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Ottawa, July 12, 2019

Lesley Griffiths
Panel Chair
c/o Canadian Environmental Assessment Agency
160 Elgin Street
Ottawa ON K1A 0H3

By email

Dear Ms. Griffiths:

RE: CN Milton Logistics Hub – CEAR File No. 80100

The Federation of Canadian Municipalities (FCM) is providing written submissions to the panel regarding the application of municipal laws to the federal railway undertaking proposed by CN.

This is an unusual step by FCM and has involved extensive internal discussion. The FCM process was initiated by a request for assistance from the Regional Municipality of Halton but has since involved an extensive FCM process involving staff, legal counsel and its Legal Advisory Committee.

The focus of this discussion has been upon submissions made by CN with respect to the applicability of local bylaws to the project under consideration by your Panel. More precisely, in its response to Information Request 2 dated May 5, 2017, CN makes broad comments to the effect that, because of the railway's federal status, local bylaws are inapplicable to the project.

These comments by CN were reviewed by FCM staff and legal counsel, by FCM's Legal Advisory Committee and were deemed to be incomplete. As a result, it was the collective view CN's position does not accurately reflect the constitutional principles at play, nor their proper application in the context of this project. Further, FCM determined that it should make written submissions to this Panel on this matter because the interaction between federal undertakings and local bylaws is a matter of national importance to the municipal sector.

We hope that the more complete portrayal of the law and its application CN generally – as well as to other federal undertakings – will be of assistance to the Panel.

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Should you or your staff have any questions, please contact Jen Arntfield, Manager, Policy and Research at <contact information removed>

Sincerely,

<Original signed by>

Stéphane Émard-Chabot
Legal Counsel

CN Milton Logistics Hub
CEAR File No. 80100

Submissions of the Federation of Canadian Municipalities (FCM)
on the issue of

The Applicability of Municipal Bylaws to CN and Federal Undertakings

FCM – The Organization and Reasons for Providing Submissions

Since the creation of its precursor in 1901 (the Union of Canadian Municipalities), FCM has been the sole national organization dedicated to representing municipalities collectively where issues of national public policy intersect with municipal interests. With some 2000 members, FCM represents over 90% of the Canadian population. FCM membership is also representative of Canada's diversity: it includes all of Canada's largest cities, hundreds of small urban and rural communities and 19 provincial and territorial municipal associations, in all provinces and territories across the country

The Regional Municipality of Halton has asked FCM to file submissions with the Panel in light of CN's broad assertions that local bylaws have no application to federal undertakings such as railways. FCM gives careful consideration to any request from its members to intervene in judicial or administrative proceedings. Decisions to intervene are vetted through a three-stage process: a) consideration by staff and legal counsel; b) positive recommendation from FCM's Legal Advisory Committee, comprising six municipal lawyers from across the country; c) approval by FCM's Board (or Executive Committee, depending on meeting schedules).

In this case, FCM has concluded that CN's submissions on the constitutional status of national railways are sufficiently problematic to justify providing a more complete and nuanced response in order to assist the Panel in its work.

At the outset, FCM may also clarify that these submissions are limited to responding to specific CN submissions on constitutional issues. FCM is not commenting on any aspect of federal environmental assessment.

Applicability of Municipal Bylaws to Federal Railways: The Complete Constitutional Analysis

a) Introduction

In its responses to the Panel's Information Request 2 dated May 5, 2017, in particular in the answer to IR 2.3, CN's answer is formulated in very broad terms and the proponent concludes that, regardless of the doctrine used – *immunity* or *paramountcy* – the project falls entirely within federal jurisdiction, leaving no room whatsoever for the application of local bylaws or rules. FCM submits that this is not the outcome of the proper application of either principle of constitutional law.

In the 2007 *Canadian Western Bank*[1] case, the Supreme Court of Canada addressed both doctrines. A number of banks had argued that because of the federal government's constitutional jurisdiction over banking, they did not have to comply with provincial consumer protection legislation. Put simply, the banks were claiming that their federal status gave them immunity from provincial rules.

