COURT OF APPEAL FOR ONTARIO

CITATION: Halton (Regional Municipality) v. Canadian National Railway Company, 2024 ONCA 174
DATE: 20240307
DOCKET: COA-22-CV-0144

Simmons, Paciocco and Thorburn JJ.A.

BETWEEN

Regional Municipality of Halton, Corporation of the Town of Milton, Corporation of the Town of Halton Hills, The Corporation of the City of Burlington, Corporation of the Town of Oakville, and the Halton Region Conservation Authority

Applicants (Appellants)

and

Canadian National Railway Company

Respondent (Respondent)

and

Attorney General of Ontario, Attorney General of Canada, Federation of Canadian Municipalities, and Railway Association of Canada

Interveners

Kent E. Thomson, Steven G. Frankel, Chenyang Li, Rodney Northey and Henry Machum, for the appellants

Sheila Block, Andrew Bernstein, Yael Bienenstock, Jon Silver and Colette Koopman, for the respondent

Joseph Cheng, Andrew Law and Margaret Cormack, for the intervener, Attorney General of Canada

Padraic Ryan and Adrienne Ralph, for the intervener, Attorney General of Ontario

2024 ONCA 174 (CanLII)

Peter Griffin and Bhreagh Ross, for the intervener, Railway Association of Canada

Stéphane Émard-Chabot, for the intervener, Federation of Canadian Municipalities

Heard: November 20 and 21, 2023

On appeal from the judgment of Justice Frederick L. Myers of the Superior Court of Justice, dated September 21, 2022, with reasons reported at 2022 ONSC 4644 and 2022 ONSC 5375.

2024 ONCA 174 (CanLII)

Paciocco J.A.:

OVERVIEW

[1] The respondent, Canadian National Railway Company ("CN") is in the process of constructing an "intermodal hub" on a 485-hectare parcel of land in the town of Milton. With the use of multiple parallel tracks, a railway yard, and massive cranes, this installation will enable shipping containers to be moved by freight train for most of their journey to and from the Greater Toronto Area. The shipping containers will be moved into and out of the intermodal hub by heavy trucks. The construction of the intermodal hub will enable more efficient and economic movement of goods and a reduction in heavy truck traffic on Canadian highways along with the broader environmental benefits that this entails.

[2] But the intermodal hub project has affected, and if it comes to fruition will continue to affect, many local residents adversely, including through the disruption caused by ongoing construction, the noise and heavy truck traffic it will generate, its environmental impact, and the demands it will impose on local infrastructure.

Not surprisingly, the project has generated fierce local opposition. CN has met opposition at every stage of the approval and development process by residents and/or local governments.

[3] This decision addresses an appeal by several of these local governments, including the upper-tier municipality, the Regional Municipality of Halton,[1] of an order denying an application they brought against CN for declarations and injunctions (for convenience I will generally refer to the appellants collectively as "Halton"). Halton sought declarations that CN is obligated to seek and obtain requisite approvals under more than 65 listed provincial laws, regulations, and municipal bylaws (the "listed local laws"), without constitutional constraint. The order being sought could also have enjoined CN from continuing construction or operation until it complies with those listed local laws.

[4] Halton claims that it had no choice but to seek this relief, since, in its view, CN has steadfastly refused to accept the application of any provincial or local legislation, claiming blanket immunity because the intermodal hub is a federal undertaking. It submitted that CN's position is legally incorrect under the governing principles of cooperative federalism, notwithstanding federal approval.

[5] The evidence does support the conclusion that CN has claimed this sweeping immunity in the past, but CN disclaimed this position before the

[1] The Halton Region Conservation Authority is also an appellant in these proceedings.

2024 ONCA 174 (CanLII)

application judge, arguing (as it did before us) that although there are local laws that may apply to the intermodal hub project, CN does not need the approval of local authorities before proceeding to construct and operate the intermodal hub. It argues that Halton is attempting to use the listed local laws to usurp Parliament's exclusive federal jurisdiction to determine the location of, and to construct and operate, the intermodal hub railway installation, contrary to the constitutional doctrines of interjurisdictional immunity and paramountcy.

