of the localities" by the Agency under the CTA. Specifically, Halton submits that the Review Panel apparently refused to consider, as part of the environmental assessment, effects on transportation and land use planning which included effects on community services and infrastructure and municipal revenues and truck routes and project-related changes on truck traffic.
- [90] However, the Agency notes that the Review Panel was mandated in the Agreement to collect information regarding the interests of the localities and consequently did in fact include on its record information about these matters. The onus falls on the parties to submit that evidence and to do so in a timely manner. The Report of the Review Panel made it clear that, contrary to Halton's submission, these matters were considered, although they were not found to be "environmental effects" of the Project within the meaning of CEAA 2012. The Review Panel and Halton's diverging views regarding what did or did not constitute an environmental effect of the Project do not entail that the record is incomplete.
- [91] Moreover, if the record of the joint proceeding were incomplete, nothing in the record shows that Halton was precluded from bringing forward arguments and evidence at all relevant times. To the contrary, Halton had many occasions to file extensive evidence and did so. Halton started to file its evidence in writing in December 2016 and continued to file evidence prior to, throughout and right up until the end of the public hearing in July 2019 when it presented its final comments both orally and in writing. Halton had

ample time to file all of the evidence it wished prior to the end of the public hearing in July 2019. In this proceeding, the Agency has considered the evidence and information on the record in its assessment of what constitutes, in its view, the interests of the localities for the purpose of its determination of CN's Application. Among other things, the Agency will expressly address in this Determination, the topics Halton cites in its submission dated April 27, 2021, including land use planning, community services and infrastructure, municipal revenues, truck routes and project-related changes on truck traffic. For all of the above reasons, the Agency rejects Halton's primary argument that the Agency's record is incomplete.

- [92] At paragraph 93 of its submission dated April 27, 2021, Halton provides information that came into existence subsequent to the completion of the Review Panel process. This information relates to the results of a coroner's inquest held in London, United Kingdom, which concluded that exposure to excessive air pollution led to a child dying of asthma. Halton also provides information regarding the National Pollutant Release Inventory (NPRI), established under the *Canadian Environmental Protection Act, 1999*. It also refers to statements from members of the public who opposed the project. This information was provided during the comment period on draft conditions of the Decision Statement and received by the Impact Assessment Agency of Canada (IAAC).
- [93] In its answer dated May 4, 2021 answer, CN indicates that Halton's assertion concerning the applicability of the coroner's inquest is not relevant and that the use of the NPRI, based on conservative air quality assessments and overstated emissions, would generate values that would be incorrect and inappropriate.
- [94] The Agency notes that the Review Panel received a significant amount of evidence regarding the direct effect of the Project on human health and air quality as an interest of the localities and community opposition to the Project. While this additional air quality information that arose after the close of the Review Panel's process will be considered, the Agency's record is already replete with information on these issues. Moreover, both the Minister and the Governor in Council were aware of the findings of the Review Panel on air quality when they issued, respectively, the Minister's Decision Statement and the Order in Council. The Agency understands the concerns of the localities, including those over air quality, and will consider them in its assessment of the reasonableness of the location of the railway line. The Agency has therefore given the coroner's report and the NPRI information the weight the Agency considers appropriate.

- [95] In its submission dated April 27, 2021, Halton is critical of the Minister’s referral to Governor in Council and the alleged failure of the Minister’s Decision Statement to establish the conditions that are “directly linked” or “necessarily incidental” to the Agency’s authority under section 98.
- [96] However, the Agency notes that it does not sit in review or appeal of the decisions of the Minister nor is the Agency required to explain or to justify its determination under the CTA in light of the conclusions made in the environmental assessment. The Agency instead must consider those conclusions in light of the requirements for railway operations and services. It will not simply accept without prior consideration the conclusions of the environmental assessment process conducted pursuant to the requirements of CEAA 2012.
- [97] The Agency recognizes that CN and Halton disagree on the applicability of certain provincial or municipal laws to this Project. The Agency does not agree with Halton’s submission that the *National Transportation Policy* as stated in section 5 of the CTA requires an assessment and application of provincial and municipal laws to the Project, and whether the location of the railway can be considered “reasonable” in this context. The Agency must assess the reasonableness of the location of the railway line, within the context of Milton. However, as part of its “reasonableness” determination, the Agency is not required to determine the application of provincial and municipal laws to the Project. There is sufficient evidence and information on the record of this proceeding for the Agency to determine whether the location of the railway lines is or is not reasonable as required by section 98 of the CTA, without having to first determine, as a preliminary matter, whether a particular provincial or municipal law applies to the Application.
- [98] The Agency does not agree that statements in previous Agency determinations indicate that it “tacitly acknowledges the limits of its own statutory and constitutional authority”, as proposed by Halton. Instead the Agency was acknowledging in these passages that its approval of a section 98 application does not relieve a federally regulated railway company from complying with other applicable legislative or legal requirements, if any. The Agency therefore rejects Halton’s submissions related to the alleged deficiencies of the Minister’s Decision Statement.
- [99] In its submission dated April 27, 2021, Halton argues that the Review Panel identified six significant adverse environmental effects that Halton characterized as being “immitigable.” Halton submits that the Agency cannot conclude that the location of the Project is reasonable, given these conclusions.

- [100] In its answer dated May 4, 2021, CN submits that there is no basis to conclude that the Review Panel determined any of the environmental effects to be inherently incapable of being addressed. CN indicated that, while Halton may disagree with the sufficiency of the various additional mitigation measures, labelling the effects themselves as “immitigable” is inaccurate and misleading.
- [101] While the Review Panel identified significant adverse environmental effects and the Minister referred those effects to the Governor in Council, the Agency notes that there are specific mitigation measures that apply to those environmental effects intended to make them less severe or serious. In fact, the Review Panel report identified numerous recommended measures to mitigate those significant adverse environmental effects. The Minister’s Decision Statement establishes 325 conditions on CN to protect the environment and human health—many of which go beyond those initially proposed by the Review Panel and 40 of which address air quality specifically. This includes a condition that CN develop and implement an air pollutant and greenhouse gas emissions reduction plan. The Minister describes these 325 conditions as being “legally binding” on CN; a position that Halton also disputes.
- [102] Furthermore, the Review Panel identified the potential for human health effects in context, highlighting that the Project would be a “limited” contributor and human health effects were likely to occur regardless of whether the Project proceeds because of the challenges that come from modern urbanization. The Agency therefore rejects Halton’s submission that the so-called immitigable environmental effects of the Project must necessarily result in a finding, by the Agency, that the location of the railway lines is not reasonable.
- [103] In its additional submissions, Halton argues, as it did at the public hearing, that the conditions appended to the Minister’s Decision Statement are unenforceable; that the environmental assessment was conducted pursuant to CEEA 2012 and that pursuant to that Act, the IAAC cannot enforce conditions related to subsection 5(2) effects. Halton submits that the Minister’s Decision Statement does not identify which department is responsible for enforcing them. Halton is also concerned the Agency has no authority to enforce many subsection 5(2) conditions in the Minister’s Decision Statement, as they would require the Agency to monitor CN’s future day-to-day operations, a requirement that, according to Halton, courts have rejected in several cases beginning in 2001 and affirmed in 2018.
- [104] CN argues that the IAAC has the authority to enforce conditions in the Minister’s Decision Statement. It further highlights that it would be consistent with past Agency practice if its

conditions incorporated the conditions in the Minister's Decision Statement into the section 98 approval. In CN's view, if the Agency did so, it would have every legal right to enforce them, presumably in close collaboration with the IAAC.

- [105] Additionally, CN stated that it was noteworthy that the one specific example Halton provided of an allegedly unenforceable condition—limiting the number of trucks that may enter the Project each day—would constitute regulation of the actual operations of the federally regulated intermodal facility on the site of that facility. According to CN, it is in no way the regulation of interprovincial trucking and it would therefore be perfectly lawful for the Agency to adopt the daily entrance limitation as a condition of the section 98 approval, or indeed any of the conditions in the Minister's Decision Statement.
- [106] The Agency notes that the CEA Agency, in its presentation to the Review Panel at the public hearing, clarified its role concerning the enforcement of conditions attached to the Minister's Decision Statement and its powers and scheme for infractions and penalties. As stated in the Minister's Decision Statement, pursuant to section 184 of the *Impact Assessment Act* (IAA), SC 2019, c 28, s 1, a Decision Statement issued by the Minister under subsection 54(1) of CEAA 2012 is deemed to be a Decision Statement issued under subsection 65(1) of the IAA and is enforceable accordingly under that act. The IAAC has stated that it will enforce conditions in the Minister's Decision Statement before and during construction as well as over the course of all Project operations. IAAC replaced the CEA Agency, as the federal assessment agency, effective August 2019.
- [107] The Agency is not the forum to decide whether the conditions in the Minister's Decision Statement are "legally binding." It has no such jurisdiction or statutory authority. Therefore, for the purpose of this determination when examining the interests of the localities, the Agency will consider that the conditions imposed by the Minister's Decision Statement are enforceable. It will also take into account the fact that the IAAC has publicly stated it would enforce these conditions. For these reasons, the Agency does not find it appropriate or necessary to duplicate the entire set of conditions imposed in the Minister's Decision Statement as part of this determination. The Agency therefore rejects Halton's submissions regarding the alleged unenforceability of the conditions in the Minister's Decision Statement.

Halton's May 25 letter

- [108] On May 25, 2021, the Agency received a letter from Halton indicating its concern about the Agency's procedural decision, dated May 14, 2021, to accept CN's reply filed May 12, 2021, one day later than provided for in Decision No. LET-R-29-2021. Halton

argues that this is unfair as this resulted in CN having one additional day to review Halton's reply submissions that had been filed on May 11, 2021, as directed by the Agency.

- [109] Halton also expresses concerns regarding a statement made by CN that, Halton suggests, "has enhanced our apprehension that the section 98 determination is a foregone conclusion." Halton further indicates that CN's Chief Legal Officer wrote a letter to the Agency dated January 22, 2021, regarding its section 98 application on which Halton was not copied. Halton cites these matters as "troubling" and that "create an apprehension that our clients Submissions in opposition to CN's section 98 CTA application do not matter."
- [110] The Agency has the power to make and enforce administrative decisions concerning process it administers pursuant to the CTA. This includes the issuance of final decisions, which are binding; parties are expected to acknowledge and abide by the Agency's decisions and act accordingly. Additionally, the Agency notes that in Decision No. LET-R-8-2021 it pointed out that CN had not forwarded its January 22, 2021, letter to Halton and the Agency ensured that Halton was provided a copy.
- [111] The Agency also does not accept Halton's claim that the referenced actions and statements made by CN in correspondence to the Agency infer that there is a pre-determined outcome for CN's Application. Moreover, Halton does not explain how they reflect on the Agency in any way at all.
- [112] In accepting CN's May 12 submission, the Agency stated that CN's delay in submitting its reply was brief and CN made a request to extend the timeline to respond. While the Agency noted that its procedural directive provided CN and Halton with the opportunity to reply, the Agency accepted CN's explanation that it had made an error and that accepting its late reply would not unduly prejudice Halton. In the Agency's view, Decision No. LET-R-29-2021 disposed of the matter definitively. Therefore, the Agency need not address Halton's letter dated May 25, 2021 any further.

Halton's June 22, June 28 and September 1 Letters

- [113] On June 22, 2021, Halton submitted a letter to the Agency in which it raised CN's proposed merger with Kansas City Southern Railway (KCSR). Halton indicated that CN was in the process of seeking approval from the United States Surface Transportation Board (USSTB) for the proposed merger. Halton submitted letters from municipalities surrounding Chicago concerning impacts of the proposed merger on them. Halton asked

the Agency to request CN to disclose how its proposed merger in Chicago will impact railway operations and services and the interests of the localities that will be affected by the Project in Milton.

- [114] On June 28, Halton provided a second submission in respect to the proposed merger, in which it alleged that documents submitted by CN to the USSTB implicated the Project directly. Consequently, Halton requested the Agency to open pleadings on the proposed merger and to seek documents submitted to the USSTB regarding the effect that the proposed merger will have on the Project.
- [115] In its response dated June 25, 2021, CN indicates that the railway operating environment in Chicago is a very different railway environment than found in Milton. Further, CN submits that the issues raised by the municipalities were addressed in the context of the Project, considered by the Review Panel, the Minister of the Environment and the Governor in Council and that a condition in the Minister's Decision Statement addresses the number of trucks that can access the Project and the number of containers the Project can handle.
- [116] In another submission dated June 28, 2021, Halton adds that maps submitted by CN to USSTB indicate the Project and do not include CN's intermodal yard in Brampton, which Halton suggests indicates the extent to which Milton will be affected by the Project.
- [117] On September 1, 2021, Halton submitted an additional letter to the Agency requesting that the pleadings be opened regarding new developments in CN's proposed merger with KCSR. Halton also requests that CN disclose any business plans for the Project, assuming that the merger proceeds and to provide the confidential documents CN submitted to the Surface Transportation Board relating to the impact of the merger on the Project.
- [118] The Agency has considered all of these submissions and finds that they are of limited relevance, if any, to its deliberations. First, the Agency notes that the merger/acquisition has not been approved and therefore, may not occur. Moreover, CN is not the only railway company seeking USSTB approval to merge with the KCSR. It would be highly speculative and inappropriate for the Agency to monitor and reference very recent proceedings before USSTB as part of the exercise of its own mandate, which began in 2016, pursuant to section 98 of the CTA. Further, the impact that municipalities surrounding Chicago believe may result from a proposed merger are of no obvious relevance to CN's Application under section 98 of the CTA. The Agency also notes that its record is replete with evidence from localities in and around Milton regarding the issues that are of concern to the localities regarding the Project. The Review Panel in its report

and decisions by the Minister of the Environment and the Governor in Council acknowledge and address in its conditions, a potential future increase, if any, in volumes of traffic at the Project.

[119] Consequently, the Agency denies Halton's request to reopen pleadings and to seek documents filed by CN with USSTB regarding CN's proposed merger/acquisition of the KCSR.

[120] The Agency will now turn to Issue 1, its determination of CN's Application.

ISSUE 1 - WHETHER THE LOCATION OF THE RAILWAY LINES IS REASONABLE TAKING INTO CONSIDERATION THE REQUIREMENTS FOR RAILWAY OPERATIONS AND SERVICES AND THE INTERESTS OF THE LOCALITIES THAT WILL BE AFFECTED BY THE RAILWAY LINES

Preliminary engagement activities

INITIAL CEA AGENCY ACTIVITIES

[121] On March 31, 2015, CN filed its Project Description to the CEA Agency concerning its proposed Project. On April 8, 2015, the CEA Agency informed the Agency of CN's Project Description and requested that the Agency review the CN's Project Description and identify the potential for the Agency to exercise a power or perform a duty or function related to the Project and the potential for environmental effects to be associated with that power, duty or function as per subsection 5(2) of CEA 2012.

INITIAL AGENCY ACTIVITIES

[122] On April 8, 2015, the Agency initiated a proceeding, and in Decision No. LET-R-25-2015 and Decision No. LET-R-26-2015, ordered CN to provide the Agency with detailed, large scale, final plans of the Project, to address whether the Project involves the construction of a "railway line" within 100 m of the centre line of an existing railway line for a distance of not more than 3 km and to describe the method of calculating the 3 km given that the Project involves the construction of multiple yard tracks.

[123] As noted in the Introduction, on May 13, 2015, the Agency issued Decision No. 144-R-2015, in which it determined that an approval under subsection 98(1) of the CTA was required for the construction of the extension of the mainline and Service Tracks 1 and 2, as they are longer than 3 km, and for Tracks 5 and 6, as they would

be located outside the 100 m of the centre line of an existing railway line, the New Mainline Track. The Agency thereby ordered CN to submit an application for approval to construct railway lines to be known as the Milton Logistics Hub.

- [124] On May 13, 2015, the Agency responded to the request from the CEA Agency, advising the CEA Agency that CN would have to apply for Agency approval pursuant to section 98 of the CTA.

SUBSEQUENT CEA AGENCY ACTIVITIES

- [125] On May 22, 2015, the CEA Agency announced that a federal environmental assessment was required for the Project pursuant to CEAA 2012, issued Guidelines, and invited public comments on those Guidelines by June 21, 2015.
- [126] On July 20, 2015, the CEA Agency finalized those Guidelines and announced that the environmental assessment of the Project would be conducted by a review panel and established timelines for the review panel's activities.

ESTABLISHMENT OF A JOINT PROCESS FOR THE REVIEW OF THE PROJECT

- [127] On December 6, 2016, as set out in the Agreement, the Review Panel was appointed to conduct the environmental assessment and, for the purposes of a potential railway line construction determination by the Agency, to gather information and views concerning the location of new railway lines.
- [128] The Review Panel process was intended to simplify and facilitate the involvement of all interested parties by combining opportunities for input related to both the environmental assessment and the potential railway line construction determination. The purpose was to provide a "single window" via one hearing, conducted jointly under two different statutes, by a Panel appointed by the Minister of the Environment and by the Chairperson of the Agency, to gather all relevant information, evidence and public views concerning the Project. This "single window" would assist the Review Panel in preparing its report pursuant to CEAA 2012 on whether the Project would result in significant adverse environmental effects, and, if permitted, would assist the Agency to determine, subsequently, as required by section 98 of the CTA, whether the location of the railway lines is reasonable.

- [129] On October 26 and October 27, 2016, the Agency and the CEA Agency held public information sessions in Milton, Ontario, on the joint process being established for the Project.
- [130] In accordance with the Agreement's Terms of Reference, the Review Panel conducted its assessment in three stages:
- Stage 1: Review of the Sufficiency of the Environmental Impact Statement – December 2016 to April 2019
 - Stage 2: Public Hearing – April 2019 to July 2019
 - Stage 3: Report Preparation – August 2019 to January 2020
- [131] The first stage of the Review Panel's mandate was to determine whether the information provided by CN was sufficient to proceed to a public hearing. This stage commenced in December 2016 and continued until April 2019. During that time, the Review Panel reviewed the Environmental Impact Statement (EIS) and additional information provided by CN, provided opportunities for participants to comment, formulated information requests, held an orientation session, and conducted a site visit.
- [132] As part of its sufficiency review, the Review Panel also held a public orientation session on March 1 and 2, 2017, in Milton. The Review Panel invited representatives of the federal, provincial and municipal governments to present their respective mandates and areas of expertise in relation to the Project and its potential environmental effects. Additionally, members of the public were provided with the opportunity to provide written submissions, in opposition or support of the Project, to be added to the Review Panel's record.
- [133] The Information Request process conducted as part of the Review Panel process was extensive, comprehensive, and detailed. Information Requests are important to the Review Panel process. It is a fully transparent and public process wherein all of the Review Panel's Information Requests that were issued and the answers provided by CN and its consultants in response to the Information Requests were posted on the Canadian Environmental Assessment Registry for the public to see and comment upon. Among other participants, Halton reviewed and commented on the Information Requests, on CN's responses to the information requests and Halton indicated whether in its view, the responses were adequate or whether the Review Panel should pose additional or follow-up information requests or whether CN should be required to provide additional information.