The Supreme Court rejected this argument. It also provided that the "interjurisdictional immunity" principle or doctrine was dated and should be limited to matters historically settled under this approach.

Further, after indicating that the "immunity" doctrine should be limited to its historical past, the Supreme Court formally ushered in a new approach for resolving any future conflicts of jurisdiction: the more flexible "paramountcy" framework.

b) Interjurisdictional Immunity

Based on the 2007 guidance from the Supreme Court of Canada, FCM finds CN's 2017 input to the panel to be problematic.

The first problem is that CN asks this panel to accept that its project is governed by the older "interjurisdictional immunity" doctrine, despite the explicit statement by the Supreme Court that this dated approach to federalism should be strictly limited to contexts that have already been the subject of judicial decisions.

Two passages, taken from the answer provided by CN to the Panel in IR 2.3, encapsulate the position taken by the proponent with respect to the meaning of this constitutional principle and its application to the project:

> Where one level of government has exclusive power conferred on it by the Constitution, then even validly enacted legislation by the other level of government will be rendered constitutionally inapplicable where it intersects with the exclusive power.
>
> […]
>
> It is CN's view that all aspects of the construction and operation of an interprovincial railway (which includes any terminal integrated with that railway) fall within the exclusive power of the federal government and, as such, any valid provincial (or municipal) law that might otherwise apply to the Milton Logistics Hub project is rendered constitutionally inapplicable under the doctrine of interjurisdictional immunity. *CN's response to IR 2.3 a) – May 5, 2017*

Using the court's 2007 guidance, however, FCM can identify no precedent for the courts conferring upon national railways a blanket right to ignore local bylaws. To the contrary, as long ago as 1899, the Privy Council decision in the *Notre Dame de Bonsecours* case held that municipal bylaws relating to drainage diches applied to national railroad infrastructure.[2]

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[1] *Canadian Western Bank v Alberta*, [2007] 2 SCR 3, 2007 SCC 22 (CanLII).
[2] *Canadian Pacific Railway Company v Corporation of the Parish of Notre Dame*

FCM also notes the 1993 change in status to CN. CN went from being a federal Crown corporation to becoming a private for-profit corporation. Based on this change in in its corporate status, CN, as an entity and a property owner, no longer enjoys any special federal constitutional status. This is in clear contrast to many port and airport authorities that are still maintained as crown corporations and have been deemed to attract the older immunity doctrine.

Although national railways – and CN's "works" in particular – fall under exclusive federal jurisdiction, this is not a determining factor in deciding whether the older immunity doctrine should apply. The immunity approach applies to this project only where CN can point to a clear judicial precedent applying immunity to large intermodal hubs of this nature. Absent that precedent for immunity, the Supreme Court's 2007 direction must be followed, and the modern "paramountcy" approach should be used in place of the older "immunity" approach.

Thus, unlike the statement contained in CN's response to IR 2.3, the mere "intersection" of federal and local rules does not render local legislation inapplicable. Instead, one must apply the fairly straightforward three-part test set out in 2007. It is only if the answer to all three questions is positive that the local rule is declared inapplicable.

Question 1 – Does the true objective (the "pith and substance" in legal terms) of the local rule fall within the constitutional jurisdiction of the municipality?

The Supreme Court's decision in *Châteauguay* and the Court of Appeal for Ontario's decision in *Canada Post* (published shortly after *Châteauguay*), illustrate both possible outcomes of this first step. In *Châteauguay*, the City tried to use its expropriation powers specifically to influence the location of a cellular telephone antenna. The Supreme Court deemed that this was, in essence, an attempt at regulating radiocommunications and therefore the City had crossed the line by trying to legislate matters that fell under protected federal jurisdiction. This rendered the bylaw *ultra vires*.

By contrast, in *Canada Post*, the Court felt that the City of Hamilton's general roads bylaw, which regulated the placement of all items – including federal mailboxes – within the roadway was, in pith and substance, a valid municipal regulation. Although Hamilton's bylaw applied to mailboxes, its purpose was to manage all users of the roadway and, as a result, its objective fell squarely within municipal powers and was valid, even though it had ancillary effects on Canada Post's equipment. (The grounds on which the Court ultimately ruled in favour of Canada Post are unrelated to this step of the analysis.)