[6] The application judge found that the factual record that Halton relied upon was inadequate to permit adjudication of the issues of interjurisdictional immunity and paramountcy, or to show that the multitude of listed local laws raised issues that were not hypothetical. On this basis he denied the declarations and injunctions that Halton sought relating to all but three bylaws. For those three bylaws the application judge agreed that live controversies had been established and he had the evidence needed to adjudicate Halton's requests on their merits. But he went on to deny declarations and injunctions relating to these three bylaws based on the doctrine of interjurisdictional immunity.

[7] Halton raises numerous grounds of appeal from this decision. For the reasons that follow and having had the benefit of the contributions made by numerous interveners, I would not accept any of Halton's grounds of appeal and would dismiss its appeal. As I will explain, the application judge was entitled to exercise discretion to deny the declaratory relief, and did so for cogent reasons,

2024 ONCA 174 (CanLII)

without committing extricable legal errors or palpable and overriding errors of fact. Similarly, no errors can be identified in his decision to deny the requested injunctive relief.

[8] I would also deny the appellants' leave to appeal the significant costs award of nearly $2.3 million that has been imposed against them.

[9] Although the appeal is dismissed, I emphasize, as the application judge did, that federal undertakings are not "enclaves immune from provincial laws of general application" and accordingly the interjurisdictional immunity he recognized has limited application. CN will undoubtedly have to comply with some provincial and municipal laws. Consistent with the demands of cooperative federalism it should do so insofar as it can without impairing the core of the federal power under which the intermodal hub was authorized. Similarly, Halton should implement and enforce its laws only to the extent they do not impair the core of that exclusive federal jurisdiction, which includes determining the location of, constructing and operating the intermodal hub.

MATERIAL FACTS

[10] The federal regulatory processes in which CN obtained approval from the Canadian Transportation Agency ("CTA") and the federal Ministry of the Environment and Climate Change to build and operate the intermodal hub on its land in Milton took several years to complete, from 2015 to 2021. As part of the

2024 ONCA 174 (CanLII)

approval process an independent Review Panel was established by the federal Minister of the Environment and Climate Change (the "Minister").

[11] On February 20, 2018, while federal approval was under consideration, Halton applied for declarative relief on issues relating to the applicability of provincial and local laws to the intermodal hub. In that application Halton identified fewer than 20 specific local laws that it said applied, and sought, among other relief, a declaration that "[v]alid provincial and municipal by-laws of general application apply to the [intermodal train hub] unless they (a) impair a vital or essential aspect of a federal railway, or (b) conflict with a federal statute, regulation or approval." Halton did not seek injunctive relief in that application.

[12] On October 29, 2018, CN secured a temporary stay of this initial application pending disposal of the federal approval process: *Halton v. CNR*, 2018 ONSC 6095, 83 M.P.L.R. (5th) 122. Although CN took the position in its representations to the Review Panel that as "a federal undertaking, it is solely within federal jurisdiction, and that the various provincial and local laws that the applicants want to ensure are considered in planning the development do not apply to it", it took a more modest position before the stay motion judge, accepting that it may have to comply with some local laws: *Halton v. CNR*, at paras. 86 - 88.

[13] The stay motion judge found that the balance of convenience favoured a temporary stay of Halton's application because: (1) the federal approval process

2024 ONCA 174 (CanLII)

could address and lead to the resolution of some of the issues in contest in the application that was before her, given that the federal expert panel had been directed to take local issues into account in relation to "municipal land use, human safety in relation to motor vehicle safety, and human health, including air quality, water quality, and noise exposure"; and (2) a ruling on the application would represent an unwarranted and unnecessary intrusion into the federal review that was underway: *Halton v. CNR*, at paras. 112, 123. However, in her reasons the stay motion judge rejected an alternative submission made by CN that the application should be stayed because it was "too hypothetical or lacking concrete factual foundation": *Halton v. CNR*, at paras. 100, 106.