[134] The Information Request process was as follows:

- April 2017-October 2017: Review Panel issues Information Request packages 1-5 (first round)
- May 2017-June 2018: CN provides responses to first round of Information Requests
- June 2017: Review Panel opens comment period on responses to first round of Information Requests
- July 2018: Review Panel closes comment period on responses to first round of Information Requests
- February-September 2018: Review Panel issues Information Request packages 6-8 (second round), and opens second comment period
- August 2018-March 2019: CN provides responses to second round of Information Requests
- April 2019: Review Panel closes comment period on responses to second round of Information Requests

[135] In response to Information Request (IR) 5.1 and provided as Attachment IR5.1-1 (CEAR #655) dated June 12, 2018, CN submitted its Consolidated Table of Mitigation Measures and Proponent Commitments (CN's Commitments) concerning mitigation measures, plans, and follow-up programs, and commitments addressing Project-related effects.

[136] On March 29, 2019, Halton submitted its brief concerning the sufficiency of information of significant adverse environmental effects from the Project. Halton, at that time, submitted that CN had not provided sufficient information to support required conclusions on whether the Project was likely to cause significant adverse environmental effects.

[137] On April 15, 2019, the Review Panel concluded that it had sufficient information to proceed to the public hearing. The Review Panel based its conclusion on information related to various aspects of its mandate, including details of the Project, its environmental effects, proposed mitigation measures, and requirements for follow-up programs. The conclusion also involved consideration of information regarding the requirements for railway operations and services and the interests of the localities that may be affected by the railway lines.

PUBLIC HEARING

- [138] On April 16, 2019, the Review Panel issued a notice of hearing indicating that the public hearing would begin in Milton on June 19, 2019, commencing stage 2 of its process.
- [139] One of the key purposes of the public hearing was to give interested parties an opportunity to present their views on the Project, its potential environmental effects, and how it might affect local interests. The hearing also provided an opportunity for CN to explain its Project and respond to questions, so that the Review Panel could clarify or test information and better understand the factors to be considered as described in its Terms of Reference.
- [140] The Review Panel held general hearing sessions and technical hearing sessions. General sessions provided CN with an opportunity to present an overview of the Project and its anticipated environmental effects, and for registered interested parties to present their views and recommendations. Technical hearing sessions allowed technical experts, including Indigenous traditional knowledge holders, to provide their views and analysis of the Project to the Review Panel. All hearing sessions allowed CN and other interested parties the opportunity to ask questions about the presentations.
- [141] Topics of the technical sessions included Project description, alternative means, and railway operations and services; socio-economic conditions; geology, soils and geochemistry; hydrology and water quality; fish and fish habitat; terrestrial environment; air quality, noise, vibration, light, and human health; and archaeological and heritage resources, including built heritage.
- [142] During the public hearing, 48 different interested parties made 88 presentations to the Review Panel.
- [143] On July 19, 2019, the Review Panel held a closing remarks session, commencing stage 3 of its process. On that date, the Chairperson of the Review Panel stated (page 3623 of the transcript):

The Panel will be reviewing this information as we prepare our report. At this point, I declare the record for the joint process of the review of the Milton Logistics Hub Project to be closed. The transcript of today will be the last document we consider and any future submissions will not be received or reviewed by the Panel.

REVIEW PANEL REPORT

[144] On January 27, 2020, the Minister received the Review Panel's report for the Project.

[145] In its recommendations, for most of the factors reviewed, the Review Panel concluded that with CN's proposed mitigation and in some cases with additional Review Panel recommended mitigation, the Project would not have significant adverse environmental effects. However, the Review Panel also 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 environmental effects on air quality, human health, wildlife habitat, and the availability of agricultural land.

[146] The Review Panel emphasized that in each case, direct Project effects are relatively small but would be added to an environment where air quality, wildlife habitat and the available agricultural land have already been affected by development, and would continue to be affected by a substantial amount of planned future development in the region. The Review Panel indicated that most of the adverse environmental effects identified by the Review Panel as significant are likely to occur whether or not the Project proceeds because the lands have been designated for future development.

ORDER AND MINISTER'S DECISION STATEMENT

[147] On January 20, 2021, the Government of Canada issued Order 2021-0008 that stated:

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.

[148] Following extensions of time on April 3, 2020, September 21, 2020, and December 21, 2020, the Minister, issued his Decision Statement on January 21, 2021 based on Order 2021-0008.

[149] The Minister's Decision Statement established conditions to address the significant adverse environmental effects identified by the Review Panel. Specifically, the Minister established 325 conditions on CN to protect the environment and human health—many of which go beyond those initially proposed by the independent Review Panel and 40 of

which address air quality specifically. The Minister indicated that the conditions imposed would make the Project the most stringently regulated intermodal logistics hub in Canada and among the most stringently regulated in North America. The conditions include measures to address effects on air quality, human health, groundwater and surface water, migratory birds, species at risk, fish and fish habitat, the use of lands and resources by Indigenous peoples, and physical and cultural heritage.

- [150] The Minister also responded to concerns raised during the joint review process regarding the potential for CN to expand the Project, as well as to traffic and safety concerns. The Minister established a condition limiting truck traffic to 800 vehicles entering the site per day, averaged on a monthly basis. In addition, CN will also be required to establish a community liaison and communication process, and to document and respond to feedback from the community, as well as demonstrate how this feedback is addressed. This includes liaising with potentially affected parties to identify and address potential impacts on traffic and road safety.
- [151] The Minister clarified that the IAAC will enforce conditions before and during construction, and over the course of all Project operations. Any changes to the Project will need to be considered by the Minister through an amendment process to determine if they can proceed. This includes condition 4.10 pertaining to the requirement for CN to develop a noise-based follow-up program in consultation with the Agency.
- [152] Lastly, the Minister indicated that Environment and Climate Change Canada intends to work with the Government of Ontario to develop a regional air quality management strategy in the Greater Toronto and Hamilton Area (GTHA). Leveraging expertise from both governments and other potential partners, the strategy involves scientific work to inform the development of a plan to address existing and any future air pollution from key sources in and around the region, many of which will remain irrespective of whether the proponent decides to proceed with the Project. This collaboration is expected to support long-term health and environmental benefits to the seven million Canadians that live in the area, including in Milton, Ontario. Work on the development of the strategy will take place over the next two years and will focus on actions that can be implemented quickly, as well as over the longer term.

Location of the railway lines

- [153] The railway lines that are the subject of this application would be located primarily on a parcel of land that CN owns within Milton. The land is located immediately adjacent to its

main line of railway, known as the CN Halton Subdivision, which runs through Milton. Some of the existing railway lines would be relocated onto land within the boundaries of CN's existing railway right-of-way.

- [154] When CN submitted its Application to the Agency in 2016, CN had owned the parcel of land for many years. Moreover, Halton had been aware for many years that CN owned the land and that CN intended to develop it for purposes related to the operation of its railway transportation business and to enhance the operation of its Halton Subdivision. Much evidence at the public hearing focused on a proposed project that CN had discussed, at a great level of detail, with Halton in approximately 2007 and 2008. That project was not an intermodal terminal, but it involved the development of the same parcel of land for railway-related infrastructure, involving trucks travelling into and out of the project site each day. Ultimately, CN decided not to proceed with that project.
- [155] CN's Halton Subdivision currently accommodates 25 to 30 CN trains per day.
- [156] The CN owned land in the vicinity and adjacent to CN's Halton Subdivision totals 1000 acres. The portion of that land to be used for the Project is approximately 160 hectares (400 acres) in area. The operational footprint of the Project occupies approximately 59 hectares (146 acres), within the 160 hectares (400 acres) site.
- [157] The operational footprint of the Project is the area within the intermodal yard where containers will be transferred from one CN train to another CN train or transferred between a CN train and a truck. The footprint of the project is significant since that is the area of the Project where a new source of railway noise would be introduced; the sound of the containers being transferred from a train or to or from a truck. The footprint of the Project does not include those portions of CN's existing railway right-of-way, immediately adjacent to the parcel of land, where CN proposes, as part of its Application, to relocate or extend certain railway lines within the existing railway right-of-way.
- [158] As stated, the CN-owned land is located within Milton. CN's 160-hectare site is bounded to the north, by Britannia Road; to the east by the CN-owned railway right-of-way known as the CN Halton Subdivision; the west by Tremaine Road (although the subject land does not reach all the way to Tremaine Road at all locations) and to the south by Lower Base Line. It is of considerable significance to the Agency's determination that Britannia Road and Tremaine Road currently are or will be upgraded as regional arterial roads. They are all roads within Milton on which trucks, of all types, currently travel and are authorized to travel. Stated differently, none of the road segments on which the Project-generated truck traffic would operate are in residential neighbourhoods.

- [159] The Project is a transportation infrastructure project. Milton is historically familiar with significant transportation infrastructure projects. Milton is bisected, generally east to west, by Ontario Highway 401, the widest and the busiest stretch of highway in the entire province. Milton also accommodates within its boundaries large portions of Ontario Highway 407, an express toll route, and a smaller portion of Ontario Highway 403. Collectively there are approximately seven interchanges with these highways within Milton.
- [160] Milton is also familiar with railway transportation infrastructure. In addition to the CN Halton Subdivision, which travels, generally, in a north-south direction through the Town, there is also a main line of railway operated by the Canadian Pacific Railway company, which traverses Milton in a generally east-west direction. Main Street, in downtown Milton, crosses both the CN Halton Subdivision and the CP Galt Subdivision. Adjacent to Main Street in downtown Milton is the Milton GO Station, part of an intercity commuter railway network, operated by or on behalf of the Province of Ontario. The Milton GO station is one of the many stations on the GO Transit line of commuter railway service that runs between Milton and the City of Toronto.
- [161] The abundance of transportation infrastructure in and around Milton has influenced the evolution and the nature of its economy. A not insignificant part of the local economy is composed of distribution centres, logistics facilities, warehousing and storage, many of which, at least to some degree, are related to the transportation of freight in intermodal containers. Freight moves into and out of those distribution centres and warehouses primarily by truck and primarily by trucks with diesel engines.
- [162] At the hearing, the Town of Milton and the Halton Region made it clear that they intend to develop and diversify the economy away from reliance on those traditional transportation distribution sectors. It was also clear, at the hearing, that a business park within the Town is still being developed and is still available for new, additional distribution centres. While many of those transportation-related businesses are located in industrial area north of the Highway 401, it is equally true that there was evidence at the hearing that a new business park, located south of the Highway 401, is available and open to new transportation-related developments including more distribution centres. One of the Region's many reasons for opposing the Project is that it wished the CN-owned site to be developed for an alternative vocation with higher employment densities: research and development campus for a high-tech company, employing many hundreds of highly educated technical people. There was no evidence of any such project actually in the works, however, or forecast at any location within Milton.

- [163] The location of the railway lines is, as stated, within Milton. The Town is, in turn, located within the Region of Halton. The Region is, in turn, located within the GTHA. Like the GTHA, the population of the Town continues to grow and to grow quickly. At the hearing, we heard that the population of Milton has more than doubled in the 25 years between 1991 and 2016, and the population of Halton is now over half a million people. The population continues to grow and is expected to do so for some time. Both the Minister and the Review Panel report mentioned that the population of the GTHA is approximately 7 million people. If the GTHA were somehow to become a province of Canada, it would have the second-largest population of any province yet would occupy the second-smallest geographic area, making it the area of the greatest population density in Canada.
- [164] For many years, Milton had combined the features of a town and a suburban community where the housing stock was predominately single-family homes constructed on suburban lots. Going forward, that is no longer the case. A person who appeared at the public hearing described how he left the City of Mississauga to move to Milton since Mississauga, because of the population density and traffic congestion, had become, in his word, a “zoo.” He had hoped to escape that environment by moving to Milton but readily recognized that it was likely that Milton would eventually display many of the same aspects of life in Mississauga that he hoped to avoid.
- [165] Another person who gave evidence at the public hearing spoke to the rapid construction of new housing to meet the demands of the growing population. He commented on how the form of housing had changed as the density of housing increased. He commented that the housing currently under construction in Milton was at a higher density than before. He also spoke of the even greater density of the housing being designed for the future in Milton. Milton is changing in fundamental ways, driven by unprecedented population growth. That population growth happens independently of the Project.
- [166] That is the overall geographic context of the location where CN intends to build an intermodal logistics hub on approximately 160 hectares of land. In that context, some opposition to the Project was foreseeable. Halton has indicated it was not opposed to the construction of an intermodal terminal per se. However Halton and citizens’ groups are opposed to the construction of an intermodal terminal in the Region of Halton. That said, as the population of Milton and of the GTHA grows and continues to grow, so does the demand for the goods transported in intermodal containers which, in turn, increases the need for facilities to handle the transportation of containers efficiently within the GTHA. The ongoing population growth in the GTHA increases the number of containers destined to the area and simultaneously increases the number of people potentially opposed to the Project.

- [167] We will now focus on the location of the railway lines and the type of railway lines, within the Project that forms part of the Application. According to CN, the Project will consist of a realignment, extension, and doubling of additional lengths of its existing Halton Subdivision mainline track (mainline extension), three service tracks to hold and switch railcars, three pad tracks to accommodate the loading and unloading of intermodal railcars, and turnouts to facilitate switching of traffic between the mainline, service, and pad tracks. The mainline extension will occur between mileage points 39.50 and 36.86 of CN's Halton Subdivision and the yard will also involve the construction of an estimated 20.51 km of new yard track.
- [168] CN indicates, in its remarks at the public hearing, that the Project would support Chicago-Detroit-Toronto railway traffic and the Halifax-Moncton-Montréal-Toronto railway traffic. CN stated that the Halifax-Moncton-Montréal-Toronto service was one of its most reliable trains on its network. CN clarifies that when a train comes in from Halifax to Milton, it brings in the equipment that is going to be reloaded going back and this balance between incoming and outgoing equipment is very efficient for CN.
- [169] In its site selection study, CN considered several options for the Project location and identified a parcel of land that conformed to the criteria identified as part of its site selection study. As a first step, CN reviewed available land using two principles related to 1) the general location within the GTHA, and 2) the area of land required for the Project. To meet these requirements the Project would require 160 hectares (400 acres) directly adjacent and parallel to the existing mainline, and located somewhere between the Bayview Junction, near Hamilton, and Doncaster Junction on the northern edge of Toronto. CN found four sites that met these two principles: Brampton North, Halton Hills, North Milton and South Milton. Any sites that did not meet the two principles were disqualified from further consideration in the site selection process.
- [170] In terms of the North Milton site versus CN's preferred South Milton location, CN indicates, in its response to a Review Panel Information Request, that a terminal at the North Milton site (including the level terminal pad and access track) would be located between approximately Mile 26.5 and Mile 32.7 of its Halton Subdivision. CN asserts that a terminal and access track at this location would involve an excessive amount of excavation; for example, at the north end of the level terminal, the difference between the ground elevation and the track elevation would be 16 metres. For this reason, a terminal at this location was determined to be not feasible. Additionally, the North Milton site encroached on lands located within the Niagara Escarpment Plan Area and was associated with greater potential adverse environmental effects during construction and future maintenance.

[171] CN showed that it considered other locations and this one was best suited for the project. In contrast to the other potential sites, it conforms to CN's criteria for site selection as its Milton location places it in an area with warehousing, storage, and logistics facilities close to demand centres in the high population-growth areas of Milton and Halton Region. Additionally, the Project location, situated between 400-series highways, either the 401, 403, and 407 allows CN to position its infrastructure effectively within existing and new warehouse developments and distribution centres that are primarily located within the 401 Industrial and Business Park extending from Tremaine and Campbellville roads in the northwest to the junction of Highway 401 and James Snow Parkway in the southeast. Contrary to many allegations at the hearing from members of the public who oppose the Project, it would not be located in, nor adjacent to, an existing or proposed concentration of residential housing. The Project is surrounded by many acres of CN owned land and isolated from any residential developments by the regional arterial roads that effectively frame it on all sides.

MAINLINE EXTENSION

[172] The existing CN Halton Subdivision (mainline) comprises two railway lines at the Project's location, with an existing north track extending on a continuous basis for the length of the Halton Subdivision and a south track connecting to the north track at mileage point 39.4 and running parallel to the north track for 16 km south to the junction with CN's Oakville Subdivision in Burlington, Ontario. CN indicated, on Diagram 01-SK-01 filed on April 20, 2015, that the existing right-of-way is located directly adjacent to the mainline in the vicinity of the Project.

[173] CN states that it will shift the two existing mainline tracks by up to 98 m from their current location and realign the north track by shifting it east of its current location. The south track will also be shifted east of its current location and extended north by 3.909 km. The portion of the north track to be realigned outside the existing right-of-way will measure 1.687 km while the portion of the south track to be relocated outside the existing right-of-way will measure 1.609 km. The remainder of the mainline work will be performed within the existing right-of-way.

SERVICE TRACKS

[174] CN's plans designate that three service tracks will be built parallel to the mainline extension to hold and switch railcars. These service tracks allow longer trains to be assembled on these tracks in preparation for the next destination.

PAD TRACKS

- [175] CN also shows that three pad tracks will be built parallel to the mainline extension to enable containers to be loaded and unloaded from rail cars and truck chassis with mobile reach stacker-type cranes. Adjacent to the pad tracks, CN stated that there will be space available on the work pads to allow for the temporary staging of containers and chassis, loading/unloading activities, and to facilitate container, crane and truck movements. These work pads will measure approximately 65 m wide by 2000 m long.

SWITCHES

- [176] CN asserts that the length and layout of the pad and service tracks are designed to minimize the need for switching activities. Switching is an activity where railcars or groups of railcars are repositioned from one track to another. Switches are located on the mainline and at each end of the pad and service tracks allowing switching activities to occur on each of the tracks and out onto the mainline.

ANCILLARY INFRASTRUCTURE

- [177] CN states that an access road, road crossings, stormwater management systems, buildings, and electrical and communications infrastructure will be required to support Project operations.

Requirements for railway operations and services

RAILWAY SERVICES

- [178] CN cites increases in Global and North American intermodal traffic as a specific driver for intermodal traffic consisting of containerized cargo between trains and trucks at the Project. CN identifies that the products in an intermodal container vary based on client demand, destination, and season. Products include, but are not limited to, items such as toys, furniture, appliances, clothing, electronics, household goods, automotive parts and maintenance products, lawn care equipment, cosmetics/health care, and food products. Some containers are temperature-controlled to accommodate products that must be chilled, frozen or heated in the winter.
- [179] CN indicates that world container throughput has more than tripled, increasing from 225 million twenty foot equivalent units (TEUs), in 2000, to almost 700 million in 2014, outpacing growth in the world economy. In Canada, from 2000 to 2014, intermodal

container throughput almost doubled, increasing from over 2.9 million TEUs in 2000 to over 5.5 million in 2014. In Canada, the growth in throughput averaged 6.2 percent per year between 2000 and 2008. Since 2009, growth in container throughput remained in line with pre-recession trend, averaging close to 6 percent annually over 2009-2014.

[180] CN states that according to Statistics Canada, railway container traffic in 2013 in the GTHA amounted to approximately 15 million tonnes, or 44 percent of the national container traffic, making the GTHA Canada's largest intermodal market. The origins and destination of traffic in British Columbia and Eastern Canada reflect international containers moving through Canadian marine ports.

[181] CN identifies that it currently provides intermodal services to the region through its Brampton Intermodal Terminal (BIT), which connects the GTHA with its network of 20 domestic terminals and seven CN-served container ports across North America. The GTHA and BIT are a component of the Ontario-Quebec Continental Gateway and Trade Corridor, which is a federal-provincial partnership created between the governments of Canada, Ontario and Quebec in 2007.