In the context of the Hub project, any number of municipal bylaws have been duly enacted by Halton or Milton. As long as these bylaws fall within the powers of the municipalities, they are valid and, *prima facie*, apply to federal undertakings as well. However, as indicated above, a complete analysis requires answering the next two questions.

Question 2 – Does the local rule's effect touch the "core" of the federal power?

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de Bonsecours, [1899] UKPC 22

If the local rule is properly enacted – if the objective is within the purview of the municipality – the next step is to assess its effect on the federal government's jurisdiction. In order to be constitutionally inapplicable, the local rule must do more than affect peripheral or tangential issues within the ambit of the federal government's jurisdiction. It must to go the "core" of that authority.

In *Canadian Western Bank*, the Supreme Court carefully reviewed this requirement and the various ways in which the "core" has been defined (e.g. essential, vital, absolutely necessary) and highlighted its preferred approach: to determine if the local rules bears upon the federal subjects "in what makes them specifically of federal jurisdiction".[3] By this approach, as long as a valid municipal rule does not touch upon matters that are so fundamental that they define what makes interprovincial railways federal in nature, it does not affect the "core" of the federal jurisdiction and is entirely applicable.

Question 3 – Is the effect on the "core" of the federal power sufficient to constitute an "impairment"?

The final step of the analysis – if a valid municipal bylaw touches upon a central aspect of the federal government's authority – is to determine the significance of the effect. In short, the fact that a valid bylaw has an impact on a core element of the railway does not render it constitutionally inapplicable. In order to cross the third threshold, the effect must be more than a nuisance or an inconvenience. In the words of the Supreme Court, a bylaw will be considered constitutionally inapplicable if a vital part of the federal undertaking is "placed in jeopardy, and not before".[4]

Conclusion on Interjurisdiction Immunity – In the context of the Hub project, the "intersection" of federal and local rules does not, as the proponent indicates, render local rules inapplicable. The correct answer is that barring an outright attempt by Halton and Milton to prevent the construction of the Hub, local rules have to be given their full effect if they are validly enacted so long as they do not place in jeopardy the project itself. Any municipal requirements that "affect" the project, even at its core, including requirements that impose additional costs or constraints on the proponent, are not, under this doctrine, constitutionally inapplicable.

The proponent cannot escape this conclusion simply by declaring, as it does, that every aspect of its project is vital to its implementation. CN might not like local constraints protecting wetlands and waterways, for example, but this does not mean the constraints are constitutionally inapplicable. CN bears the legal burden of demonstrating the municipal requirement causes "impairment" of a "core" element of the project. This burden is not easily met.

c) Paramountcy

Paramountcy is the preferred approach to resolving constitutional overlaps. The Court expressed this preference in *Canadian Western Bank* in order to better reflect the modern, unwritten constitutional principle of cooperative federalism. Whereas the "immunity" doctrine can result in the undesirable situation of a legal "vaccum" – a situation where federal requirements don't exist

[3] *Canadian Western Bank*, at para 51.
[4] *Canadian Western Bank*, at para 48.

and local or provincial requirements do not apply – the "paramountcy" doctrine avoids legal vacuums and requires demonstrable conflict for validly-enacted local or provincial requirements to not apply to an undertaking.

This perspective acknowledges that in a complex modern state such as Canada, issues – and their corresponding remedies – often cannot be neatly carved up to match the division of powers set out in the *Constitution Act, 1867*. As a result, it is better to acknowledge that, in many instances, all levels of government might have a stake in the matter at hand. Thus, barring any direct conflicts between their various rules and requirements, valid laws from all levels can co-exist.

The paramountcy doctrine, by design, is more flexible than the earlier immunity doctrine. It provides more leeway for federal, provincial and municipal layers of regulation to overlap and interact. If a local bylaw can withstand the more stringent analysis of interjurisdictional immunity, as FCM submits, the bylaw will almost certainly survive the analysis under the more flexible paramountcy doctrine.