[14] In 2021, federal approval for the construction of the intermodal hub on CN's property in the Halton Region was granted by the Governor in Council, CTA and the Minister. The Minister included a recital that the approval did "not relieve [CN] from any obligation to comply with other legislative or other legal requirements of the federal, provincial, or local governments". The Minister also imposed hundreds of conditions on CN to mitigate the project's adverse effects.

[15] The temporary stay of Halton's initial application for declaratory relief issued by the stay motion judge ended with the federal approval. Subsequently, on May 13, 2022, Halton amended that application, for the second time, expanding the reach of the relief it is seeking. This second amended application is the application that was before the application judge and that now forms the subject of

2024 ONCA 174 (CanLII)

the current appeal. In it, the relief Halton is seeking includes requests for declarations that CN "is obligated to seek and obtain all requisite approvals under each of the [listed] provincial laws … prior to constructing and operating the [intermodal hub]"; and that paramountcy and the doctrine of interjurisdictional immunity have no impact on the operability or applicability of any of the listed local laws. Halton's amended application also requests an additional order, to "the extent necessary" for "injunctive relief enjoining CN from constructing or operating [the intermodal hub] … for which approval has not been sought and obtained under the [listed local] laws." During oral argument before this Court, counsel for Halton explained that it pursued a narrower request for injunctive relief before the application judge, seeking only injunctive relief under s. 440 of the *Municipal Act, 2001,* S.O. 2001, c. 25, relating to the three bylaws that the application judge addressed in his reasons. Halton explained that it did so because these three bylaws were the only listed local laws that CN had breached at the time of the application hearing.

[16] The decision of the application judge denying all of the relief sought by Halton came after a five-day hearing in which more than 27,000 pages of material was filed and lengthy pleadings had been exchanged. The application judge acknowledged that his 62-paragraph decision is "relatively brief", explaining, in effect, that more extensive reasons were not required because "of the view that [he] take[s] of this matter", his desire to avoid impacting future proceedings, and

2024 ONCA 174 (CanLII)

his need to make only one constitutional holding. He said that the Attorney General of Ontario, whom he found to be an honest broker, had correctly expressed the constituent principles he needed to resolve that one constitutional issue,[2] and he adopted and reproduced multiple, selected paragraphs from the Attorney General of Ontario's factum.

[17] At the outset of his decision, the application judge commented that local politicians opposed the construction of the intermodal hub "in their back yards" during the federal hearings. He concluded that they "continue to oppose it" before him. He said that he was not criticizing politicians for carrying out their perception of their local mandate but commented that instructions they provided to "officials to decline to participate in any further technical discussions with CN until CN applies for municipal approvals … is not cooperative federalism."

[18] As I have introduced, for all but three of the listed local laws the application judge exercised discretion not to grant the requested relief because, in his view, the factual foundation was inadequate, failing to disclose a live controversy.

[19] Before arriving at that conclusion, the application judge described the general legal principles he was applying, commenting that the kind of relief being sought is not available in the absence of a live factual controversy. He found that

[2] The Attorney General of Ontario was an intervener below but took no position on the outcome of the dispute.

2024 ONCA 174 (CanLII)

the application before him lacked the “factual underpinnings” to demonstrate a live controversy. He explained that Halton “purported to bring a hypothetical dispute involving a multitude of listed laws that may or may not ever be applicable.”

[20] The application judge also concluded that he did not have the fact specific information required to resolve whether interjurisdictional immunity applied to the listed local laws, other than the three bylaws he would go on to give individuated analytical consideration. He noted that “the identification of the core of a federal power in a particular case and the degree of impairment proposed [issues of importance on the question of interjurisdictional immunity] are fact-specific and nuanced questions” that require evidence of the factual effect of an impugned law. He said, “simply listing 50 or more laws that might apply one day is not a sufficient basis to raise a constitutional issue in a justiciable manner.” He concluded that save facts relating to the three bylaws “there is no factual dispute before the court on which CN shoulders a burden of proof.” For these reasons he “decline[d] to consider the hypothetical questions of whether the laws listed by the applicants are invalid or inoperative under the doctrines of interjurisdictional immunity or paramountcy.”