[182] CN indicates that traffic in the GTHA represents over 30 percent of all traffic moving across Canada and the United States. By the same token, of the total traffic touching the GTHA, intermodal accounts for 70 percent, making the region and BIT the most important hub of CN's intermodal operations across its North American network. CN handles about 1 million containers at its BIT facility resulting from container traffic that cycles through other markets in Canada, the United States, or internationally. In addition, CN moves containers that are not destined for the GTHA market but rather will simply be passing through the GTHA, such as containers originating in Halifax or Montreal that are en route to the United States or that originate on the West Coast and go to markets east of Toronto.

[183] CN's Application highlights that container traffic originating in or destined to the GTHA has been growing steadily over the years. In spite of the 2008-09 recession, which hurt container volumes as it did all other business segments of the railway, this traffic grew at an average annual rate of 4 percent, again outpacing the 2 percent growth in the economy.

[184] In support of CN's Application, and appended to it, CN received letters from:

- Canadian Chamber of Commerce

- Ontario Chamber of Commerce
- Milton Chamber of Commerce
- Toronto Region Board of Trade
- Brampton Board of Trade
- Southern Ontario Gateway Council
- Halifax Chamber of Commerce
- Halton Hills Chamber of Commerce
- Burlington Chamber of Commerce
- Prince Rupert and District Chamber of Commerce
- Fédération des chambres de commerce du Québec
- Halifax Port Authority
- Montreal Port Authority
- Port of Prince Rupert
- Port Metro Vancouver
- Montreal Gateway Terminals
- Cerescorp Company and Termont Montreal Inc.
- American President Lines
- China Shipping (Canada) Agency Co. Ltd.
- Core Products Canada Ltd.
- COSCO Container Lines
- DHL Global Forwarding (Canada) Inc.
- Hanjin Shipping America, LLC
- Hapag-Lloyd (America) LLC
- Montship
- Pival International Inc.
- Protos Shipping Ltd.
- Triple M Metal LP
- Westwood Shipping Lines, Inc.
- Yang Ming Lines
- ZIM Integrated Shipping Services Ltd.
- GCT Canada
- DP World (Canada) Inc.
- North Atlantic International Logistics
- East and West Logistics
- Lantic Sugar

- [185] In support of the Project, representatives of the Montréal Port Authority, Halifax Port Authority, Prince Rupert Port Authority, and the Vancouver Fraser Port Authority appeared at the public hearings and relayed their respective plans to expand the intermodal container capacity of the ports they operate to accommodate the continuing and constant growth of intermodal traffic.
- [186] In particular, the Montréal Port Authority identified its Contrecoeur terminal project which will essentially double the port's capacity by adding an additional 1.15 million TEU containers per year of which just over 11 percent of its current capacity destined for the Ontario market.
- [187] Additionally, the Halifax Port Authority identified that it's investing in a \$35 million berth extension so that it can handle two ultra-class container vessels simultaneously at its terminal and linked its expansion to rail infrastructure improvements that would support its expansion.
- [188] As well, the Prince Rupert Port Authority identified that it was adding terminal capacity in Price Rupert. The last expansion was completed in 2017, for a capacity of 1.35 million TEUs. It also stated that it would be moving into its next expansion later in 2019, DP World, the container terminal operator will be taking that on to move capacity up to 1.8 million TEUs midway through 2022.
- [189] The Vancouver Fraser Port Authority indicated that the GTHA is "by far the largest destination for containers moving through Canada's west coast ports," up to 15 percent of all containers processed, and that the Project would support its development of its new container terminal, the Roberts Bank Terminal 2 project. It indicated that container dwell times are transportation network-dependent and the Project would contribute to ensure that these times remain as low as possible enhancing network fluidity.
- [190] Additionally, several groups appeared in favour of the Project, in particular the Brampton Board of Trade, Canadian Chamber of Commerce, Chambers of Commerce in the Halton Region, including the Milton Chamber of Commerce, Mississauga Board of Trade, Vaughan Chamber of Commerce, and the Toronto Region Board of Trade also made submissions that included information on existing problems with supply chain congestion and how additional intermodal capacity will support tens of thousands of regional businesses and jobs that depend on larger regional supply chains.
- [191] Shippers and shipping organizations also made submissions during the hearing, including the COSCO Shipping Lines (Canada) INC., Food and Consumer Products Canada,

Hapag-Lloyd (Canada) Ltd., JB Hunt Transport, Inc., Mediterranean Shipping Company, Shipping Federation of Canada, and ZIM Integrated Shipping Services (Canada) Co. Ltd. These groups highlighted their needs for greater fluidity in the entire, interconnected, transportation network generally, including at ports and at intermodal terminals, and their needs, specifically, for reduced truck wait times at intermodal terminals as well as for overall capacity growth in order to facilitate their deliveries to customers.

RAILWAY OPERATIONS

- [192] CN states that its Project will be designed to allow efficient transfer of containerized cargo between trains and trucks at the Project site. It is forecasted to handle, on an annual basis, approximately 350,000 containers at the start of operation and approximately 450,000 containers at full operation. Once completed, the Project will operate 24 hours a day, 7 days a week.
- [193] The Project can be divided into four operating functions: train operations, lift operations, truck entrance/exit (truck gate), and equipment maintenance.
- [194] The Project site will be served by four intermodal trains per day. Two of the trains to be handled on the Project site are part of the 25 to 30 trains/day currently moving along the Halton Subdivision while two new trains are forecasted to be added to service the Project. According to CN, doubling of the tracks will allow trains to continue to circulate fluidly along the Halton Subdivision, minimizing disruptions to vehicle movements at public crossings.
- [195] CN indicates that, based on the train's design and destination, trains will enter the Project site and be directed either to a pad track or to a service track. Longer trains can also be assembled on the service tracks in preparation for the next destination. In some cases a train will have railcars destined to more than one track, in which case the locomotive will place the railcars into the correct track upon arrival. Through trains will then couple to the railcars they are picking up and depart from the Project site.
- [196] According to CN, containers will be loaded and unloaded from rail cars and chassis using mobile reach stacker-type cranes. There will be space available on the work pads to allow for the temporary staging of containers and chassis, loading and unloading activities and to facilitate container, crane and truck movements throughout the Project site.
- [197] CN states that, prior to departure, the locomotives will couple to the railcars from either or both the service and pad tracks and move onto the mainline.

- [198] The Project will use mobile reach stackers to lift containers on/off a chassis and on/off a railcar. For outbound movements, containers are assigned to specific railcars, taking into consideration each railcar's destination, size, and weight among other things. Reach stackers will travel along the paved pads accessing different areas of the Project via an access road that connects the administration building to the work pads. To load or unload the railcars, reach stackers lift containers and place them onto either a railcar, truck chassis, or the pad storage areas.
- [199] All trucks entering or exiting the Project site will use the proposed entrance off Britannia Road. CN estimates that approximately 650 trucks per day will be entering and subsequently exiting the Project site at the beginning of operation and, as noted above, approximately 800 trucks per day each way at full operation.
- [200] CN states that trucks entering the Project site will travel along CN's private inbound/outbound 1.7-km access road located entirely on CN land within the boundaries of the Project site. CN states that the design of the inbound access road would allow for fluid movement and queuing of approximately 140 trucks into the Project site. At the end of CN's private access inbound road, the trucks then approach CN's Speed gate, an automated gate system (portal) and it is at this check point where the condition of the containers and the container documents are reviewed. CN indicates, in its Plan, that there will be six inbound lanes and four outbound lanes for trucks at the portal.
- [201] CN will use the portal to reduce the time trucks idle in line. Each truck will pass through the portal building which houses a series of lights, cameras and sensors. These record high-definition images of the truck, container and chassis as well as record the container and chassis identifiers through optical character recognition.
- [202] CN states that, once through the portal, the truck will proceed to a kiosk (similar to an ATM) where the driver will self-identify (using a license number/fingerprint scan). The driver will then provide the information required to complete the transaction (e.g., seal numbers, container weight). Once the transaction is complete, the driver will receive a gate receipt and will proceed into the Project site. Clerks will troubleshoot any issues the drivers may have completing their transactions.
- [203] CN clarifies that, exiting the Project site, truck drivers will complete the same process. All drivers wishing to pick up or drop off a container in the Project site must be registered with CN. The registration process involves recording their driver's license information, the companies for which they may drive, obtaining a picture of the driver and an encrypted digital representation of a fingerprint.

[204] A variety of container types are used for intermodal shipments resulting in a variety of truck and chassis combinations for different operating conditions. CN indicates that the following truck movements are expected to/from the Project:

- truck pulling bare chassis;
- truck pulling chassis with a container (container may be either loaded or empty); and
- bobtails tractor (tractor without chassis).

[205] The following equipment will be required as part of operations at the Project site:

- reach stacker cranes (forecasted at 8 to 12);
- yard tractors (hostler tractors for use within the Project site only - forecasted at 8 to 10);
- light vehicles (pick-up trucks, vans – forecasted at 3 to 4); and
- maintenance vehicles (welding truck, fork lift, front-end loader – forecasted at 3 to 4).

[206] CN states that the project will include a full service garage to maintain and repair cranes, hostler trucks and other CN vehicles. The garage will be designed to accommodate different types of repairs, including full engine overhauls, boom replacements, and container and chassis repairs.

INFRASTRUCTURE AND GROUND ALTERATIONS

[207] CN indicates that activities associated with the construction of the terminal and track facilities will include:

- site clearing and grading activities;
- track construction and signals installation;
- terminal infrastructure and paving;
- grade separations;
- utilities;
- watercourse realignment, restoration and naturalization; and
- construction equipment and operation.

[208] A preliminary schedule for the development of the Project has the construction phase over an 18 to 24-month period.

[209] CN identifies that the project components will include:

- yard tracks;
- work pads and container storage;
- realignment of the existing mainline;
- double track extension of the mainline;
- truck entrance/gate and access road (including overpass);
- administration building and maintenance garage;
- stormwater management (SWM) system;
- vegetation clearing, grading and berms;
- realignment of Indian Creek;
- realignment of Tributary A;
- naturalization and restoration;
- electrical and communications infrastructure;
- Lower Base Line crossing; and
- realignment of existing petroleum pipelines.

[210] According to CN, in order to maintain water quality and quantity, stormwater runoff from the Project, including the work pads, access roads, parking areas, gate area and administration building, will be collected and conveyed through a network of storm sewers and drainage swales to two SWM ponds before draining into Indian Creek or Tributary A.

[211] CN's SWM Pond 1 will be located adjacent to the truck gate and SWM Pond 2 will be adjacent to the administration building and maintenance garage. Both ponds will be designed as wet detention ponds. A series of grassed swales are provided between the yard and gate/administration building to collect, store, treat and convey storm runoff from the work pads and yard tracks to the SWM ponds. Oil grit separators, which capture litter, coarse sediment, some nutrients, oils and greases (hydrocarbons) will be provided for the administration building and gate area. Both of these features provide pre-treatment of runoff prior to discharge to the SWM ponds.

[212] Flow diversion channels will capture off-site or external runoff draining from adjacent properties and will convey drainage waters around the Project to Indian Creek and its tributaries. Flows will be collected and discharged downstream of the SWM ponds.

- [213] CN states that Tributary A currently flows across the CN property to its confluence with Indian Creek immediately west of Tremaine Road. To accommodate the Project, while maintaining flows across the site, flows in this tributary will be conveyed through two twin box culverts approximately 125 m in length beneath the yard tracks and work pad area. Flows will also be conveyed through two twin box culverts approximately 75 m in length beneath the truck gate, and a smaller culvert beneath the truck access roadway near Britannia Road.
- [214] CN states that the lower reaches of Tributary A will be realigned to meander around SWM Pond 1 using natural channel design methods before connecting into Tributary A upstream of the existing berm. Maintaining separation between the Tributary A flows originating upstream of the Project site and the stormwater runoff collected within the Project site will allow runoff from the Project to be treated through the SWM Ponds prior to discharge or mixing with offsite flows. The new Tributary A channel will be approximately 500 m long.
- [215] CN outlines its efforts to offset potential effects on Indian Creek and Tributary A, including several measures to minimize impacts, stabilize the streams, improve habitat and restore natural conditions that support fish habitat. CN will be consulting with the Department of Fisheries and Oceans to request a review of the proposed realignment of Indian Creek and Tributary A.
- [216] CN indicates that to support the electrical demands of the Project, an 8-MVA transformer will be installed near the administration building. Any electrical lines crossing the work pads or yard tracks will be installed underground, while lines in other areas will be installed above ground. On-site power generators will be used as back-up power in the event of a failure. Additionally, an on-site radio communications system will be required to enable radio communications with terminal equipment and staff and to ensure safe operations.
- [217] CN states that to avoid the blockage of vehicular traffic, while trains enter or exit the Project site, a grade separation via an underpass will be constructed where Lower Base Line (mileage point 40.68) crosses the existing mainline at grade just east of Tremaine Road. The two-lane underpass will be approximately 40 m to 55 m long and will route Lower Base Line traffic beneath the existing tracks and the Project within the existing municipal right-of-way. CN will be responsible for the design, construction, and future maintenance of the underpass and will work collaboratively with the municipal road authority to incorporate its requirements. The bridge structure supporting the tracks and Project will be owned by CN, while Lower Base Line will remain in public ownership.

- [218] Two existing underground pipelines owned and operated by Sun-Canadian that transect the Project development area, at mileage point 39.13, require realignment due to construction of the Project. Standard protection measures will be required to accommodate the relocation of the pipelines entirely on CN property. Through discussions with Sun-Canadian, these pipelines will be relocated around the north end of the proposed work pads, on property controlled by CN. The relocated pipelines will be installed via directional drill at a depth ranging from approximately 3 m to 6 m below grade.

CONSTRUCTION ACTIVITIES

Site clearing and grading activities

- [219] CN explains that the construction of the Project will require approximately 180 ha of existing land to be disturbed to accommodate construction. Site disturbance will include clearing and removal of trees and brush, stripping of all surficial organics and topsoil, site grading, including cut and fill earthworks, to accommodate the Project and realigned tracks to create a level working area.
- [220] CN asserts that the limit of disturbance, including all site grading, clearance and construction activities, occurs within the Project site and accommodates grading associated with the proposed project infrastructure (i.e., work and service pads, access roads, buildings, SWM ponds, ditches, tracks and berms), as well as potential areas required for the realignment of Indian Creek, Tributary A and corresponding restoration and enhancement areas. All grading activities will be confined to the CN property.
- [221] Surplus topsoil and earth will be used for the construction of the perimeter berms, which will be seeded and planted with native Ontario trees. CN intends to reuse the majority, if not all excess soils generated during grading for use in the construction of berms, channel realignments and landscape top cover on-site for the Project.

Track construction

- [222] CN states that the realigned mainline tracks, east of the existing mainline, will be built and put in service prior to commencing work on the Project pads. This requires stripping, grading and placement of subballast prior to building the track structure. The construction staging scheme for the Project and track work is a process commonly executed by CN.

Project infrastructure

- [223] CN indicates that once construction of the railway grade is complete, ties and rails will be distributed and placed accordingly along the track alignment. Ballasting, final surfacing with mechanized lifting and lining equipment, thermite welding, grinding, and de-stressing will complete track construction. Signals and switching equipment will be installed as required.
- [224] CN indicates that following site preparation, construction of the Project infrastructure will include the following activities:
- placement of imported granular material along access roads, parking areas and Project site;
 - placement of pavement structures for access roads, entrance gates and pads;
 - installation of culvert and drainage structures, including inlet and outlet protection;
 - construction of the administration building and maintenance garage; and
 - construction of SWM ponds.
- [225] CN states that the level area for the pads created during site grading activities will be compacted. Granular material will be placed on the pad area and compacted. Site roads and drainage system components will be constructed concurrent to this work. Work on the office building/garage and gate infrastructure will also take place at this time.

Grade separations

- [226] CN indicates that two grade separations are proposed for the Project, including a new overpass across the CN track for truck access and a new underpass at Lower Base Line. In the case of Lower Base Line, CN commits to collaborating with the road authority to ensure appropriate design and construction are achieved and that appropriate environmental mitigation measures are incorporated for the construction of the underpass and bridge structure supporting the Project and its tracks.
- [227] CN's construction of the grade separation (overpass) within the Project site along the private access road will include excavation of material for reuse on site (i.e., berms), construction of concrete abutments and retaining walls and concrete pre-cast or cast-in-place girders.

Utilities

- [228] CN declares that for a third-party utility infrastructure, it will work with other affected parties, including Milton and Sun-Canadian, to develop methods and timing for construction to keep on its schedule and allow for the protection of the environment. CN confirms that it possesses existing agreements with the utility entities. The majority of the existing utility crossings will not interact with the Project components as they are located at an appropriate depth or possess adequate wall or casing thickness.
- [229] CN indicates that no connection to municipal water supply is available at this time. As such, three holding tanks for potable water will be installed near the administration building to supply potable water for washroom, showers and lunch room facilities. Potable water demand is anticipated at 30 gallons (gal)/person/day resulting in 3,000 gal/day. Potable water will be transported to the Project and stored in underground water storage tanks with a capacity of approximately 5,000 gal each (15,000 gal total) to meet the potable water demand. A separate rainwater catchment and recycling system with an area of 3,700 m² will be installed to capture rainwater to supplement the water supply for vehicle washing, landscaping and on-site sewage.

Watercourse realignment

- [230] CN states that the realignment of Indian Creek and diversion of Tributary A will require the establishment of new channels that will be constructed in the dry (i.e., isolated from flows using diversion, pumping or potentially piping) and then connected to the existing watercourse channel allowing flows along these new channels.
- [231] In conclusion, the Agency has considered all of the above evidence related to the requirements for railway operations and services, recognizing the guidance of the Federal Court of Appeal that those words refer “only to those requirements that will enable the railway company to provide service to its customers.” The Agency is satisfied that the Project will enable CN to provide intended services to its customers, including those located in the GTHA.

Interests of the localities

- [232] The Agency will now consider the interests of the localities that will be affected by the lines. The Agency interprets the word “locality” broadly; it variously encompasses neighbourhoods, communities, towns or townships, cities or regions. The Agency also takes a broad view of who may speak to the interests of localities, to raise concerns about

the plans of a railway company; it variously encompasses residents, land owners, business owners, local government representatives and indigenous peoples, among others. The Agency will start by considering CN's efforts to ascertain the response of the representatives of the localities to the Application.

ENGAGEMENT

CN's pre-application activities (public engagement)

- [233] CN states that it initiated the formal consultation process on the Project with its March 19, 2015 public announcement and the official opening of the public information centre on March 28, 2015. CN identifies various stakeholders, including members of the public, interest groups, municipal contacts and regulatory agencies, with a potential interest in the Project, and developed a contact list that was used for consultation activities.
- [234] CN published various Project-related announcements and notices in the local newspaper, the *Milton Canadian Champion*, with general distribution in Milton. In addition to publication in the local newspaper, the invitation to the public open house and public information centre was mailed to approximately 36,000 addresses on July 6, 2015, distributed to stakeholders on its contact list on July 8, 2015, and posted on its Project specific website and on digital signage throughout the community to notify stakeholders.
- [235] CN established a Project website, which it maintained throughout the regulatory process. The site contained information on the proposed Project and regulatory process, a frequently asked questions section, a Project 1-800 number and a Project email address. The Project website enabled stakeholders to directly submit comments to the Project team.
- [236] On March 28, 2015, CN opened its public information centre on the second floor of 61 James Snow Parkway in Milton, to support its consultation efforts in the community. CN personnel were present to answer Project-related questions.
- [237] On July 16, 2015, CN held a public open house at the Best Western Plus Milton located at 161 Chisolm Drive, Milton. CN and its consultants provided general Project information, including an overview of the Project, EA process and considerations, improvement opportunities, and preliminary technical report results. Approximately 350 people attended the public open house sessions, with 148 people signing up to receive Project information. Project representatives encouraged attendees to fill out and return

comment forms following the session, to gather feedback on the Project and any questions and concerns. A total of 72 comment forms, 187 signed form letters, and three individual letters were submitted to CN during the meeting.