In its statements in IR 2.3, the proponent sets out the dual test to be used in assessing whether the federal rule will push aside the provincial or local rule: paramountcy will be triggered in cases where there is either an operational conflict (compliance of both sets of rules is impossible) or a conflict of purpose (whereby applying the local rule would frustrate the federal purpose). This summary is accurate. However, FCM objects to the characterization, by the proponent, of the purported conflicting purposes.

The case law is clear. To establish a conflict of purpose under the paramountcy doctrine, there is "a heavy burden on the party claiming paramountcy." In order for a conflict to exist, "there must be 'clear proof of purpose'".[5] In addition, the local rule will only be inapplicable to the extent of the conflict. Put simply, this doctrine seeks to support cooperative federalism: it was not intended to displace, in a wholesale fashion, valid requirements put in place by the lower orders of government. The analysis required is much more subtle.

The proponent relies on the *Lafarge* decision as a parallel to the present project and states that the federal "purpose" to be used for the paramountcy analysis was the grant of wide powers of approval to a federal agency. However, the facts in *Lafarge* reflect the true, highly restrained approach to invalidating local rules. The only issue in *Lafarge* was the applicability of a municipal height restriction for a new structure to be built on lands owned by the Vancouver Port Authority (VPA). The Supreme Court did not decide this case on the basis that the VPA has broad decision-making powers. It ruled only that the height restriction in the City's zoning bylaw would frustrate the building height approved by the VPA, thereby creating a "conflict of purpose".

The key lesson from that seminal decision, and all others that have followed, is how conflicts of purpose are to be properly characterized. It would be against the spirit and the letter of the paramountcy doctrine to conclude that because the federal government has attempted to confer upon a federal agency broad decision-making powers that its stated purpose was to set aside all

[5] *Canada Post v Hamilton (City)*, at paras 72-89 for the complete analysis, quoting the Supreme Court of Canada in *Quebec (Attorney General) v Canadian Owners and Pilots Association*, 2010 SCC 39 (CanLII)

valid requirements enacted by the lower orders of government. The notion of "conflict" in the context are highly specific matters and must be analysed on a case-by-case basis.

FCM's Expertise

In addition to its program and policy development work, FCM has experience in contributing to judicial decision-making in cases of national importance affecting municipal governments. By virtue of its national vantage point and its unique understanding of the role and activities of Canadian municipalities, FCM has made a useful contribution in past instances where the Courts and administrative tribunals have been asked to rule on crucial matters of municipal law.

FCM has appeared, as a party or an intervener, before the Supreme Court of Canada, the Court of Appeal for Ontario, The Court of Appeal of Quebec, the Federal Court of Appeal, and the Federal Court. FCM has also participated in a number of applications to the CRTC (Canadian Radio-Television and Telecommunications Commission). For example, FCM has been granted leave to intervene in the following cases:

114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town), 2001 SCC 40 – The seminal case redefining the standard of judicial deference owed to municipal decisions.

Barrie Public Utilities v Canadian Cable Television Assn, 2003 SCC 28 – A key administrative law decision dealing with the standard of review applicable to CRTC decisions and interpreting provisions of the *Telecommunications Act*.

Croplife Canada v Toronto (City), 75 OR (3d) 357, 254 DLR (4th) 40 (CA) – The decision of Court of Appeal for Ontario in the wake of the *Spraytech* decision affirming the importance of judicial deference in the context of municipal bylaws

Rogers Communications Inc v Châteauguay (City), 2016 SCC 23 – The first Supreme Court of Canada decision regarding radio and telecommunications since the adoption of the framework in *Canadian Western Bank* to resolve jurisdictional conflicts.

Canada Post Corporation v Hamilton (City), 2016 ONCA 767 – The application of the *Canadian Western Bank* framework to overlapping jurisdictions relating to community mailboxes on municipal rights-of-way.

As a party, FCM participated in the following cases both of which dealt with the constitutional boundary between a municipality's authority over its property and the status of telecommunications carriers as federal undertakings:

Federation of Canadian Municipalities v AT & T Canada Corp, 2002 FCA 500.

Edmonton (City) v 360Networks Canada Ltd, 2007 FCA 106.