[21] Summarizing these conclusions he said, “another way to say the same thing is that the bulk of this application is premature.”

2024 ONCA 174 (CanLII)

[22] The three bylaws the application judge did consider under the doctrine of interjurisdictional immunity were Milton bylaw 33-2004 that prohibits anyone from removing topsoil and altering the grading of any land without a permit; Milton bylaw 035-2020 requiring a permit to widen an entrance road, and Halton bylaw 32-17 that requires a permit to construct an access to a regional road. He found that whether CN needed to comply with these bylaws was a live issue before him supported by a factual record showing that CN undertook each of these activities – moving topsoil, altering a Milton Road, and adding an entrance to a regional road – without permits.

[23] He then found on the basis of evidence before him that the process for obtaining these permits requires compliance with all applicable official plans, which would require official plan amendments at both the town and regional levels. He also found that these processes would entail years of delay.

[24] The application judge went on to conclude that, the Regional Municipality of Halton and the other "applicants leave little room for doubt as to their intention in this proceeding. They wish to prevent CN from constructing the intermodal hub until it complies with municipal planning processes".

[25] The application judge, in part, based this conclusion on the history of opposition that the Regional Municipality of Halton and the other applicants had taken to the project, and his observation that most of the materials filed dealt with

2024 ONCA 174 (CanLII)

complaints about the federal approval. But he also based this finding on the implications of the requests before him. As indicated, he concluded that the injunctions and declarations that Halton was seeking would require "years of proceedings in which they will make open-ended discretionary decisions as to whether to allow CN to construct and operate its intermodal hub at the site already approved by federal authorities." In his view, Halton was "purporting to rely on seemingly narrow permitting issues as an entree to full zoning and municipal planning processes related to the location of the intermodal hub" and that, "[i]n the guise of making discretionary permitting decisions for seemingly narrow local issues" Halton was seeking to prevent CN from constructing and operating it at the approved location, by seeking "veto authority".

[26] The application judge went on to find that the proposed injunctions and declarations under the three bylaws would substantially "impair the core of the federal undertaking" and that the doctrine of interjurisdictional immunity prevents this outcome. He said, Halton is "not entitled to use the permitting processes on curb cut and grading bylaws to force CN to seek their discretionary approval of the location and construction of the intermodal hub".

[27] Of note, the application judge said clearly that he was not deciding whether any of the listed local laws, including the *Planning Act*, apply to the intermodal hub project, and he cautioned that his decision "does not mean that CN is immune to

2024 ONCA 174 (CanLII)

any or all local or provincial laws". Indeed, he opened his decision by stressing how narrowly he was resolving the issues:

> My holding today is that the applicants' position that prior to building the intermodal hub CN is required to apply for exemptions from curb cut and grading bylaws by applying for and obtaining official plan amendments impairs the core of the federal power and undertaking substantially and in a way that there is ample precedent to preclude.

2024 ONCA 174 (CanLII)

[28] In his main costs decision[3] the application judge commented that "the litigation [conducted by Halton and the other applicants] was political in its conception and its implementation. It was hardball in design and execution. And it was met by an equally hardball political response." He nonetheless denied CN's request for elevated costs, saying, "I am not prepared to find that the applicants' litigation conduct was reprehensible", commenting, "I stop just short of the next step to brand as reprehensible political conduct engaged in by a political body."

[29] In addition to the litigation before us, Halton sought judicial review challenging the reasonableness of decisions that resulted in the federal approval of the intermodal hub project. On March 1, 2024, the Federal Court set aside the Minister's Referral Decision dated September 1, 2020, and the Cabinet Justification Decision and remanded these decisions for redetermination: *Halton*

[3] A second costs decision, clarifying other aspects of this costs award, was subsequently issued.

(Regional Municipality) v. Canada (Environment), 2024 FC 348. This decision does not bear on the issues before us.

2024 ONCA 174 (CanLII)

ISSUES

[30] In its materials and submissions Halton offered several iterations of its grounds of appeal. In my view, the grounds of appeal that emerge and that require response may be fairly and efficiently characterized and addressed in the following order:

A. Did the application judge misapprehend the evidence relating to CN's claim to absolute immunity?

B. Did the application judge misapprehend the evidence in finding that Halton wished to block the intermodal hub, or make and base his decision on unfair and unjustified findings concerning the conduct of elected officials?