[238] CN submitted, as part of its Application, a record of its public and interest group consultations. CN identified two community groups that were opposed the Project; Milton Says No and Milton RAIL. Milton Says No, submitted a petition, on January 4, 2017, with 1,385 signatures from members of the community of Milton and Halton Region. Milton RAIL is a volunteer ratepayer group initially formed in 2001 after CN began purchasing agricultural land in Milton through numbered companies during the latter part of 2000.

[239] CN indicates that, as a result of its engagements, the public identified to it the following Project-related issues:

- Traffic routing and congestion
- Rationale for site location
- Noise
- Pollution
- Impact on roads
- Safety
- Job request
- Requires only federal approval
- General environment
- Light

[240] During that time, CN also engaged provincial and municipal government agencies in localities that will be affected by the location of the proposed railway line.

[241] According to CN, the purpose of the Project is to allow CN to provide intermodal service by railway to its customers throughout the GTHA in a manner that meets CN's operational requirements. The Agency also notes that the railway line is located within a part of the GTHA that has been the site of a mix of uses including agricultural, municipal (e.g., the Halton Region Waste Management Facility), residential, industrial, and recreational (e.g., the Mattamy National Cycling Centre), amongst others.

EXERCISE OF DISCRETION

- [242] As stated in the Regulatory Framework section above, the Agency benefits from a broad statutory discretion when it decides what constitutes, and what does not constitute, an interest of the locality in the context section 98(2) of the CTA. By extension, the Agency has a broad discretion to decide what weight to give the evidence of a given interest of a locality when the Agency is balancing that interest against the requirements for railway operations and services.
- [243] That discretion is broad but it is not unlimited. The Agency must be guided by judicial consideration. As noted, the Federal Court of Appeal explained that the Agency must have regard to the “physical coexistence” of the railway line in proximity to localities. The Agency may have regard to its previous decisions involving other section 98 applications by railway companies, although, as an administrative tribunal, the Agency is not bound by its precedents. The Agency must also respect its finite statutory powers. The Agency’s broad discretion must be exercised within the limitations of the four corners of its enabling statute, the CTA. Ultimately, the Agency, a creature of statute, is a transportation agency; it is not an environmental assessment agency.
- [244] The differences between the two agencies involved in the joint process for the review of the Project are clearly illustrated by the differences between CN’s Application to the Agency and CN’s environmental impact statement filed with the CEA Agency. The form and content of the former is largely discretionary; the latter is closely prescribed. Section 98 of the CTA makes it clear that the Agency may only act upon an application filed by a railway company but section 98 does not indicate, prescribe or list any factors that an applicant railway company must address in any such application; there are no applicable regulations either.
- [245] Conversely, before it could file its Environmental Impact Assessment (EIS) with the CEA Agency, CN had to have regard to section 5 of CEAA 2012 which prescribes, in detail, a number of environmental effects that CN had to address. In addition, CN could not prepare its EIS until the CEA Agency issued its project-specific Guidelines for the preparation of an EIS, in final form, in July 2015. Those Guidelines are binding and they are even more comprehensive than section 5 of CEAA 2012. In essence, the content of an EIS, including the environmental effects it must address, is prescribed by statutory provisions and formal Guidelines. On the other hand, the scope of what constitutes an interest of the locality is not determined in advance, either by the statute or by any guidelines. That is one of the reasons why the Agency does not accept any contention that all environmental effects of a project are also automatically interests of a locality.

The environmental effects that must be taken into account in the EIS are prescribed, in great detail, by law; the interests of a locality are not. Stated another way, there is no reason for the Agency to believe that Parliament intended the environmental effects that must be considered by law under section 5 of the CEEA 2012 to also constitute interests of the localities affected by a railway line under section 98 of the CTA.

- [246] The joint process for the review of the Project, including the “single-window” approach, brought many benefits but also clearly created some confusion among some of the participants in the process. As stated in the Preliminary Matters section above, the joint process resulted in a broad and comprehensive record of evidence and information. Some of that evidence was relevant to the environmental assessment conducted under one statute; some of the evidence was relevant to the Agency’s subsequent determination of the reasonableness of the location of the railway lines, under another federal statute. Also, some of the evidence was relevant to both processes; some of it to neither.
- [247] Based on the position they took in this proceeding, some participants appear to believe the joint process removed the Agency’s ability to decide what constitutes an interest of the locality. If that position were correct, the Agency would be essentially bound to conduct an environmental assessment as part of its determination of the reasonableness of the location of the railway line, and be satisfied that significant adverse environmental effects, if any, have been addressed. However, this is not the case. The Agency recognizes that there will inevitably be some overlap between some things that are environmental effects of a Project and some things that are relevant to the interest of the localities affected by the line. In the Agency’s view, that overlap is not, as some participants seem to contend, absolute or perfect. Stated another way, environmental considerations, including any environmental assessment that may have been conducted by another administrative body and the mitigation measures that are to be implemented to address environmental effects, are one of the factors that the Agency may be called to consider when examining the interests of the localities for the purpose of deciding if the location of the line is reasonable. To the extent that a Project has been authorized by an Agency specifically mandated under environmental legislation to examine these very concerns, the Agency may be satisfied that these issues have already been addressed. Environmental assessments and rail construction authorizations are two different regulatory authorizations, decided under two different statutory regimes. In the Agency’s view, Parliament did not intend for Projects to undergo two consecutive environmental assessments, nor to mandate the Agency to redo and question the work and the conclusions of the IAA or the Minister.

[248] The limitations of the statutory jurisdiction of the Agency do not, however, prevent the Agency from reading and considering the environmental assessment report of the Review Panel and the Minister's Decision Statement. Indeed, it is wise and prudent for the Agency to do so when deciding what constitutes an interest of the locality affected by the line and what weight to attach to the report and the Decision Statement. In Decision No. 85-R-2013 dated March 8, 2013, which involved a section 98 application, the Agency said that the information provided as part of an environmental assessment is relevant "to inform" the Agency of the interests of the localities potentially affected by the location of the railway lines. The environmental assessment in that case was not conducted by the Agency itself and was conducted prior to CEAA 2012, but the principle remains valid. The environmental assessment information on the record of this proceeding similarly "informs" the Agency in its decision-making process; it does not dictate how the Agency will exercise its discretion involving an interest of a locality affected by a line.

[249] As an example, the Review Panel considered project-generated noise, from a number of sources, to be an environmental effect. Ultimately, however, because of existing separation distances and added mitigation measures, the Review Panel held that noise from the Project did not constitute a significant adverse environmental effect. The Agency understands why the Review Panel considers project-generated noise to be an environmental effect and does not disagree with its finding that such noise does not constitute a significant adverse environmental effect. That said, to some degree, the Agency's agreement matters little since those are findings and conclusions made under CEAA 2012 as the Agency has no statutory power to determine a significant adverse environmental effect. That is not the Agency's role under CEAA 2012 nor under the CTA. However, as noted in a previous paragraph, those findings and conclusions do inform the Agency in its decision-making process under the CTA.

[250] To continue the example, the Agency has decided to consider railway noise, from a number of sources at the Project site, as part of its Determination of CN's application. In this case, and because of the joint process, the Agency has access to the same record as the Review Panel had. Having reviewed and considered all of the relevant evidence, the Agency considers railway noise to be an interest of the locality affected by the line, pursuant to section 98 of the CTA. Strictly speaking, this is not because it is an environmental effect of the Project. The Agency has no jurisdiction to make such a finding and there are a number of factors the Agency may consider in exercising its broad discretion, as set out in the following paragraphs. This is not, of course, an exhaustive list of those factors nor is it intended to be.

- [251] First, the Agency observes that several different representatives from a number of different constituencies have made it plain to the Agency that they are concerned about railway noise. The people who visited the CN public information centre in Milton identified railway noise as a potential concern to them; CN compiled those public comments and identified them as a potential concern of the public in its Application. The members of the public, including the members of Milton Says No and Milton RAIL, sent a number of emails to the Agency in the months leading up to the public hearing expressing their potential concerns, among other things, about railway noise. Members of those same public interest groups also attended the public hearing in Milton to express their concerns in person.
- [252] Second, the Agency observes that the potential concern of the public over railway noise falls within the dimension of “physical coexistence of railway lines in proximity to localities,” mentioned by the FCA in 1999. The potential concern of members of the public is squarely related to the proposed physical location of the lines of railway that CN seeks to construct. The potential concern varies depending on how far, or how close, the new lines of railway will be located from people who live in Milton. Had CN proposed to locate its line of railway in a different part of Milton or in a different part of Halton, the dimension of “physical coexistence” would change and a greater or lesser number of people in the locality would potentially have cause for concern. This highlights the importance of the specific location of the line.
- [253] Finally, railway noise is a matter over which the Agency has statutory jurisdiction; since 2007, the Agency has knowledge and experience, under section 95.1 of the CTA, in resolving complaints filed by members of the public over railway noise that they consider not to be reasonable.
- [254] The converse is also relevant to consider. Based on that same non-exhaustive list of factors, the Agency may exercise its discretion to decide that a given concern does not constitute an interest of the locality affected by the line. Or, where the Agency finds that a given concern does constitute an interest of the locality, it may decide, based on some of these same factors, the appropriate weight to give it when balancing it against the requirements for railway operations and services. To recap, among other things, in exercising its discretion, the Agency may consider the extent and the quality of the evidence on the record, the extent to which the representatives of a locality have raised a potential concern; whether that concern is widespread within the locality, whether the concern relates to the location of the line, to the “physical coexistence” of the line or

to the proximity of the locality to the line. The Agency may also usefully have regard to the extent to which the concern is related to transportation matters and the extent to which it fits within the Agency's statutory jurisdiction.

[255] As part of its consideration of the interests of the localities affected by the Project, the Agency has considered the results of CN's consultations with localities, the record and the results of the Review Panel's process, and the Minister's Decision Statement and its accompanying conditions. The Review Panel's report undertaken pursuant to CEEA 2012, examined the following subject areas; in most cases, it found them to be environmental effects of the Project:

- Noise and vibration
- Air quality
- Alternative means of carrying out the project
- Effects on road transportation networks
- Demand for community services and infrastructure
- Effects on passenger, commuter and freight railway services
- Accidents and malfunctions
- Agriculture
- Physical and cultural heritage, and structures, sites or things of historical, archaeological, paleontological or architectural significance
- Outdoor recreation
- Human health
- Land use planning
- Need for the Project
- Ultimate capacity
- Municipal finances
- Property value and enjoyment of property
- Light
- Surface water and groundwater
- Changes to wetlands
- Terrestrial environment
- Wildlife
- Fish and fish habitat

[256] One of the bullets in the above list is “need for the Project”. It requires a comment. As the Agency understands the report of the Review Panel, it was not required to discuss the need for the Project as part of an environmental assessment. However, it chose to comment on the evidence presented by some of the witnesses at the public hearing regarding what those witnesses apparently considered to be the need for the Project. Of course, the need for the Project was not addressed as an environmental effect. Although the Agency has read and considered the report of the Review Panel, the Agency has not otherwise considered the need for the Project as part of the Agency’s determination of CN’s Application under section 98 of the CTA. As stated above in the Regulatory Framework section, there is no need for the Agency to do so as, by judicial consideration, the need for the Project is presumed by the filing of the Application.

[257] Many of these environmental effects coincide with areas of federal interest pursuant to subsection 5(1) of CEEA 2012 within the legislative authority of Parliament; as stated above, these are matters that CN was obliged to address in its EIS:

- fish and fish habitat as defined in subsection 2(1) of the *Fisheries Act*, RSC 1985, c F-14;
- aquatic species as defined in subsection 2(1) of the *Species at Risk Act*, SC 2002, c 29;
- migratory birds as defined in subsection 2(1) of the *Migratory Birds Convention Act, 1994*, SC 1994, c 22; and
- with respect to aboriginal peoples, an effect of any change that may be caused to the environment on:
 - health and socio-economic conditions,
 - physical and cultural heritage,
 - the current use of lands and resources for traditional purposes, or
 - any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.

[258] The Agency has informed itself of the topics discussed in the report of the Review Panel related to subsection 5(1) of CEEA 2012. They involve subject matters and other federal statutes with which the Agency, quite properly, has little experience or expertise. The Agency finds that the concerns raised related to these topics are addressed by CN’s Commitments and by the conditions in the Minister’s Decision Statement as part of the environmental assessment of the Project. These topics may, to some degree, also constitute interests of the localities affected by the line. In any event, having considered

these matters, the Agency finds that these topics do not require any additional assessment or further consideration by the Agency as part of this Determination under section 98 of the CTA in deciding whether the location of the line is reasonable.

[259] The Agency has informed itself of the remaining topics, many of which are environmental effects pursuant to subsection 5(2) of CEAA 2012. The Agency considers that some of these environmental effects merit additional review and comment by the Agency as part of its determination of the reasonableness of the location of the railway line, pursuant to section 98 of the CTA.

[260] The Agency also is of the opinion that localities were adequately engaged and that the representatives of the localities effectively brought to the Agency's attention several potential areas of concern. The Agency considers that the areas of concern in the following list constitute interests of the localities within the meaning of section 98 of the CTA, particularly when considering the effect of the physical co-existence of railway lines in proximity to localities, and merit further examination and comment by the Agency as part of its determination of the Application.

- Noise and vibration;
- Accidents and malfunctions;
- Air quality;
- Ultimate capacity;
- Effects on passenger, commuter and freight rail services;
- Community infrastructure use (roads and utilities);
- Outdoor recreation;
- Land use planning and conversion of agricultural lands; and
- Municipal revenues.

[261] The Agency will now examine the interests of the localities that will be affected by the line in the context of each of these potential areas of concern.

NOISE AND VIBRATION

[262] Several people were concerned that the Project would generate too much noise. The operation of a railway line inevitably produces noise; so does the construction of railway lines. Some people were also concerned about truck noise; that the Project-generated truck traffic, those trucks entering and exiting the Project to transport containers on the regional arterial road network, would also generate unwanted noise.

- [263] The types and levels of noise were studied in great detail in the Information Requests that preceded the public hearing and at the public hearing itself. The environmental assessment considered noise as an environmental effect of the Project and the Agency considered noise as an interest of the locality at the public hearing. Vibration was also studied, but it was a far lesser concern.
- [264] Noise and vibration, if appropriate separation distances are not observed, have the potential to adversely affect human health, safety and well-being, property, and the environment. Noise and vibration from the construction and operation of a railway line is no exception. For instance, in the absence of appropriate separation distances or other mitigation measures, human health can be adversely affected by noise from passing trains or idling locomotives, shunting, whistling, or noise from the compression or “stretching” of trains. Typically, railway line construction activities such as the use of motorized equipment and vehicles, including back-up alarms, manual activities including welding, hammering, dropping of metal objects, pile driving and blasting, all have the potential to cause unwanted noise.
- [265] Noise that is inevitably produced by the operation of a railway line is typically mitigated via setbacks and separation distances and where setbacks are not sufficient or available, by noise walls and or noise berms. Halton and the people of Milton are generally familiar with the use of setbacks and other mitigation measures as the appropriate authorities allowed subdivisions of residential homes to be constructed adjacent to, but set back from, the CN Halton Subdivision in various part of Milton over a number of years.
- [266] For example, as indicated in CN’s Application, Mattamy Homes (Mattamy) conducted a noise feasibility study as part of the approval process for its Willmott West Property development (Willmott), located east of the CN railway right-of-way, north of Louis Saint-Laurent Avenue (within Milton). Mattamy recommended several measures to ensure that noise was addressed, including the requirement for an acoustic barrier 5.5 m in height, consisting of a 3.0 m high earth berm with a 2.5 m high acoustic wall on top, along the railway right-of-way for principal mainlines.
- [267] This Willmott development was constructed adjacent to the CN railway right-of-way in Milton but it is not adjacent to the part of the railway right-of-way or to the parcel of CN-owned land where CN intends to build the Project. It is, however, an example of how separation distances and other mitigation measures may be used to allow residential houses and the noises from the operation of the CN Halton subdivision to physically co-exist.

- [268] As part of its Application, CN conducted an ambient noise study. CN also assessed noise effects due to the construction and operation of the Project (CN's noise study). The assessment in CN's noise study was based on the Canadian Transportation Agency's Railway Noise Measurement and Reporting Methodology and was consistent with the Federal Transit Administration criteria and Health Canada's criteria.
- [269] CN took into consideration various points of reception, including existing residences and future residential developments. CN's noise study identified 38 points of reception (PORs) that ranged from farmhouses and isolated residences co-existing with the existing CN infrastructure (existing residences), existing subdivision/urban developments located north of the Project towards Derry Road (existing subdivisions), and future subdivision/urban developments being proposed to the north of the Project but closer to Britannia Road (future subdivisions). The Project includes various mobile railway noise sources, such as trains operating on the mainline track, trucks driving along roads on-site, train and vehicle operations on the Project's intermodal tracks and pads, and stationary noise sources such as fuelling stations and transformers. The POR setbacks from these mobile railway line noise sources ranged between 53 and 859 metres in the case of the existing residences, 55 and 62 metres in the case of the existing subdivision, and 37 and 56 metres in the case of the future subdivision.
- [270] CN's noise study recommended the use of physical noise mitigation measures, located on CN land within the Project, such as berms and barriers that would be, at a minimum, 5 metres in height and situated in various locations necessary to achieve a reduction in noise levels at nearby PORs such that the change in acoustical environment due to the Project operation noise effect would be acceptable. CN indicated that with the mitigation measures applied, there are also acceptable effects as a result of Project operation. CN asserted that the effects of noise sources operating within the Project pad (such as reach stacker movement and loading/unloading, hostler movement, and heated containers), were shown to be effectively mitigated with the berms/barriers.
- [271] The Review Panel was satisfied that noise and vibrations from the construction and operation of the Project, including trains operating on the mainline, would not cause significant adverse environmental effects.
- [272] The Review Panel, in its report, indicated that CN, in its noise study, stated that the existing ambient noise levels were typical of a suburban environment and dominated by existing train traffic, local vehicular traffic, and urban hum from the developed areas. Noise from the Project would be generated 24 hours per day, although 85 percent of truck movements would occur during business hours. Only two new trains would be added to

the mainline. Noise mitigation measures would variously include speed limits, berms, barriers, enclosure of noise sources, and selection of quieter equipment. CN would install measures such as sound barriers during the early stages of construction. Noise sources along the mainline, north of Britannia Road, would include locomotive movements, idling and coupling noise.

- [273] Developers of new residential housing would be required by Milton to extend the noise barriers along the main tracks. Halton expressed concern about the lack of detail for the proposed mitigation measures. Developers who owned land north of Britannia Road and adjacent to the CN Halton Subdivision requested additional noise barriers between future adjacent homes and noise sources. Health Canada raised concerns about sleep disturbance.
- [274] The Review Panel stated that CN expressed confidence that all noise criteria would be met through mitigation. The Review Panel made additional recommendations to ensure this while also noting that enforcement would be available through the Agency. The Review Panel recommended that CN should conduct further sleep disturbance analysis in consultation with Health Canada, during the detailed design phase of the Project, to evaluate individual nighttime impulsive noise events from the operation of the Project. If the potential for sleep disturbance exists, CN would be required to implement additional mitigation measures on its property including additional berms, noise walls, operational changes or other appropriate measures. These mitigation measures would likely be effective to eliminate any significant effect on human health.
- [275] The Review Panel also pointed out that CN modelled noise for future off-site truck noise using the STAMSON noise model, which CN stated is a qualified road noise model. It is the same noise model used in the environmental assessment of the proposed widening of Britannia Road and Tremaine Road. That was an environmental assessment not related to the Project and not conducted by CN. CN predicted that, based on the results of the model, noise generated by Project-generated truck traffic along off-site haul routes would meet the Health Canada and U.S. Federal Transit Administration criteria. As a result, CN said that no change to the proposed mitigation measures for truck noise would be required.
- [276] Halton disagreed. Halton predicted that noise from the planned and approved major roadway upgrades on Tremaine Road and Britannia Road would increase the cumulative noise effect by up to 5 dBA, and would therefore combine with predicted Project effects on noise to cause significant adverse cumulative environmental effects. However, as set out in the Review Panel's report, Halton also confirmed that this predicted noise increase

would be primarily due to the increase in car traffic, and not the increase in Project-generated truck traffic. The Review Panel did not find a significant adverse cumulative environmental effect from truck noise beyond the Project.

- [277] The Review Panel, in its report, took note of the available separation distances. The Review Panel concluded that most noise from the transfer of containers would occur within the operational footprint of the Project (the track pad and work pad areas) which is located entirely south of Britannia Road and separated by a distance of more than 300 metres from the nearest existing houses, the current residential subdivision located north of Louis Saint Laurent Avenue and the planned future residential subdivision under construction north of Britannia Road.
- [278] The Review Panel concluded that the standard 300-metre setback mitigation measures CN considered, and the physical noise control measures and operational changes, would satisfactorily attenuate sound at the few existing residences located on the arterial roads bordering the Project Development Area, the existing residential subdivisions located north of Louis Saint Laurent Avenue, and the future residential developments currently under construction north of Britannia Road.
- [279] The Review Panel, in its report, therefore concluded that these various mitigation measures should be sufficient to keep noise levels below the US Federal Transit Administration's standard of a less than one to five decibel change, and Health Canada's criterion of no more than a 6.5% increase in "Highly Annoyed."
- [280] The Minister's Decision Statement imposed conditions on the Project relating to railway-related noise and vibration within CN's care and control, specifically conditions 4.6 to 4.10.4 (for noise) and conditions 11.3.1 to 11.3.3 (for vibration). In regards to noise, condition 4.6 requires CN to manage Project-generated noise so as to limit a change in noise level at any POR by less than one to five decibels and less than a level of 6.5 percent Highly Annoyed. Condition 4.7 requires CN to develop a communication protocol. Condition 4.8 requires CN to conduct construction activities during daytime and condition 4.9 requires CN to develop a protocol for receiving noise-related complaints.
- [281] The Agency agrees with the Review Panel's findings and the Minister's Decision Statement related to the mitigation of noise and vibration. With respect to specific concerns raised by some of the people in the localities in this regard, the Agency is satisfied that the noise and vibration during construction and operation of the railway line were adequately assessed.

- [282] Lastly, CN is required, pursuant to Minister's Decision Statement condition 4.9, to establish a noise complaints protocol. As well, pursuant to condition 4.10, CN is required to establish a noise-based follow-up program. These conditions complement the Agency's process, pursuant to section 95.1 of the CTA, to determine, upon application, whether railway-related noise or vibration is reasonable and if it is not reasonable order a railway company to undertake any change in its railway construction or operation that the Agency considers reasonable. The Agency's process includes the option of collaborative measures, facilitation and mediation as well as adjudication.
- [283] In addition, pursuant to condition 3.2, CN must establish a community liaison process. This process has the potential to afford some of the people in the localities potentially impacted by railway noise and vibration the ability to put those concerns to CN directly.
- [284] For all these reasons, the Agency finds that the concerns raised by various parties as an interest of the locality related to noise and vibration from Project-generated truck traffic have been addressed to the extent that those concerns now have little weight when deciding whether the location of the line is reasonable.

ACCIDENTS AND MALFUNCTIONS

- [285] Various representatives of the localities expressed the interest of the localities in ensuring that the Project not cause accidents and malfunctions. Their concerns included accidents and malfunctions that could occur from the operation of the Project itself and extended to concerns over accidents and malfunctions that could occur outside the Project, on the arterial roads within the locality over which the Project-generated trucks would travel.
- [286] The construction and operation of the Project has the potential to result in accidents and malfunctions, which could cause adverse impacts on localities. Specifically, representatives of the localities suggested that numerous injuries and fatalities could be expected over the life of the Project as a result of train derailments and spills within the Project. The Agency notes that some of the people in the localities and in the greater community expressed concerns regarding traffic accidents between Project-generated trucks and other vehicles, cyclists, and pedestrians using regional roads along routes identified between the Project entrance/exit and 400-series highways.

[287] As part of its Application, CN identified the following types of potential accidents and malfunctions associated with activities on or near the Project site:

- Hazardous materials spills (including fuel oil, glycol, lubricants and hydraulic fluid) on land or water;
- Spills of an intermodal shipping container on land;
- Traffic accidents in relation to the entry points of the Project; and
- Derailments.

[288] As part of its supplemental filings, CN also identified the following types of potential accidents and malfunctions associated with activities outside of the Project site:

- Hazardous materials spills on regional roads;
- Vehicular traffic accidents along routes identified that could be used by Project-generated trucks; and
- Pedestrian and cyclist accidents.

[289] The Review Panel, in its report, indicated that CN stated that the Project features design aspects that would reduce both the probability and severity of environmental effects resulting from accidents. These design features include low train speeds, low volumes of dangerous goods, shut-off valves on the stormwater management system, and CN's network-wide safety culture. CN considered that the effects of a fire on air quality would be the main risk to human health, but the risk of a fire occurring would be low because of the small volumes of combustible material on site. Transport Canada reported that intermodal terminals in Canada have an excellent safety record.

[290] Halton filed a report which suggested that numerous injuries and fatalities could be expected over the life of the Project due to potentially fatal dangerous goods accidents, but CN clarified that Halton had made those predictions based on data from all railway operations, not based on data related specifically to the operation of intermodal terminals. Also, the Agency notes that CN, in responding to Halton's assertions concerning accidents and malfunctions that might arise both on site and beyond the Project footprint, clarified that the fatalities Halton assumed would result were based on non-fatal incidents but were mistakenly applied to fatal incidents. The Agency, in assessing the evidence before it concerning accidents and malfunctions, rejects Halton's contention that the Project has the potential individual risk intensity of a typical rail yard due to the nature of its intermodal terminal operations.

- [291] The Review Panel concluded that the risk of a serious accident, including a major derailment, was low and the environmental effects could be adequately mitigated through design, and through prompt and effective emergency response. The Review Panel recommended that CN regularly update emergency response plans; collaborate with local authorities; and work with the community liaison group to address issues of concern to the community.
- [292] The Review Panel found that CN's commitments to implement mitigation measures for accidents and malfunctions were necessary to avoiding a significant adverse environmental effect. Additionally, the Review Panel considered that additional mitigation measures beyond CN's commitments were necessary to avoid a significant adverse environmental effect. Therefore, the Review Panel recommended that CN further reduce the potential environmental effects of accidents and malfunctions.
- [293] The Minister's Decision Statement imposed conditions relating to accidents and malfunctions within CN's care and control, specifically conditions 14.1 to 14.6.3, addressing the Project's potential to cause significant adverse environmental effects. In regard to preventing and mitigating accidents and malfunctions, condition 14.1 requires CN to store hazardous materials according with appropriate procedures and requirements, to inform shippers of safe loading procedures, and to have spill kits in designated locations on site. Conditions 14.3, 14.4, and 14.5 requires CN to develop, maintain, and implement an accident and malfunction response plan in relation to each phase of the Project.
- [294] The Agency notes that CN stated, in its responses to Information Requests filed prior to the public hearing, that CN expect all CN-controlled truck drivers to follow the "rules of the road" when driving on public roadways, and to follow site-specific guidelines when operating within a terminal or on customers' property. CN trucks are equipped with GPS that would enable CN to investigate any non-compliance with these guidelines and implement corrective actions on a case-by-case basis. CN also calculated that Project-generated truck traffic would result in an annual expected net collision increase on all truck routes of approximately 1.87 collisions, which is within the yearly fluctuations in collision frequency currently experienced at any single major intersection in the study area. These analyses are as a result of all the trucks generated by the Project and not specifically those carrying dangerous goods. The probability of a collision involving trucks transporting dangerous goods is further reduced from the 1.87 collisions annually given that only 2.7 percent of the containers would be carrying dangerous goods.

[295] The Agency recognizes the concerns expressed by some of the people in the localities with respect to road safety but observes that Project-generated trucks travelling between the Project and the 400-series highways will be travelling only on arterial roads, all of which, at the time of the public hearing, were already six lanes wide or were already in the process of becoming six lanes wide. This reduces the likelihood of serious roadway accidents. Additionally, the Agency notes that:

- Britannia Road has or will have separate bicycle paths, including isolated bike paths not immediately adjacent to the lanes on the roadway where the cars and trucks operate;
- By definition, an arterial road is designed to limit and to restrict the number of access points for vehicles entering and exiting the road, which design, among other things, is intended to reduce the number of accidents and collisions with vehicles, cyclists, and pedestrians;
- The widening of Britannia Road was not attributable to the Project, or to the Project-generated truck traffic, and that the arterial roads were to be expanded to six lanes whether the Project is or is not built; and
- The Britannia Road bike lanes were planned to be built in any event and will be built whether the Project proceeds or not.

[296] The Agency notes that Transport Canada filed information at the public hearing concerning its programs related to railway safety, transportation of dangerous goods, and intermodal surface security oversight. Transport Canada also has regional inspectors responsible for monitoring the compliance of railway companies with the requirements of the *Railway Safety Act*, RSC 1985, c 32. Transport Canada's railway safety program includes monitoring activities, such as audits and inspections, and follow-ups to complaint handling.

[297] In its filed submissions concerning rail safety, Transport Canada found that CN's proposed mitigation measures were consistent with the requirements in the *Transportation of Dangerous Goods Act*, SC 1992, c 34, with respect to emergency response. The Transportation of Dangerous Goods Program administers and oversees policies and regulations in a manner intended to harmonize with international standards and provide expertise and emergency response in the event of a release of dangerous goods. The *Transportation of Dangerous Goods Regulations*, SOR/2001-286, establish safety requirements, which include classification, documentation, packaging, safety marks, training, emergency response assistance plans and incident reporting. Transport Canada's regional inspectors also monitor compliance with the *Transportation of Dangerous Goods Regulations*.

- [298] Transport Canada stated at the hearing that, in the last five years, there were 20 Transportation Safety Board of Canada reportable incidents at BIT, with 17 of those being derailments. Of those derailments, one involved dangerous goods, and that incident did not result in the release of dangerous goods. Transport Canada also provided additional data on railway transport occurrences at CN's BIT and the Canadian Pacific Railway Company's Vaughan Intermodal terminal which is located north of Toronto. The data indicated that at those two facilities, over a ten-year period, there was a combined total of 14 incidents reported that involved dangerous goods. Transport Canada agreed with CN that, because of the low speeds at which railway cars operate in the terminal, the consequences of any derailments are likely to be relatively minor.
- [299] The Transportation Safety Board of Canada is an independent agency, created by an Act of Parliament (the *Canadian Transportation Accident Investigation and Safety Board Act*, SC 1989, c 3) with the mandate to advance safety in air, marine, pipeline, and rail transportation in Canada and investigates, among other things, railway accidents.
- [300] The Agency also notes that CN indicated that only 2.7 percent of containers moving through the Project would be expected to carry dangerous goods and these goods would primarily include consumer products such as household cleaning supplies, batteries, automotive parts, or paints. The terminal would not handle dangerous goods in bulk and in the cases where dangerous goods would move through the site, the containers would be placarded and handled in accordance with the *Transportation of Dangerous Goods Act*. CN has stated that the majority of goods moving through the site would not be dangerous goods and would instead be classified as general household items such as furniture, clothing, food products and electronics.
- [301] The Agency has considered the interests of the localities to ensure that the operation of the Project and the operation of the trucks travelling into and out of the Project, not result in accidents and malfunctions. Based on all of the evidence before it, the Agency agrees with the findings of the Review Panel and with the Minister's Decision Statement, both of which recognize that the probability of any such accidents or malfunctions is low and that the consequences of any such accidents or malfunctions are likely not to be severe. In addition to the design features of the Project, CN will have emergency response plans and other guidelines in place in the event of a derailment within the Project or of a collision either within the Project or on the arterial roads within the locality. All of these commitments are a reasonable approach to minimize the risk of accidents and malfunctions within the locality.

AIR QUALITY

- [302] Local representatives and some of the people who live in the locality expressed concerns over air pollution. Their concerns related to emissions from the operation of the Project itself and extended to concerns over emissions from the Project-generated truck traffic travelling on the arterial roads around the Project. As the air quality in the locality is already poor. Improvements in the air quality in the Region are, and will be, required whether the Project is built or not.
- [303] Existing air pollution in the local air shed is the result of various existing industrial, transportation, and power generation sources; amongst others. In terms of transportation-related air pollution, a significant source is the emissions from diesel engines in vehicles, such as trucks, especially trucks used in the so-called last mile pick-ups and deliveries of freight. Diesel engines are the de facto standard for transportation of goods which will most likely remain the predominant engine type for the foreseeable future until replaced by electric-powered trucks. As previously noted, a not insignificant part of the economy of the locality, such as distribution centres and warehouses, depends on the transportation of goods by truck, including diesel trucks.
- [304] The construction and operation of the Project has the potential to adversely affect air quality immediately adjacent to the Project site, which also contributes to the existing air pollution in the surrounding area's air shed that could cause adverse impacts for localities.
- [305] Specifically, Project-related activities such as trains, trucks, and other vehicles operating on site as well as Project-generated truck traffic result in combustion by-products including diesel particulate matter, benzo(a)pyrene, and benzene as well as dusts from vehicle tires, uncovered soils, and brake pad wear.
- [306] As part of its Application, CN filed an air quality study (air study) associated with the Project that considered air pollution levels from the Project's construction and operations once the Project is completed. CN's air study assessed ambient air quality in terms of the background levels of contaminants of potential concern (COPC). The study indicated that exceedances of certain COPCs were observed in background air quality data from regional National Air Pollutant Surveillance (NAPS) and provincial monitor stations as well as in data from CN's own on-site air quality monitoring station. These exceedances were for combustion-related pollutants such as benzo(a)pyrene, benzene, and particulate matter under 10 microns (PM₁₀).

- [307] CN also filed a human health risk assessment (risk assessment) that quantified the potential health risks to human receptors from chemical exposure as a result of Project-generated air emissions. CN indicated that its risk assessment framework and technical guidance for conducting this risk assessment was consistent with guidance provided by Health Canada. The risk assessment used a series of steps to identify risks to human health, namely problem formulation, exposure assessment, toxicity assessment, risk characterization, and uncertainty analysis.
- [308] The Review Panel, in its Information Requests, requested that CN include the effects of off-site trucking within its cumulative air emissions assessment which CN did in its response to IR3.16.
- [309] The Review Panel, in its report, stated that CN assessed the human health risks of exposure to a range of air pollutants, including particulate matter, nitrogen oxide, and diesel exhaust and its constituents, including diesel particulate matter, benzo(a)pyrene and benzene. It also reported that CN stated that its relative risk analysis of diesel exhaust demonstrated that the Milton air shed would be essentially the same with the Project as it would be without it. Moreover, the relative risk to health would be at the lowest end of the risk range in Southern Ontario. Health Canada pointed out that there is no human health threshold for certain air quality parameters, and stated that, in its view, CN had not adequately assessed the health risks from diesel exhaust. Halton said that CN had failed to assess a range of other adverse health effects including premature non-cancer mortality, asthma, cardiovascular and acute respiratory symptoms. Health Canada recommended that CN reduce emissions of non-threshold contaminants associated with diesel exhaust. CN subsequently agreed to prepare a human health risk assessment of the effects of diesel exhaust, in consultation with Health Canada.
- [310] The Review Panel concluded 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 Review Panel considered 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 PM_{2.5}, resulting in a high-magnitude effect that, without improvements to general emissions technology, would be long-term.
- [311] The Review Panel indicated that air quality has already deteriorated due to human activities, especially traffic-related emissions, and that the Project would further contribute air emissions, especially benzo(a)pyrene and benzene, and cause further exceedances for particulate matter. The Review 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 and human health exposure ratios that were already near the maximum acceptable level. The Review Panel found that the residual effect of Project air emissions on human health would be low on its own, but becomes significant when combined with existing baseline exceedances and existing exposure ratios that are already near the maximum acceptable level of 1.0 for some parameters. Some exceedances might be short in duration, only above acceptable limits for hours or a few days a year, however in light of the importance of maintaining high levels of human health, the Review Panel found these exceedances to be of concern.

- [312] The Review Panel concluded that the Project, in combination with other projects and activities that have been or will be carried out elsewhere in the region, is likely to cause a significant adverse cumulative environmental effect on air quality. The Review Panel found that existing 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 PM_{2.5}.
- [313] The Minister's Decision Statement imposed conditions relating to railway-related air quality within CN's care and control, specifically conditions 4.11 to 4.21.5 addressing the Project's potential to cause significant adverse environmental effects. In regards to air quality, conditions 4.11 and 4.12 require CN to manage Project-generated dust on site while 4.13 requires CN to implement measures to mitigate air emissions from on-site vehicles including the use of zero-emission vehicles, as appropriate. In addition, as per conditions 4.14 and 4.15, CN shall provide annual updates to the Impact Assessment Agency of Canada concerning its electrification and idling reduction technology implementation efforts. Additionally, as per conditions 4.16 and 4.17, CN shall develop an air pollutant reduction plan and establish targets to increase the proportion of low-emission trucks on site. Significantly, the Minister has imposed a cap on the number of trucks that CN can accommodate at the Project each day with condition 4.19 that provides that the monthly average number of trucks entering the Project does not exceed 800 and the maximum daily number of trucks not exceed 880.
- [314] The Agency notes that the Review Panel was aware that the Province of Ontario has initiated some air shed management projects in neighbouring areas but did not receive evidence about these on the record. In consideration of this, the Review Panel made additional recommendation 5.5 that recognized that there are already exceedances of a number of air quality objectives in the region around Milton and evidence of downward

air quality trends. The Review Panel recommended that the Province of Ontario and Halton, in collaboration with Health Canada, jointly investigate how best to achieve and maintain appropriate ambient air quality objectives in the regional air shed, particularly with respect to the increasing generation of diesel emissions from all sources in the Region. This joint investigation is referred to as a Regional Air Quality Management Study.