C. Did the application judge err in law by misapplying the law of interjurisdictional immunity to the three bylaws?

D. Did the application judge err by failing to apply the stay motion judge's finding that Halton's applications were not hypothetical or premature?

E. Did the application judge err in law or in fact by declining to address the constitutional applicability and operability of the overwhelming majority of the listed local laws?

F. Should leave to appeal the costs award be granted and the appeal allowed?

[31] CN raised an issue in response, claiming that even if this Court finds that the application judge erred in his analysis of interjurisdictional immunity, then in the alternative the doctrine of paramountcy supported the application judge's disposition relating to the three bylaws. Given my conclusion that the application judge committed no errors in resolving these claims based on interjurisdictional immunity, I need not address the law of paramountcy.

2024 ONCA 174 (CanLII)

ANALYSIS

A. DID THE APPLICATION JUDGE MISAPPREHEND THE EVIDENCE RELATING TO CN'S CLAIM TO ABSOLUTE IMMUNITY?

[32] Halton argues that the application judge misapprehended the evidence before him, on a range of issues. I will address other alleged misapprehensions below so that the issues can be addressed thematically but will begin with Halton's contention that the motion judge misapprehended CN's position, thereby tainting his approach to the relevant evidence.

[33] It was an important feature of Halton's narrative that "CN has asserted repeatedly for more than seven years that – pursuant to the doctrines of interjurisdictional immunity and federal paramountcy – it enjoys absolute immunity from complying with any local laws in constructing and operating the Hub." Halton produced supporting documentation and affidavit evidence to establish this claim.

As I noted above, the stay motion judge found this to be CN's historical position in her decision: *Halton v. CNR*, at para. 86. Halton relies upon this characterization of CN's historical position to explain its own litigation strategy and the breadth of its application, as well as to demonstrate the live issue that was before the application judge.

[34] In the face of this record, Halton argues that the application judge misapprehended CN's position when he said in his Reasons for Judgment that CN "does not deny that local laws may apply to the intermodal hub", and in noting in his costs endorsement that CN will apply for permits in appropriate cases, a comment that Halton calls a "speculative" finding.

[35] I agree with Halton's claim that a misapprehension of a party's position can lead to a failure to give proper effect to the evidence on an issue that goes to the core of the outcome, thereby giving rise to a ground of appeal: see *Carmichael v. GlaxoSmithKline Inc.*, 2020 ONCA 447, 151 O.R. (3d) 609, at paras. 124 - 125, leave to appeal refused, [2020] S.C.C.A. No. 409, for a general description of "misapprehensions of evidence". But, in my view, Halton has not established that the application judge misapprehended CN's position.

[36] In his Reasons for Judgment, the application judge did not find that CN had never denied that local laws apply to the project. His comment in his Reasons for Judgment that the federal approval of the project "does not mean that CN is

2024 ONCA 174 (CanLII)

immune to any or all local or provincial laws" shows that he attended to the evidence before him on this point. When he described CN's position in his Reasons for Judgment it is clear from the context that he was simply describing the position that CN took before him. Halton has not shown that the application judge summarized CN's position before him inaccurately. Indeed, by suggesting that CN "fudged" its position before the application judge, Halton seems to be acknowledging that CN told the application judge that it accepts that some of the local laws may apply to the intermodal hub. Whatever Halton may think of the sincerity of the position CN took before the application judge, the application judge was entitled to accept it, and I see no basis for interfering with his decision to do so. For these reasons, the Reasons for Judgment do not support a finding that the application judge misapprehended CN's position.