- [315] The Agency afforded CN and Halton the opportunity, in Decision No. LET-R-29-2021, to file additional submissions to address, among other things, the Minister's Decision Statement and the conditions imposed on the Project therein, which were announced in January 2021. In its submissions, Halton reiterated its general claim, as it had done at the public hearing in 2019, that most of the conditions imposed by the Minister's Decision Statement would be, in its view, unenforceable. Halton added that the cumulative adverse effects to air quality in the region were, in its words, significant and immitigable. The Agency notes that Halton's additional submissions were silent on and did not address the Regional Air Quality Management Study, referred to by the Minister in his January 2021 announcement, to be conducted jointly by the Region, the Province and Health Canada.
- [316] The Agency is not convinced that the air quality situation in the region is immitigable as Halton claims and is of the view that the air quality exceedances would occur whether the Project was constructed or not. Also, the Agency expects that the Regional Air Quality Management Study will help address the existing degraded air quality in Halton and will do so in a manner that focuses on all of the sources of air pollution, both present and future, wherever those sources may be found in the Region. In other words, the Regional Air Quality Management Study will address the emissions from the Project but will do so in a broader and therefore more representative manner. The interests of the locality related to air quality transcend the air quality effects of the Project.
- [317] The Agency agrees with the Review Panel's findings and the Minister's Decision Statement concerning air quality and its potential effects on human health. The Agency finds that the assumptions CN applied in the air study and risk assessment are reasonable in consideration of the information before it. The Agency accepts both of the study's conclusions, acknowledging CN's further commitments made during the Review Panel process, that air emission reduction measures are necessary for its operations. The Agency considers that the existing air quality problems in the local air shed can be most effectively addressed, as proposed by the Minister, through the Regional Air Quality Management Study.

[318] With regard to concerns raised by some of the people in the localities, the Agency is satisfied that the air quality during the continued operation of the railway line itself will remain at acceptable levels at homes in Milton including those located in residential subdivisions constructed adjacent to the CN Halton Subdivision, barring exceptional operating circumstances and atmospheric conditions. The Agency finds that the concerns of the locality over emissions from Project-generated truck traffic have been addressed by the conditions imposed in the Minister's Decision Statement and are intended to be addressed, as necessary, by the Regional Air Quality Management Study. The Agency acknowledges that Halton is not confident that conditions imposed by the Minister will successfully address its concerns over deteriorating air quality. These matters will be further addressed as part of the Regional Air Quality Study. This has been taken into account by the Agency when weighing all factors in deciding whether the location of the line is reasonable.

ULTIMATE CAPACITY

[319] Halton expressed a concern that CN, if allowed to construct and operate the Project proposed in its Application to the Agency, would eventually expand the operation of the Project to handle a far greater number of intermodal containers. Such expansion would, in turn, generate more Project-generated truck traffic and more emissions, all of which would be potentially contrary to the interests of the localities that are affected by the lines. This concern was fuelled by the great amount of land available within the boundaries of the Project itself and the even greater amount of land that CN owns beyond the boundaries of the Project. These concerns were reasonable in the circumstances and were addressed by CN and ultimately resolved by the Minister when he included a condition in the Minister's Decision Statement which limits the number of containers that CN may handle at the Project in any given year.

[320] CN proposes to locate the Project adjacent and parallel to the existing CN mainline on properties entirely owned by CN. The Project would be built on approximately 160 hectares (400 acres) of the approximately 400 hectares (1,000 acres) of CN-owned land adjacent to CN's existing Halton Subdivision. The Project which is the subject of the Application before the Agency relates, therefore, to approximately 40 percent of CN-owned property at the Project location in Milton. This developed portion of CN-owned lands at the Project site accounts for all activities CN has identified as necessary to support its approximately 450,000 container per year throughput needed to meet its common carrier obligations outlined in the Railway Operations and Services section above.

- [321] The Review Panel, in its report, stated that CN indicated that the Project would handle approximately 450,000 containers per year at full operation for the foreseeable future, and that if CN increased this throughput, efficiency and customer satisfaction would diminish. Halton suggested that the Project could be expanded to handle up to a million containers a year, with increased environmental effects. The Review Panel found that CN's predicted container throughput was reasonable and based its assessment and conclusions on the Project as proposed. However, the Review Panel made additional recommendations that would limit air emissions and changes to water quality and quantity, even if capacity were to expand.
- [322] The Minister's Decision Statement imposed the requirement, at condition 2.2.1, that CN shall carry out the Project such that no more than 450,000 containers are handled per calendar year. The limitation on the number of containers to be handled in a given year can also be usefully read in conjunction with conditions 2.16 and 2.17, which require CN to notify the Impact Assessment Agency in writing of any potential change to the Project that may result in environmental effects. In a similar context, the Agency has also taken note of the related condition imposed on CN by the Minister that limits the number of trucks that may enter and exit the Project in a given day.
- [323] Halton, in its submissions at the public hearing, made a presentation prepared in consultation with the President of Vickerman and Associates, predicting various scenarios whereby CN, given the amount of land that the Project occupies, could ultimately handle approximately 996,000 containers per year and that number of containers would likely result, in turn, in more Project-generated heavy trucks travelling to and from the Project.
- [324] In response, CN contended that any expansion beyond the designated Project capacity would adversely impact the level of service and that its focus is to create a terminal that will fit within the supply chain and provide the service that it wants to its customers. In its closing submission at the public hearing, CN indicated that:
- the expected demand does not justify increasing the Project's proposed design capacity;
 - Halton's analysis is premised on several flawed or incorrect assumptions. For example, Halton assumed that the footprint of BIT is "50% smaller in area than the footprint of the Milton Logistics Hub" (when it is in fact 75 percent larger) and it further assumed that the operating area footprint of the Project is 400 acres, or more than 250 percent larger than it is in fact proposed to be;
 - Halton used Mr. Vickerman's own PRISM model, which he described as "a planning model, and an approximate model," to estimate the capacity of the

- Project. PRISM does not appear to account for the interrelationships between individual project components and processes or for changes in key operational factors over time (such as daily or seasonal peaks or slow periods in the terminal), and it does not appear to account for real-world variability (such as weather delays). In contrast, CN used the Arena® discrete event simulation model, which captures the relationship between inputs and accounts for temporal and real-world variability. Further, Halton did not have access to or use the commercially sensitive network-specific operations data and information from CN. These data enable a more realistic assessment of capacity at the proposed terminal. Instead, Halton relied on generic industry rules-of-thumb; and
- Halton’s assumptions about “throughput optimization” ignore the *raison d’être* for the facility, which is to serve an increasingly demanding, time-sensitive customer base. The Project must consistently operate in a manner that provides a high level of customer service—if it does not, the customers will have no choice but to use other shipping options. Through its simulation modelling, CN determined that operating the Project beyond the design capacity will have a negative impact on critical customer service metrics, which would undermine the Project’s very purpose.

[325] The Agency observes that the Halton-Vickerman projection of approximately 996,000 containers per year expressly identified physical, and other, changes that CN would have to make to the Project; most critically, CN would have to add more gates and more cranes. CN would have to construct additional entry gates for trucks on the access road within the terminal and CN would have to increase the number of cranes and change the type of cranes it intends to use at the Project. These are the cranes that move containers onto and off of trucks as well as onto and off of trains within the Project. CN has no such plans to modify the Project in that manner, for a number of different reasons, and those changes are not part of the Application before the Agency.

[326] The Agency believes it is important to have a more comprehensive understanding of the Project and its potential effects upon the interests of the localities to underline the relationship between the number of containers that CN handles in a given year at the Project and the number of Project-generated trucks travelling on the regional arterial roads in Milton. It is correct, generally speaking, that the greater the number of containers handled at the Project, the greater the number of trucks entering and exiting the Project to handle containers. That said, not all of the containers handled at the Project in a given

year will enter or exit the Project at the entry gate on Britannia Road. Many of those 450,000 containers will arrive at the Project on one CN train and will depart the Project on another CN train.

- [327] CN, in its response to IR2.30, clarified that the 450,000 annual containers is a projection for the number of containers moving by rail into, out and through the Project. Approximately 60-65 percent of these containers are forecast to be for local use (i.e., will be moving by truck into or out of the terminal). The remaining 35-40 percent will enter the terminal and depart the terminal via train (not truck).
- [328] The Agency notes that CN stated its view that the Project's design capacity of 450,000 containers per year would be sufficient to meet its projected intermodal requirements for another 20 years without expansion. In view of this declaration, and the relevant conditions cited above, and the Minister's Decision Statement, the Agency is satisfied that the ultimate capacity would remain at its initial design capacity for the foreseeable future. It was not unreasonable for the interests of the localities to be affected by the lines to express a concern over the ultimate container-handling capacity of the Project, but the Agency is satisfied that CN and the Minister have adequately addressed those concerns.
- [329] The Agency considers it prudent and necessary to comment on another Halton representation about the evidence on the record regarding container handling capacity, albeit at the CN Brampton Intermodal Terminal, which was more commonly referred to as "BIT". BIT is located in the City of Brampton in the Region of Peel and it is also served by the CN Halton subdivision.
- [330] Halton, like many of the parties, took advantage of the option to present its final comments on the last day of the public hearing both orally and in writing. The penultimate paragraph of the written version of Halton's final comments refers to BIT:

Finally, the SAEs are not justified in the circumstances. According to CN's own information on the capacity of the Brampton Intermodal Terminal, the proposed Milton Project is not needed now. Indeed, it is not needed for another decade. In light of the Project's SAEs, CN has more than 10 years to find an alternative location where SAEs are not likely.

- [331] The Agency is not aware of the CN evidence or information to which Halton refers in the above-noted paragraph. Moreover, the Agency observes that the majority of the evidence on the record, whether from CN or from other witnesses, does not support the statements in the above-noted paragraph.

[332] The Agency is not required to consider the need for the Project as the need for the construction of the railway lines at the root of the Project is presumed, by law. That said, as the Review Panel also observed in its report, the Agency invariably heard considerable evidence from the parties at the public hearing on the continued growth of intermodal traffic in Canada generally and on the bottlenecks and other problems that some CN customers already experience from congestion at BIT. The Agency also heard considerable evidence on the past and continued population growth of Milton and of the GTHA. That population growth inevitably increases the demand for goods transported in intermodal containers.

EFFECTS ON PASSENGER, COMMUTER AND FREIGHT RAIL SERVICES

[333] In the very early stages of the joint review of the Project, MTO and Metrolinx raised a concern that the operation of the Project would add additional CN trains to the CN Halton Subdivision and that those additional trains could potentially adversely affect the operation of passenger and commuter railway services on adjacent railway lines in the broader general area. Ultimately, after careful review of the evidence, this concern was shown to be unfounded.

[334] While CN transports freight on the CN Halton Subdivision, the potential could exist for the Project to impact service levels and scheduling of passenger and commuter rail services that share sections of CN's Halton Subdivision located outside Milton. CN clarified that presently, the GO Transit commuter service uses a particular segment of CN's Halton Subdivision. This segment is shared between CN freight trains, GO commuter trains, and VIA passenger trains.

[335] In their respective submissions to the Review Panel on the sufficiency of CN's Environmental Impact Statement, the Ontario Ministry of Transportation (in the Government of Ontario's submission dated April 6, 2017) and Halton (in its submission dated April 9, 2019) identified that existing freight, passenger and commuter rail service could be affected by the Project. The Ontario Ministry of Transportation indicated that negative effects on transit or freight movement along the Brampton-Georgetown railway corridor could result in socio-economic effects on neighbouring communities.

[336] In response to the Review Panel's IR 4.17, requesting information of the effects on passenger, commuter and freight rail services, and IR 4.18, requesting information on the

Brampton-Milton freight corridor, CN clarified that no potential effects are expected on passenger, commuter or freight service as a result of the operation of the proposed Project.

- [337] In CN's view, two of the trains to be handled by the Project are part of the existing 25 to 30 freight trains per day currently moving along the Halton Subdivision. Today, these two trains stop at the BIT to drop off and pick up railcars and then continue to the United States using the Halton Subdivision. Once the Project is operational, these two trains will stop in Milton instead of BIT prior to continuing to the United States using the same segment of the Halton Subdivision. For these two trains, there is no expected scheduling effects on passenger, commuter and freight service or on neighbouring communities because these trains are currently moving over this portion of the track.
- [338] CN states that the other two trains per day will represent an increase in the total number of trains along the Brampton-Georgetown portion of CN's Halton Subdivision when compared to today's operating conditions. However, the type of train movements along this portion of the CN mainline will not differ from those already experienced by the neighbouring communities (i.e., pass through traffic). The two incremental trains on the segment between BIT and Georgetown fall within the expected variability for this segment of the Halton Subdivision and no new effects are anticipated on the neighbouring communities.
- [339] CN asserts that when scheduling the rail traffic, the commuter service is given fixed time slots, as defined in an existing agreement between Metrolinx and CN, as well as an agreement between VIA and CN. Once these timeslots are established, freight movements are scheduled around the fixed commuter/passenger time slots so as to not interfere with passenger movements. These fixed time slots will remain in place after the Project is operational; therefore, there will be no effect on commuter/passenger traffic from adding two additional trains per day on the portion of the Halton Subdivision between BIT and the Project.
- [340] A representative of the Ontario Ministry of Transportation clarified at the public hearing that the impact of two additional trains per day along CN's Halton Subdivision on passenger and commuter railway service appeared manageable. Additionally, the Ontario Ministry of Transportation clarified that the construction of a freight bypass was no longer being considered. The Province of Ontario, Metrolinx and CN are now working towards incremental service improvements on existing infrastructure.

[341] The Review Panel, in its report, observed CN's confirmation that there are no passenger train movements along the portion of the Halton Subdivision where the Project would be located. While the Project would add two new trains per day to the Brampton-Georgetown corridor of the CN Halton Subdivision, this increase falls within the expected variability of existing train traffic (25-30 trains per day). The Review Panel concluded that the Project would not have an adverse impact on passenger, commuter or freight rail services.

[342] The Agency has reviewed the evidence and concurs with the Review Panel's conclusion. The Agency has considered the interests of the localities in this respect and finds that construction and operation of the Project will not adversely affect the operation of passenger, or commuter, or freight railway services.

COMMUNITY INFRASTRUCTURE

Roads

[343] Some members of the public, Milton Says No, Milton RAIL, and Halton were all concerned about truck traffic that will result from the Project. They were concerned about the number of Project-generated trucks, about the capacity of the regional network of arterial roads to accommodate those trucks and about the routes those trucks would travel on between the Project and the various interchanges with the 400-series highways in Milton.

[344] While the construction and operation of the Project itself does not have the potential to adversely affect surrounding roads, the Agency notes that it is the Project's necessary ancillary activities such as Project-generated truck traffic which could potentially adversely impact the interests of the localities affected by the lines.

[345] Based on all of the trucking-related evidence on the record of this proceeding, the Agency notes that the concerns of the public over Project-generated truck traffic have been substantially addressed by the conditions the Minister imposed on CN in the Minister's Decision Statement, including specifically a limit on the number of trucks that CN may allow to enter and to exit the Project on a given day and in a given week. Moreover the evidence clearly demonstrates that the Project-generated truck traffic would constitute only a small percentage of the total traffic, including existing truck traffic, already travelling on the regional arterial road network every hour. There is more than enough capacity in that network to absorb the trucks travelling to and from

the Project. The Project-generated truck traffic would travel only on routes where trucks are permitted to operate and are not intended to operate on any roads where such trucks are prohibited.

[346] In July 2015, the Canadian Environmental Assessment Agency (CEAA) issued its final Guidelines to CN. Section 2.2 of Part 2 of the Guidelines required CN to assess the effects of alternative means of carrying out the Project that are technically and economically feasible. Among other topics, CEAA instructed CN to address, at a minimum, the approved transportation corridors and routes for truck traffic for vehicles owned and operated by CN.

[347] As part of its Application, CN filed a traffic memorandum as Appendix 17 to its Environmental Impact Statement (EIS) [traffic memo] to address traffic-related items such as:

- Baseline traffic volumes;
- The number of Project-generated heavy trucks;
- Assessing the potential heavy-truck capable arterial routes to/from the Project;
- Identifying the 19 heavy-truck capable routes most likely to be used by Project-generated trucks;
- Forecasting of the volumes of heavy-truck trips at key locations within the vicinity of the Project; and
- Comparing the relative impact of the addition of Project-generated truck traffic.

[348] CN estimated that, at the start of the operation of the Project, it would generate approximately 650 trucks entering and exiting the Project at the entry gate on Britannia Road, each day. The number of Project-generated trucks would increase to 800 trucks entering and exiting the Project each day, once the Project reached the stage of full operation.

[349] The members of the public were understandably concerned over the prospect of 800 trucks entering and exiting the Project each day (1,600 truck movements per day). While 800 trucks per day seems to be a large and daunting number, the evidence allows the Agency to put that number into a more meaningful context. The record of the proceedings clearly indicates that 800 trucks per day represents only a small percentage of the total number of vehicles, including heavy trucks, currently operating on the arterial roads

in Milton every day. Moreover, since the Project is intended to operate 24 hours per day, those 800 trucks would not all enter and exit the Project at the same time, they would be dispersed throughout the day and night.

- [350] CN also provides evidence that other approved uses of the same land by other parties could generate even greater levels of traffic. Some of those approved uses would generate fewer trucks; some would generate either more trucks or a greater number of trucks per hour. If, as Halton prefers, the subject parcel of CN-owned land were to be developed as “prestige industrial,” as many as 1,500 vehicles could potentially enter and exit the subject lands in a 24-hour period (approximately 3,000 vehicle movements per day). Moreover, most of those 1,500 vehicles would operate during the morning and afternoon peak traffic hours.
- [351] It is also useful to put the number of 800 trucks per day into the context of the traffic already using those same roads. The existing baseline traffic on the subject arterial roads is significant and already includes truck traffic, which encompasses heavy trucks. The evidence submitted by both CN and Halton indicates that the number of vehicles currently operating on the arterial roads in Milton is several thousand vehicles per hour.
- [352] CN used data from Halton Region to develop baseline information about traffic volumes, including passenger, medium and heavy vehicles. CN provided baseline data for peak-hour traffic and pedestrian activity at a number of intersections within the study area, encompassing downtown Milton to more rural areas, based on traffic counts carried out at various times in 2014 to 2016.
- [353] CN found that the lowest peak hour activity occurred at Tremaine Road and Steeles Avenue in the afternoon and consisted of 1,022 vehicles per hour, of which 34 were heavy trucks. The highest count was recorded at Trafalgar Road and Derry Road in the morning and consisted of 5,177 vehicles per hour, of which 132 were heavy trucks.
- [354] The Project generated truck traffic would travel on arterial roads and only on arterial roads. Those arterial roads were designed to accommodate, and already accommodate, truck traffic, including heavy trucks. Stated another way, there was no evidence that Project-generated trucks would travel on, or have any reason to travel on, residential roads in Milton or elsewhere. Halton disputed CN’s evidence that there were numerous alternative truck routes, on the regional arterial road network, to accommodate the Project-generated truck, Halton, initially, argued that none of these routes were acceptable.

[355] The Review Panel, in its report, stated that CN cited the Halton Transportation Master Plan as stating that the region of Halton does not have a specifically designated truck route network as the purpose of a major arterial road is to carry truck traffic and accommodate goods movement. CN identified a number of potential routes that truck traffic could use to travel between 400-series highways and the terminal's truck entrance on Britannia Road, including:

- east to Highway 407;
- east to Regional Road 25, James Snow Parkway, Trafalgar Road and north to Highway 401;
- east to Regional Road 25 and south to Highway 407 and Queen Elizabeth Way; and
- west to Tremaine Road and north to Highway 401.