[37] The application judge's impugned comment in his costs endorsement that CN "will [apply for permits] in appropriate cases" was made after he expressed criticism of CN's own "hardball" litigation strategy. Before making this impugned comment, he said, "CN knows full well that it will be required to comply with some local laws – perhaps most", and he described CN's history of applying "for permits in any number of other railway works". It is evident, in this context, that when the application judge went on to comment that CN "will [apply for permits] in appropriate cases", he was not making a material finding in the litigation but was expressing his expectation of how CN would behave, no doubt to signal to CN that

2024 ONCA 174 (CanLII)

it should jettison its own hardball position and engage in cooperative federalism. I am not satisfied that this comment, having been made in these circumstances in a costs endorsement, demonstrates that in arriving at his substantive decision the application judge misapprehended CN's position.

[38] I would deny this ground of appeal.

B. DID THE APPLICATION JUDGE MISAPPREHEND THE EVIDENCE IN FINDING THAT HALTON WISHED TO BLOCK THE INTERMODAL HUB, OR MAKE AND BASE HIS DECISION ON UNFAIR AND UNJUSTIFIED FINDINGS CONCERNING THE CONDUCT OF ELECTED OFFICIALS?

[39] Halton argues that during the application hearing, it "made clear that their purpose in pursuing the Application is not to block the intermodal hub from proceeding, but rather to ensure that CN complies with local enactments…" (emphasis original). It argues that the application judge misapprehended its position by finding that the Regional Municipality of Halton and the other applicants "wish to prevent CN from constructing the intermodal hub until it complies with municipal planning processes".

[40] I do not agree with this submission. It may, at first blush, appear that the application judge reasoned unevenly by accepting CN's expressions of its moderated position, while rejecting the position that Halton claimed during the litigation, but it was open to the application judge to come to this conclusion. The

2024 ONCA 174 (CanLII)

application judge based his conclusion about Halton's position, not only on the historical opposition of Halton to the intermodal hub, but also on his observation that most of the materials that Halton filed dealt with complaints about the federal approval, and on the implications of the requests for relief that were before him. As I have described, Halton was seeking declarations of broad sweep as well as an injunction that would have prevented further construction until application processes relating to curb cutting and regional roads that required official plan amendments were completed. The application judge therefore had an evidentiary basis before him for the conclusions he reached about Halton's position. His factual finding is entitled to deference, and we have not been provided with any basis for interfering.

[41] I do not accept the related claim that the application judge's comments about the political position taken by municipal officials "laid bare his unjustified contempt" for them, and "motivated His Honour to dismiss the Application." As I will explain, the application was dismissed appropriately, on its merits. The application judge's remark in his Reasons for Judgment that instructing municipal officials "to decline to participate in any further technical discussions with CN until CN applies for municipal approvals that will require CN to obtain official plan amendments…. is not cooperative federalism", was responsive to the emphasis Halton gave to the principles of cooperative federalism in its submissions before him. Once again, when read in context the impugned comments appear to have been an attempt by

2024 ONCA 174 (CanLII)

the application judge to encourage Halton to reflect on how its own behaviour has contributed to the impasse.

[42] With respect to the costs endorsement comments, the application judge was asked to elevate the costs award against Halton because of the position it had taken during the litigation, which CN submitted was disingenuous positioning. The application judge was therefore called upon to adjudicate Halton's behaviour. In my view, the language he used in expressing his conclusions in that regard does not come close to clearing the high bar set for rebutting the presumption of impartiality: *Kelly v. Palazzo,* 2008 ONCA 82, 89 O.R. (3d) 111, at para. 20, leave to appeal refused, [2008] S.C.C.A. No. 152; *Chippewas of Mnjikaning First Nation v. Chiefs of Ontario*, 2010 ONCA 47, 2 C.N.L.R. 18, at para. 243, leave to appeal refused, [2010] S.C.C.A. No. 91.

[43] I would deny this ground of appeal.