[356] CN indicated that the Halton Transportation Master Plan indicated that all arterial roads in Halton would be upgraded to accommodate truck traffic, which is the current standard of the region. CN indicated, in evidence filed in 2016, that Halton Region planned to undertake improvements to the regional arterial road network in the near term. These improvements included widening Britannia Road and Martin Street to six lanes and extending the existing six-lane portion of Tremaine Road northward to Highway 401.

[357] CN concluded that the primary truck routes would be toward the northeast, serving Brampton, Mississauga and other destinations north of the City of Toronto. CN anticipated 70 percent of trucks destined for the Milton Logistics Hub would originate from that direction, and 74 percent of truck trips departing from the Project would travel in that direction. CN stated that numerous routes were available for trucks travelling between those destinations.

[358] The Review Panel, in its report, further noted that CN used provincial trip origin and destination-based surveys to estimate the proportion of trucks likely to follow each of the identified truck routes, concluding that primary truck routes would connect to the northeast. The Ontario Ministry of Transportation stated that Project traffic would have minimal impact on provincial highways.

[359] Despite their initial rejection of all truck routes, an expert witness called by Halton at the public hearing identified two truck routes that were the least objectionable to Halton: the two truck route options with the least impact to the social and natural environment in the short term would be via James Snow Parkway or Trafalgar Road to Highway 401.

- [360] The busiest time of day for Project-generated trucks would not conflict with peak traffic and Project trucks would use 2 percent or less of the future capacity at signalized intersections, with the exception of the access intersection on Britannia Road. CN concluded that, at most, the Project would cause the percentage of heavy vehicles to increase by 0.75 to 1.5 percent during peak periods.
- [361] Halton did not dispute the capacity of the arterial roads to accommodate Project-generated truck traffic; Halton did however argue that Project-generated truck traffic could cause considerable delays at key intersections, particularly at Britannia Road and Trafalgar Road, and would impact sensitive residential and institutional land uses. CN did not call any expert evidence related to potential delays at key intersections.
- [362] The Agency finds that such delays at key intersections are unlikely given, on the one hand, the considerable available capacity of the regional arterial road network, and, on the other hand, the very small percentage of that capacity the addition of the Project-generated truck traffic would consume. The Agency is of the view that if such delays do occur once the Project has reached full operations, then the issue of intersection performance can be most meaningfully jointly addressed by all of the interested parties, having regard to all of the vehicular traffic, including but not limited to Project-generated truck traffic, in a forum such as the community liaison committee.
- [363] The Review Panel, in its report, also observed that a maximum of 800 trucks entering and exiting the Project per day is only a small percentage of the total number of vehicles currently operating on Milton roads (several thousand vehicles per hour). The Review Panel also observed that the regional arterial road network in Milton has sufficient capacity, including at peak traffic hours, to accommodate the Project-generated truck traffic.
- [364] The Minister addressed many of the issues expressed by those member of the localities opposed to the addition of the Project-generated truck traffic to the truck traffic already travelling on the regional arterial road network. The Minister's Decision Statement, at condition 2.2.1, imposed the requirement that CN shall carry out the Project such that no more than 450,000 containers are handled by the Project per calendar year. Condition 3.2 requires CN to establish a community liaison process that has the potential to afford some of the people in the localities potentially impacted by the Project-generated heavy-truck traffic the ability to put those concerns to CN directly. Additionally, condition 4.19 specifically requires CN to limit the number of container trucks entering the Project such

that the monthly average daily number of container trucks does not exceed 800 Project-generated heavy trucks and the maximum daily number of container trucks does not exceed 880 trucks.

- [365] The Agency notes that Milton employs a system of roads classification that sets out the roads within its jurisdiction where heavy-truck traffic is permitted. Unless so designated, roads within Milton are prohibited from use by heavy trucks with a gross vehicle weight in excess of five metric tonnes without a local origin or destination. Project-generated heavy trucks would travel only on arterial roads. Heavy truck operation is allowed and already occurring on these arterial roads. The Project-generated trucks are not intended to travel on any roads in Milton, or elsewhere, where heavy trucks are prohibited.
- [366] The Agency also notes Halton's submissions concerning the potential for Project-generated heavy trucks to impact roads and road users. As part of its submissions to the Review Panel, Halton stated that the haul routes appeared to have been selected based on their accessibility to truck traffic and without consideration of the adjoining land uses (existing and future), future roadway function, critical movement performance at critical intersections, existing roadway physical condition, or throughput capacity for each respective corridor. Halton identified two truck corridors but indicated that these would not be long-term routes, as both corridors are within Halton Municipalities' urban growth areas to 2031. Both of these corridors are designated for development with land uses sensitive to truck traffic, such as residential uses and a future mobility hub at Trafalgar Road and Main Street.
- [367] The Agency further notes that at the public hearing, Halton expanded its assertions that all of CN's potential truck routes had sensitive adjacent land uses, concluding that Halton did not find any feasible or practical truck route or options for the Project. In response to a question from a member of the Review Panel at the public hearing, Halton clarified that any residential land use on land adjacent to an arterial road was, in its view, a "sensitive land use". The Agency notes that heavy trucks already operate on the regional arterial road network, including arterial roads constructed adjacent to subdivisions of residential housing, which Halton alleges constitute a "sensitive land use". One of the many characteristics of the arterial roads on which the Project-generated truck traffic intends to travel is that, by design, they have restricted access. The arterial roads and the adjacent residential land uses were all developed in accordance with the provincial and regional planning process. For all of the above reasons, the Agency does not accept Halton's contention that Project-generated trucks should not be added to the existing truck traffic that already travels on the regional arterial road network and

adjacent to existing residential land uses. The Agency is not of the view that Project-generated truck traffic can be separated from or treated in a different manner than the existing truck traffic on these same routes.

- [368] The Agency also notes that the Ontario Ministry of Transportation stated it had reviewed the information provided by CN and concluded that CN's assumptions and estimates of truck routings were reasonable. It also stated that there are sufficient alternate truck routes to accommodate predicted truck traffic, both inbound and outbound. In its view the distribution and hourly volume of trucks to and from the Project at provincial interchanges would have minimal impact on the provincial highway network.
- [369] The Agency, like the Review Panel, has considered the number of routes over which the Project-generated truck traffic might travel between the Project and the 400-series highways. While all routes will see some level of Project-generated truck traffic travelling to and from the 400-series highways, the greatest number of those trucks would be likely to use existing truck routes between the Project and the Highway 401 interchanges at Trafalgar Road, James Snow Parkway and Winston Churchill Boulevard (adjacent to Milton). While Halton told the Agency that none of the existing truck routes between the Project and the various Highway 401 interchanges are acceptable for Project-generated truck traffic, its expert identified two of the existing truck routes (those using the Highway 401 interchanges at Trafalgar Road and James Snow Parkway) as having the least impact on the social and natural environment. A new Highway 401 interchange at Tremaine Road was under construction during the public hearing in the summer of 2019; that interchange will also attract a significant percentage of Project-generated trucks. It is the shortest route between the Project and the Highway 401. Trucks using this new Highway 401 interchange would occupy the regional arterial road network for the shortest distance and therefore consume the least arterial road capacity.
- [370] The Agency is in agreement with the Review Panel's findings and the Minister's Decision Statement concerning the potential effects of heavy trucks using community arterial roads. With regard to specific concerns raised by some of the people in the localities, the Agency is satisfied that the potential for the Project-generated trucks to increase local traffic and congestion during operation of the railway line is small and traffic volumes will remain at reasonable levels on affected roads.
- [371] The Agency also recognizes that the Project-related impacts of trucks on community roads are in line with other industrial facilities of the scale and activities associated with

the Project. Thus, the Agency is satisfied that the negative impact to community road infrastructure will remain acceptable even with the addition of the Project-generated truck traffic.

Utilities

- [372] While the construction and operation of the Project does not have the potential to adversely affect surrounding community infrastructure such as sewers and electrical grids directly, the Project's ancillary activities such as stormwater management, and the administrative building that employ community infrastructure could potentially cause adverse impacts for localities.
- [373] As part of its Application, CN states that to maintain water quality and quantity, stormwater runoff from the Project, including the work pads, access roads, parking areas, gate area and administration building, will be collected and conveyed through a network of storm sewers and drainage swales to two stormwater management ponds before draining into Indian Creek or Tributary A. The Review Panel, in its report, was satisfied with the design and construction of the stormwater management system.
- [374] CN also indicates that to support the electrical demands of the Project, an 8 MVA transformer will be installed near the administration building. On-site power generators will be used as back-up power sources in the event of a power failure. CN stated that it is currently in discussions with Milton Hydro Distribution to determine appropriate feed locations as well as pole upgrade requirements for servicing requirements for the Project.
- [375] The Review Panel, in its report, stated that CN would use contractors to supply water and to collect and dispose of solid waste and wastewater at licensed facilities, but would consider connecting to the municipal network if services later became available. CN did not expect the Project to impose additional costs to public services such as road maintenance, firefighting or snow removal. Halton expressed concern that CN would not connect to the municipal sewer system, which had been sized for CN's 2008 proposed development on the same site, and was also concerned that the proposed on-site water supply would not be sufficient for fire protection. The Review Panel agreed that CN would mostly not rely on local services, but recommended that CN negotiate with Halton for provision of regional water and wastewater services.

[376] The Agency recognizes that the Project-related impacts on surrounding community infrastructure such as sewers and electrical grids, while not negligible, are in line with other industrial facilities of the scale and activities associated with the Project. Thus, the Agency is satisfied that the negative impact of the Project on community infrastructure will remain acceptable in light of CN's proposed mitigation measures and design approaches.

OUTDOOR RECREATION

[377] While the construction and operation of the Project does not have the potential to adversely affect cyclists directly as all railway crossings are to be grade-separated and the Project will be subject to CN's trespass authority, the Project's ancillary on-road could cause adverse impacts for localities. Some of the people in the localities, represented by Halton and the local advocacy group Milton Says No, specifically expressed concerns about heavy trucks travelling on community roads as potentially impacting their health and safety while those people were cycling on local roads.

[378] The Review Panel, in its report, noted that CN reported that cycling is popular in the area and that the Mattamy National Cycling Centre is an important nearby sports facility. The truck entrance on Britannia Road would be designed to safely accommodate pedestrians and cyclists and the grade separation at Lower Base Line would include separate cycle lanes, which would allow cyclists to avoid crossing the mainline. CN would construct vegetated berms in key locations to reduce effects on the viewsapes and noise from Project activities. Halton stated that increased truck traffic would deter cyclists, and Milton Says No was concerned about the effects of air emissions and risks to cyclist safety particularly at roundabouts. The Review Panel noted that truck numbers would increase and arterial roads would be expanded even without the Project, making the roads less conducive to cycling. The Review Panel recommended that CN consult with cycling organizations about cyclist safety, and develop a cycling awareness program for truck drivers accessing the Project.

[379] The Agency notes that Britannia Road has or will have separate bicycle paths, including isolated bike paths not immediately adjacent to the lanes on the roadway where the cars and trucks operate. Also, by definition, an arterial road is designed to limit and to restrict the number of access points for vehicles entering and exiting the road, which design, among other things, is intended to reduce the number of accidents and collisions with vehicles, cyclists, and pedestrians. Additionally, Britannia Road's widening is not attributable to the Project and the arterial roads are to be expanded to six lanes whether

the Project is or is not built. Lastly, the Agency notes that the Britannia Road bike lanes were planned to be built in any event and will be built whether the Project proceeds or not.

- [380] The Agency shares the Review Panel’s view that these ancillary activities, such as trucking on local roads, have the potential to affect the interests expressed by localities concerning their health, security, and enjoyment of their local environment. The Agency is satisfied that the negative impact of the Project on outdoor recreation will remain reasonable but would encourage both CN and some of the people in the localities to bring concerns up to at CN’s community liaison process to explore methods by which these concerns could be addressed collaboratively.

LAND USE PLANNING AND CONVERSION OF AGRICULTURAL LAND

Land use planning

- [381] A number of residents of the locality, including the two citizen’s groups, oppose the Project because they felt, generally, that an intermodal terminal, and the truck traffic that the Project would generate, was not a welcome addition to Milton.
- [382] Halton opposes the Project on the more specific basis that, in its view, the use of the subject lands for an intermodal terminal was not consistent with good land use planning. Halton further opposed the use of these “employment” lands for the Project because, in its view, the number of jobs the Project would create was not sufficient. Halton simultaneously opposed the Project on the grounds that it would result in the loss of lands in agricultural use. The Ontario Ministry of Municipal Affairs and Housing appeared at the public hearing to address the land use issue. The Ontario Ministry of Municipal Affairs and Housing did not offer a position on the Project, either in support or opposition, but rather outlined the requirements of the *Planning Act* and the *A Place to Grow* planning policy document.
- [383] As part of its Application, CN filed its Planning Justification Report that reviewed relevant provincial and municipal planning documents including provincial policies, regional plans, the Halton Regional Transportation Master Plan, the Milton Official Plan, and Milton Zoning By-Law 144-2003.
- [384] CN’s Planning Justification Report indicated that CN’s proposed Logistics Hub is considered as infrastructure to be added to an existing transportation corridor. As such is consistent with the objectives of all pertinent planning policy documents at the provincial,

regional and municipal levels. CN's report claimed that there is also a clearly identified need for infrastructure in order to meet the growing demand for additional capacity to handle the movement of goods in the GTA. CN's report concluded that the Project represents good planning and timely implementation. It is in support of the local, regional and provincial public interest and is consistent with the stated planning policies and objectives of all three levels of government in the Province.

- [385] Halton disagrees. Land use planning was a significant issue for Halton: It filed a detailed Brief describing the Halton and Ontario land use planning regimes and standards that, in its view, were relevant to the Project. Halton filed that brief on December 13, 2016, less than one week after the Minister and the Agency announced the appointment of the three-person panel to jointly review the Project. It identified, from its first submissions in 2016 through its appearances at the public hearings in 2019, the existing land use standards that, in its view, were relevant to the Project and its environmental effects.
- [386] Halton stated that Milton is aiming to ensure a complete community that balances housing and employment, and wishes to attract knowledge-based industries and innovation employment. Warehousing and logistics centres would be directed to locations close to the 400-series highways. Further, because the Project is only proposing 130 direct jobs, Halton would need to look at other opportunities and lands to achieve their employment density targets.
- [387] CN responded to Halton's argument that the Project would not meet the target of 58 jobs per hectare. According to CN, under the 2019 Regional Official Plan, that target did not apply to the subject lands: individual sites within the greenfield areas are not required to meet the employment density targets.
- [388] The Review Panel understood that Milton wants a larger, more diverse employment base, but, as CN owned this land and that individual sites within the greenfield area are not required to meet the employment density targets identified in the Regional Official Plan, the Review Panel concluded that Halton should have foreseen the possible need to alter its plans.
- [389] The Province of Ontario and Halton consider the subject lands to be "employment" lands where owners are required to develop the lands in a manner that generates employment. Stated another way, residential uses, such as housing, or agricultural uses, such as farming, would not fall under that category.

[390] The Agency notes that CN's plans to construct a railway-related infrastructure facility on the 160-hectare plot of land adjacent to its main line of railway in Milton were to be reasonably expected by the people engaged in the land use planning process whether at the town, the region or the province. At the public hearing, the Agency heard that:

- In 2001, one of the citizen's groups, Milton RAIL, was initially formed to oppose CN's plans to develop its land in Milton for railway purposes;
- In 2008, and perhaps earlier, CN consulted extensively with Milton and Halton, at least at the staff level, and had disclosed considerable details of a previous iteration of the Project which, although not an intermodal terminal per se, would have necessarily involved a number of trucks travelling to and from the Project on the same arterial roads between the Project and the 400-series highways;
- Since 2011, the Halton Regional Transportation Master Plan has acknowledged that CN owns land in Milton at the subject location for which it has a long-range plan for an intermodal facility. The Master Plan was adopted in order to comply with section 1.6.8 of the Provincial Policy Statement, which promotes the protection of infrastructure rights-of-way; and
- On February 10, 2014, CN had an initial conference call with Milton to discuss the current Project.

[391] Stated another way, all of the people involved in the land use planning process at the various levels of government have had more than sufficient time to adapt their processes to the eventuality of an intermodal terminal operating on the subject lands and to amend, if necessary, their various land use plans and policies.

[392] It follows equally from the above that the owners of undeveloped land located north of Britannia Road and adjacent to the west side of the CN Halton Subdivision, who are building or plan to build new residential subdivisions adjacent to the railway right-of-way, have known or are deemed to have known, since at least 2008 of CN's plans to build some sort of railway infrastructure project on the subject lands.

[393] The Agency finds that the Project would not allow Halton to satisfy its employment density targets. There is also considerable uncertainty whether those targets still apply to the site. The Project does generate some direct employment, albeit not as many jobs as Halton would prefer. It is however also true that the Project which CN is proposing to construct and to operate on the subject lands would be an essential part of the national railway transportation infrastructure that brings other economic benefits to the Town, the Region, and the Province. In considering the interests of the localities to be affected

by the railway lines that CN seeks to construct, the Agency acknowledges Halton's objective to generate greater employment densities on the subject lands and will consider that objective along with the other interests of the localities and will weigh that objective against the requirements for railway operations and services.

Conversion of agricultural lands

- [394] From the perspective of the land use planning process, and as acknowledged by Halton, the lands on which CN intends to construct the Project are designated "employment" lands. As discussed above, Halton opposes the use of the subject employment lands for the Project as the Project would not generate, in Halton's view, a sufficient density of employment. However, Halton also and simultaneously opposed the Project since the Project would convert 147 hectares of land, currently being used for agriculture purposes, to "employment" uses.
- [395] The answer to these two apparently contradictory positions, according to Halton, is that the need for greater employment density on the land is heightened when the development of the subject lands for employment uses results, permanently and inevitably, in the loss of agricultural land. The Agency notes, however, that this position is not consistent with the position Halton had already adopted on the conversion of agricultural lands prior to the commencement of the environmental assessment of the Project in 2015. Among other things, the "employment" use Halton envisages for the development of the subject lands, consistent with the land use planning process, would also inevitably result in the conversion of agricultural land. In response to a question from the Agency at the public hearing, Halton acknowledged that the same parcel of land cannot be both "agricultural" and "employment".
- [396] As part of its Application, CN indicated that the subject lands primarily consists of agricultural land, the majority of which is row crops (i.e., soybeans, corn, wheat, etc.) with some of the fields also used to grow hay. Properties owned by CN are currently leased to local farmers and residents. The ground surface cover across the Project site is comprised largely of farm fields, sparse hedgerows and three watercourses.
- [397] CN stated that the Regional Official Plan includes 36,011 hectares of agricultural land and that planned development in Milton, in combination with the Project, would convert 1,732 hectares, while future urban growth would require an additional 3,000 to 4,200 hectares of land. CN stated that the Sustainable Halton process estimated that an additional 3,000 to 4,200 hectares of land in the region of Halton would be required to accommodate urban land needs to 2031, which would leave 7,000 to 10,000 hectares of

land available for agriculture. CN indicated that Halton had approved these future conversions of agricultural land, and through its own planning had indicated that the conversion of this amount of land should not affect the viability of agriculture within the Regional Assessment Area.

- [398] Halton stated that the Project would not create enough jobs to compensate for the loss of agricultural land. Halton's expert witness, Dr. Wayne Caldwell, made a presentation at the public hearing based on his 37 years of professional practice experience in agricultural aspects. In his presentation, Dr. Caldwell concluded that the Project will result in a permanent loss of agricultural land that does not comply, in his view, with regional and provincial tests to remove this agricultural resource.
- [399] The Review Panel, in its report, stated that CN the Project would remove 147 hectares of agricultural land, including 30 hectares of prime agricultural land (0.1 percent of the total amount in the Region). Mitigation for this loss could include improvement of adjacent lands or a contribution to agricultural research. The Review Panel noted that the loss of this use of land for agricultural purposes is likely to occur whether or not the Project proceeds, as Halton intends to use this land for employment uses if the Project does not proceed.
- [400] The Review Panel concluded that the conversion of the subject agricultural land would not, itself, result in a significant adverse environmental effect.
- [401] The Review Panel observed that the Project would remove agricultural land sooner than might otherwise be expected, but this would happen eventually even without the Project. While the Project would cause only a small loss of agricultural land, in combination with past conversions and future rapid urbanization, in the Review Panel's view that loss becomes significant.
- [402] The Review Panel concluded, considering those past and future losses, that the Project is likely to cause a significant adverse cumulative environmental effect to the availability of land for agricultural use in the region of Halton.
- [403] The Minister's Decision Statement imposed conditions pertaining to agriculture as it relates to the Project's potential socio-economic effects, specifically condition 10.1 requiring CN to provide additional agricultural lease opportunities or rehabilitate or improve agricultural lands for lands within its care and control at the Project site.

- [404] The Agency also recognizes the input of the Ontario Ministry of Agriculture, Food and Rural Affairs that recommended that CN work with the farming community, including local organizations such as the Halton Region Federation of Agriculture, to ensure that appropriate mitigation measures are implemented in ways that are responsive to the needs of the local farming community. Also, the Agency takes note of the views expressed by Milton Says No that Halton and Milton were close to their agricultural roots and still held community agricultural fairs.
- [405] The Agency notes that, in its closing submission at the public hearing, CN asserted that Dr. Caldwell acknowledged that “one would anticipate long term conversion [of the 30 hectares] to an urban use of some nature there.” CN went on to describe that Halton had also clearly expressed their expectation to generate considerable jobs and development credits from these lands. Given the municipalities’ explicit plan to convert these lands in the future to non-agricultural employment uses, CN stated it is reasonable to conclude that Halton considered that conversion to be acceptable.
- [406] The Agency is in agreement with the Review Panel’s findings and the Minister’s Decision Statement concerning the direct effects of constructing the Project on lands currently being used, under lease, for agricultural purposes. The Agency agrees with the Review Panel that the Project-related loss of agricultural lands is comparatively minor and that this loss would eventually happen, even without the Project. More critically, the Agency notes that Halton itself includes development plans for these employment lands that aren’t compatible with agricultural pursuits.
- [407] The Agency has considered the interests of the localities that are opposed to the conversion of the subject lands to employment uses, including the evidence of the pre-existing designation of the subject lands as “employment” lands and the relative abundance of agricultural land in the Region. The construction of the railway lines and the ancillary elements of the Project would largely be built on lands currently being used for agricultural purposes. It appears to the Agency, however, that the opposition expressed by representatives of the localities to the conversion of the subject lands arises in the specific context of the Project only. The Agency, having regard to all of the relevant evidence in the specific context of the Project as well as in the broader context of the Region generally, is satisfied that the subject lands would not have remained agricultural in any foreseeable future development scenario.

MUNICIPAL REVENUES

- [408] Halton opposes the Project on the grounds that it will result in a loss of municipal revenues. CN disputes this.
- [409] Halton's primary argument seems to be one of opportunity cost: the subject 400 acres of CN-owned land, if employed for uses other than a railway intermodal terminal, would generate greater revenues for the municipality. Halton also claims that alternative uses of the land would result in lower costs to the Region.
- [410] There is also the question of the use of the land surrounding the 400 acres on which CN intends to build the Project. The experts do not agree whether the operation of the Project will accelerate the conversion of surrounding land for what is called "intermodal-oriented development" that would accelerate the use of surrounding lands for purposes complementary to the operation of the Project. Halton's experts disagree but CN provided considerable evidence that the operation of the CN intermodal terminal in Brampton did accelerate and intensify intermodal-oriented development on the surrounding lands. This development generates, in turn, greater municipal revenues.
- [411] There is an abundance of evidence on the record, including opinion evidence, related to the alleged loss of municipal revenues; that evidence is not, however, conclusive. It is also, to some degree, inherently speculative since it could only be determined definitively once the Project is in operation and since it largely depends on developments beyond the control of CN or the Region or, for that matter, the Agency.
- [412] In terms of some of the discretionary factors the Agency considers when weighing the evidence, the municipal revenues argument does not really satisfy the condition of the "physical coexistence of railway lines in proximity to localities". First, questions of municipal revenues are not tangible, physical issues. Second, while the issues relate to the use of 400 acres for the Project, the issues are not site-specific and do not relate, in any substantive way, to proximity of the Project to people living in the locality. The same issue would presumably arise wherever the Project were built. For example, the same issue would seemingly arise if the Project were built on 400 acres in the North Milton site instead of the South Milton site. The same issue would presumably arise if the Project were built even farther away from any concentration of residential development. In other words, the alleged loss of municipal revenues is not site-specific. It is not specific to the proposed location of the line. Finally, it is not primarily a transportation issue or a matter that falls neatly within the Agency's areas of jurisdiction or day-to-day experience under the CTA.

[413] For the reasons set out above, the Agency has considered Halton’s arguments about municipal revenues as an interest of the locality affected by the lines and has given it the weight the Agency considers appropriate when balancing it against the requirements for railway operations and services in determining whether the location of the line is reasonable.

Minister’s Decision Statement conditions

[414] As previously indicated, in deciding whether to approve CN’s application for the construction of railway lines, the Agency has had regard to, among other things, the Minister’s Decision Statement issued on January 21, 2021, as part of the environmental assessment of the Project. More specifically, the Agency has reviewed and considered many of the conditions that the Minister imposed on CN as part of the Minister’s Decision Statement. Some of those conditions have been discussed, in greater detail, herein as part of the analysis of the separate interests of the localities that are affected by the railway lines.

[415] For example, the Agency discussed the following conditions of the Minister’s Decision Statement with respect to noise and vibration, the ultimate capacity of the project, and community infrastructure use, respectively: the condition that requires CN to limit noise levels from the Project; the condition that limits the number of containers that CN may handle at the Project; and the condition that limits the number of Project-generated trucks allowed to enter the Project.

[416] Those conditions are related to various environmental effects of the Project under CEAA 2012. They were not, therefore, intended as conditions related to the matters that the Agency must consider under section 98 of the CTA when deciding whether the location of the railway lines is reasonable. That said, as demonstrated in the analysis herein of each of the distinct interests of the localities that are affected by the line, these same “environmental” conditions invariably and unavoidably influence and often mitigate the physical co-existence of the localities with the location of the railway lines that CN seeks permission to construct. Stated another way, some of the conditions that emerged from the environmental assessment under CEAA 2012 were of particular interest to the Agency and unavoidably of particular relevance to the matters the Agency is required to consider under section 98 of the CTA. That overlap is consistent with the overall joint process established in 2016 to have an efficient process to review the Project under both of the relevant federal statutes as part of a “single window”.

[417] For example, as part of the Agency's consideration of CN's Application, the representatives of the localities variously expressed their interests and concerns over the noise that the Project would produce; about the number of containers CN would handle at the project and about the number of Project-generated trucks that would enter the project each day. As it happens, the Minister also considered those same interest to be environmental effects of the Project and worthy of conditions imposed on CN. The Agency cannot reasonably ignore those same conditions where they overlap, at least to some extent, with the efforts required by CN to address the interests of the localities that may be affected by those same concerns.

[418] For that reason, the Agency enumerates for ease of reference the specific conditions forming part of the Minister's Decision Statement of which the Agency took note. The enumerated conditions are not new to this Determination; the Agency has mentioned each of these conditions previously in this Determination when discussing the related interest of the locality affected by the railway lines:

- 2.2.1: CN shall carry out the Project such that no more than 450,000 containers are handled per calendar year;
- 2.16 and 2.17: CN shall notify the Impact Assessment Agency in writing of any potential change to the Project that may result in adverse environmental effects;
- 3.2: CN must establish a community liaison process;
- 4.6: CN shall manage Project-generated noise so as to limit a change in noise level at any POR by less than one to five decibels and less than a level of 6.5 percent highly annoyed;
- 4.7: CN shall develop a communication protocol;
- 4.8: CN shall conduct construction activities during daytime;
- 4.9: CN shall develop a protocol for receiving noise-related complaints;
- 4.10: CN shall develop a noise based follow-up program in consultation with the Agency;
- 4.11 and 4.12: CN is to manage Project-generated dust on site;
- 4.13: CN shall implement measures to mitigate air emissions from on-site vehicles including the use of zero-emission vehicles, as appropriate;
- 4.14 and 4.15: CN shall provide annual updates to the Impact Assessment Agency of Canada concerning its electrification and idling reduction technology implementation efforts;
- 4.16 and 4.17: CN shall develop an air pollutant reduction plan and establish targets to increase the proportion of low-emission trucks on site;

- 4.19: the monthly average number of trucks entering the Project shall not exceed 800 and the maximum daily number of trucks shall not exceed 880;
- 10.1: CN shall provide additional agricultural lease opportunities or rehabilitate or improve agricultural lands for lands within its care and control at the Project site;
- 11.3.1 to 11.3.3: CN shall ensure that vibration levels remain below acceptable levels;
- 14.1: CN shall store hazardous materials according with appropriate procedures and requirements, to inform shippers of safe loading procedures, and to have spill kits in designated locations on site; and
- 14.3 to 14.5: CN shall develop, maintain, and implement an accident and malfunction response plan in relation to each phase of the Project.

[419] It should be noted that the Agency is not incorporating these same conditions by reference into its Determination. These specific environmental conditions, while of particular interest to the Agency in considering the interests of the localities affected by the line, are not conditions imposed on CN by the Agency as part of the Agency's Determination. The subject conditions are part of the Minister's Decision Statement and will therefore be enforced, as necessary, on behalf of the Minister by the environmental agency now known as IAAC. The Agency does not need to enforce these same conditions under the CTA as they are already enforced by IAAC. There is also no need for the Agency to duplicate the enforcement obligations of IAAC and incorporate them into the Agency's Determination.

[420] Finally, each Agency determination under section 98 of the CTA is unique; the fact that these conditions were of particular relevance to the interests of the localities affected by a Project located within the GTHA does not necessarily mean that the Agency would need to consider similar conditions on any future projects in another geographic location. Each such application must be assessed on a case-by-case basis. The Agency will now address the second issue in this determination.

ISSUE 2 - WHETHER THE CROWN MET ITS DUTY TO CONSULT WITH INDIGENOUS PEOPLES WHO MAY BE AFFECTED BY THE PROJECT, AND WHETHER THE CONCERNS AND INTERESTS OF INDIGENOUS GROUPS HAVE BEEN APPROPRIATELY ACCOMMODATED

Background

- [421] In addition to the requirements imposed upon it as an administrative tribunal by section 98 of the CTA, as discussed above, the Agency is also required by the common law to consider the impact of the Project on the established or asserted rights of Aboriginal peoples.
- [422] In 1982, the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada were recognized and affirmed at subsection 35(1) of the *Constitution Act, 1982*.
- [423] In 2004, the Supreme Court of Canada issued two decisions on the same day, *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 and *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, involving Aboriginal rights. Those decisions clarified that the Crown has a duty to consult and, where appropriate, accommodate Aboriginal peoples when it contemplates decisions or actions that may adversely impact established or asserted Aboriginal rights or interests. The Court explained that the duty stems from the Honour of the Crown and the Crown's unique relationship with Aboriginal peoples.
- [424] In 2017, the Supreme Court of Canada issued two decisions on the same day, *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, 2017 SCC 40 and *Chippewas of the Thames First Nation v Enbridge Pipelines Inc.*, 2017 SCC 41, that further clarified the issue of Crown consultation. Those decisions indicated that the Crown may rely on federal administrative tribunals to fulfill this duty to consult on its behalf. The Agency may, therefore, conduct consultation with Indigenous groups on behalf of the Crown.
- [425] Agency consideration of an application to construct railway lines pursuant to section 98 of the CTA is an example of the type of decision or action that could trigger the Crown's duty to consult. In this case, the authorization has the potential to adversely impact the Aboriginal rights of the four potentially impacted Indigenous groups identified.
- [426] As a statutory administrative tribunal, the Agency has the procedural powers to conduct consultations as well as substantive powers to hear and determine matters of fact and law in making its determinations.

- [427] In this case, to determine whether consultation has been adequate and whether accommodation measures may be required, the Agency considered the Crown consultation process coordinated by the CEA Agency for the purpose of the EA of the Milton Logistics Hub, conducted in accordance with CEAA 2012 and described in the Crown Consultation and Accommodation Report (CCAR).
- [428] The extensive consultations conducted by the CEA Agency (described in greater detail below), which began in 2015, covered the entire Project, including the component related to the construction of railway lines considered by the Agency under section 98 of the CTA. The Minister's Decision Statement issued on January 21, 2021, imposed a number of conditions on the Project, including conditions that address areas of concern raised by Indigenous groups during the consultation.
- [429] The Minister's Decision Statement concluded that, "the consultation processes undertaken are consistent with the honour of the Crown and that the concerns and interests of Indigenous groups are appropriately accommodated," for the purposes of the environmental assessment.
- [430] Following the Minister's Decision Statement, Agency staff communicated with all four potentially impacted Indigenous groups to give them an opportunity to provide the Agency with any additional information to inform its decision pursuant to section 98 of the CTA. The Indigenous groups have not provided any further information and did not raise any further issues of concern in response to this engagement.

Consultation and accommodation

CONSULTATIONS

- [431] The CEA Agency identified four Indigenous groups whose rights could potentially be impacted by the Milton Intermodal Hub – the Mississaugas of the Credit First Nation (MCFN), Six Nations of the Grand River (Six Nations), the Huron-Wendat Nation (Huron-Wendat) and the Métis Nation of Ontario (MNO). Both CN and the CEA Agency consulted with these groups on the Project's potential impacts. Consultation activities are described in CN's Application to the Agency, the Review Panel's Report and the CCAR.
- [432] The CEA Agency made funding available to support the participation of all four potentially affected Indigenous groups in the consultation and EA processes. Funding was allocated

to the three Indigenous groups that chose to participate in the consultation—the MCFN, Six Nations and Huron-Wendat. While CN and the CEA Agency reached out to engage MNO during the EA, the group did not participate and did not apply for funding.

[433] Consultations provided the Indigenous groups with opportunities to:

- learn about the Project and its impacts, either through consultation meetings or public comment periods;
- co-develop a methodology to assess the severity of impacts on rights;
- evaluate the Project in relation to their potential or established rights and title;
- communicate their concerns and discuss possible mitigation and accommodation measures, as appropriate; and
- review and comment on key EA documents, including the Review Panel’s Report, CCAR, and Potential EA Conditions.

[434] During the public hearing and in writing, the MCFN, Six Nations and Huron-Wendat also presented information to the Review Panel regarding their history, rights and treaties, as well as their areas of concern with regard to the Project.

ISSUES OF CONCERN

[435] The CEA Agency assessed the Project’s potential impacts on the rights of the three participating groups based on information presented by those groups throughout the EA and consultation processes, as well as the Review Panel’s findings.

[436] Indigenous groups expressed concerns related to their archaeological sites, protection of their ossuaries, and potential project impacts on wetlands and waterways used for harvesting food and medicinal and cultural purposes. There were also general concerns about potential impacts on air quality.

[437] Based on the information available, the CEA Agency concluded that the Project could potentially have a moderate impact on the ability to exercise rights related to culture, and a low impact on traditional resources, water, and health and socio-economic conditions.

ACCOMMODATION MEASURES

[438] CN worked with the participating Indigenous groups to propose mitigation measures addressing their concerns. As indicated in the CCAR’s Executive Summary, with the exception of the Six Nations, who expressed general concerns about the environmental

impacts of the Project, the Indigenous groups that participated in the EA have clearly indicated they are confident in CN's proposed mitigation regime, and expressed interest in having CN's commitments strengthened by Project-specific conditions.

[439] The CEA Agency considered the concerns raised by the participating Indigenous groups regarding potential impacts of constructing and operating the Project on their rights and worked with other federal authorities (including Agency representatives) to prepare responses to these concerns.

[440] The potentially affected Indigenous groups were consulted and provided comments on draft EA conditions proposed by the CEA Agency, and their input was taken into account to the extent possible. The Minister's Decision Statement allowed the Project to proceed with conditions, including those in areas raised by Indigenous groups, such as cultural heritage, human health, socioeconomic effects and water. Examples of conditions include requirements to:

- develop archaeological and cultural resource chance find and salvage plans and notify Indigenous groups of any finds of this nature, and;
- take steps to mitigate adverse impacts related to noise, air quality and stormwater management and follow-up with affected Indigenous groups to determine the effectiveness of these mitigation measures.

[441] The conditions imposed on the Project in the Minister's Decision Statement will be enforced by the Impact Assessment Agency of Canada (IAAC). IAAC replaced the CEA Agency, as the federal assessment agency, effective August 2019.

CONSULTATION FOR THE SECTION 98 PROCESS

[442] Following the Minister's Decision Statement, Agency staff wrote on February 12, 2021 to all four potentially impacted Indigenous groups. This correspondence explained the Agency's role in approving railway construction under section 98 of the CTA and that, in its deliberations, it would consider the information brought forward to the Review Panel, the findings of the CCAR, and the conditions included in the Minister's Decision Statement. The correspondence also offered an opportunity for the groups to provide any additional information to inform the Agency's Determination. The groups were asked to provide any input by March 5, 2021.

[443] On February 23, 2021, a representative of the Huron-Wendat wrote to Agency staff confirming that they had nothing further to share on the Project and noting that,

“the Huron-Wendat Nation actively participated in the EA process, and has been actively engaged with CN Rail regarding the measures necessary to protect Huron-Wendat values that may be present at the Milton Hub site.” The Agency received no responses from the MCFN, Six Nations or MNO.

Conclusions on Issue 2

[444] After considering the foregoing, the Agency finds that the Crown has met its duty to consult and that the consultation process with potentially impacted Indigenous groups is adequate to inform its determination. For the purpose of the approval to construct railway lines pursuant to section 98 of the CTA, the consultation processes undertaken are consistent with the honour of the Crown and the concerns and interests of Indigenous groups are appropriately accommodated.

DETERMINATION

[445] In light of the above, the Agency considers the location of the subject railway lines to be reasonable taking into consideration the requirements for railway operations and services and the interests of the localities that will be affected by the line. Pursuant to subsection 98(2) of the CTA, the Agency therefore approves CN’s Application subject to the conditions included in this Determination.

CONDITIONS

- [446] During the construction and operation of the railway line, CN must:
1. meet its commitments and implement mitigation measures, best practices and procedures aimed at protecting the interests of the localities, as set out in its Application and other filed documents;
 2. make no amendments to those commitments, mitigation measures, best practices or procedures without prior approval from the Agency; and
 3. provide to the Agency, prior to commencing operation of the Project, a copy of the final plans of the Project, including all of the subject railway lines, drawn to scale, dated and signed by the appropriate authority.

(signed)

William G. McMurray
Member