C. DID THE APPLICATION JUDGE ERR IN LAW BY MISAPPLYING THE LAW OF INTERJURISDICTIONAL IMMUNITY TO THE THREE BYLAWS?

[44] Cooperative federalism, an animating consideration in modern constitutional law in Canada relating to the division of powers, holds that statutes enacted by both levels of government should be permitted to operate, where possible: *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 37;

2024 ONCA 174 (CanLII)

Rogers Communications Inc. v. Châteauguay (City), 2016 SCC 23, [2016] 1 S.C.R. 467, at para. 38. Notwithstanding the allure of cooperative federalism, there are times when designated constitutional powers would be inappropriately eroded by concurrent jurisdiction: *Rogers Communications Inc.*, at para. 39. The doctrine of "interjurisdictional immunity" therefore serves to qualify the operation of cooperative federalism by preventing concurrent jurisdiction in limited circumstances: *Canadian Western Bank*, at para. 34. Where it operates, interjurisdictional immunity prevents laws validly enacted by one order of government from impairing the "unassailable core" content of a head of power or a vital or essential aspect of an undertaking that is specified as exclusive under the *Constitution Act, 1867*: *Canadian Western Bank,* at paras. 33 - 34; *Bank of Montréal v. Marcotte*, 2014 SCC 55, [2014] 2 S.C.R. 725, at para. 62. This doctrine does not invalidate an impairing provision but renders it inapplicable insofar as it affects the vital part of the exclusive head of power that is being protected: *Marcotte*, at para. 64.

[45] Given the high value attached to cooperative federalism, the doctrine of interjurisdictional immunity is given limited application to prevent it from granting "sweeping immunity": *Canadian Western Bank*, at paras. 38, 77; *Marcotte*, at para. 63. Limits are imposed on the reach of interjurisdictional immunity in two different ways.

2024 ONCA 174 (CanLII)

[46] First, the doctrine is to be used with restraint: *Canadian Western Bank*, at para. 67. It should "in general be reserved for situations already covered by precedent" (emphasis added): *Canadian Western Bank*, at para. 77; *Marcotte*, at para. 63; *Québec (Attorney General) v. Canadian Owners and Pilots Association,* 2010 SCC 39, [2010] 2 S.C.R. 536 ["*COPA*"], at para. 26; *Rogers Communications Inc.*, at para. 61; *Marine Services International Ltd. v. Ryan Estate*, 2013 SCC 44, [2013] 3 S.C.R. 53, at para. 49. At times Halton appeared to suggest that interjurisdictional immunity simply cannot be applied absent a precedent. This overstates the law. The doctrine of interjurisdictional immunity "will usually not expand… to protect the core of legislative powers that have not already been so defined in our jurisprudence" (emphasis added): *Desgagnés Transport Inc. v. Wärtsilä*, 2019 SCC 58, [2019] 4 S.C.R. 228, at para. 93. And in *Canada (Attorney General) v. P.H.S. Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134, at para. 67, a case where there was no precedent on point, McLachlin C.J. said, for the Court, "[t]his is not determinative since new areas of exclusive jurisdiction could in theory be identified in the future," albeit courts are "reluctant" to do so. However, it remains true that ordinarily, the absence of an established precedent will present a formidable obstacle to an interjurisdictional immunity claim.

[47] Second, to prevent interjurisdictional immunity from being given broad sweep the doctrine is applied strictly even in those spheres where it is available

2024 ONCA 174 (CanLII)

for consideration. To be rendered ineffective under this doctrine a law must: (1) impair, (2) a “core” or “vital and essential” element of the exclusive power.

[48] “Impair” is a higher standard than “affect”, the standard that once applied. For interjurisdictional immunity to be conferred under the current law, the impugned law must intrude in a significant or serious way on the exercise of the core competence, although “it need not paralyze it” or “sterilize it”: *COPA*, at paras. 43 - 45.

[49] A “core” of a federal power – the thing that must be impaired by the impugned law for interjurisdictional immunity to operate – has been described as the “‘basic, minimum, and unassailable content’ of the legislative power in question which is ‘necessary to make the power effective for the purpose for which it was conferred’”: *Desgagnés Transport Inc.*, at para. 93 (citations omitted). As indicated, the core is often identified by considering what is “vital or essential” to achieve the purpose for which exclusive legislative power was conferred.

[50] There are generally two steps in an interjurisdictional immunity inquiry. The first step is to determine whether the impugned law trenches on the protected core of the other level of government’s exclusive legislative jurisdiction: *COPA*, at para. 27; *Rogers Communications Inc.*, at para. 59. This involves determining what is in the core of the power or undertaking, a determination that should be guided by precedent. This is done by asking, what is the “basic, minimum, and unassailable

2024 ONCA 174 (CanLII)

content" of the legislative power in question, which is "necessary to make the power effective for the purpose for which it was conferred": *Desgagnés Transport Inc.*, at para. 93. If interjurisdictional immunity could apply based on this inquiry because the impugned law will intrude upon the protected undertaking, the second step is launched, which is to resolve whether the impugned law's intrusion on the exercise of the protected undertaking is sufficiently serious to invoke the doctrine: *COPA*, at para. 27. This involves determining whether the impugned law "impairs" an aspect of the law or undertaking that "makes them specifically of [the exclusive] jurisdiction": *Canadian Western Bank*, at paras. 48 - 49, 51; *British Columbia (Attorney General). v. Lafarge Canada Inc.*, 2007 SCC 23, [2007] 2 S.C.R. 86, at para. 115.

[51] Halton submits that the application judge made extricable errors of law in answering each of these questions. I will address Halton's arguments following the structure for analysis I have just described.

Did the Application Judge Err in Deciding that the Three Bylaws Intruded Upon a "Core" Federal Undertaking?

[52] The parties agree that the federal government has exclusive jurisdiction over interprovincial railways. Section 91(29) of the *Constitution Act 1867* provides the federal government with exclusive jurisdiction over subjects "expressly excepted" from matters otherwise exclusively within provincial jurisdiction. Section 92(10)(a)

2024 ONCA 174 (CanLII)

expressly excludes interprovincial railways from exclusive provincial jurisdiction over “Local Works and Undertakings”, while s. 92(10)(c) does the same for works that Parliament declares to be for the general advantage of Canada, which Parliament did with respect to “railway and other transportation works in Canada of CN” in s. 16(1) of the *CN Commercialization Act*, S.C. 1995, c. 24.

[53] However, Halton argues that the three bylaws do not intrude upon the core of the railway undertaking that is protected by interjurisdictional immunity and submits that the application judge erred in finding otherwise.

[54] As I will explain, in the decision under appeal, the application judge identified the core of federal jurisdiction over railway undertakings as including the power to decide where the intermodal hub could be constructed and operated, and he reasoned that since the bylaws purported to require municipal consent to proceed with the construction, they impaired that vital or essential core. Halton offers overlapping arguments to the contrary.

[55] First, Halton argues that the application judge erred by characterizing the intermodal hub as a railway undertaking. In oral submissions it stressed that “the trucking component [of the intermodal hub] is critical”, and a “dominant feature”. It emphasized that most of these trucks will not be owned or operated by CN, and that many of them will be conducting short haul operations within Ontario. In a reply factum, Halton argues that a finding that the intermodal hub is at the core of the

2024 ONCA 174 (CanLII)

federal power, and that this core is impaired, must be based on evidence, which it claims was lacking before the application judge. On this basis, Halton submitted that the intermodal hub is not, and has not been shown to be a railway undertaking, thereby falling outside of the exclusive jurisdiction of the federal government over interprovincial railways. To buttress its arguments, Halton relies upon s. 16(2) of the *CN Commercialization Act*, which provides by way of exception, that the s. 16(1) declaration of general advantage "does not apply to the … operation of motor vehicles of all kinds for the carriage of traffic in conjunction with or substitution for the rail services managed or controlled by CN."

[56] I am not persuaded that the application judge erred in treating the intermodal hub as a vital part of a railway undertaking. There was ample evidence before the application judge establishing that the function of the intermodal hub is to enable the transport of goods in and out of the Greater Toronto Area by rail. The use of containers to permit goods to be transferred more effectively from truck to railcar at the intermodal hub does not change this. In *Canadian Western Bank*, at para. 54, Binnie J. and Lebel J. summarized the federal transportation cases to assist in their analysis of that case. Remarks they made when considering *Ontario (Attorney General) et al. v. Winner et al.*, [1954] 4 D.L.R. 657 (P.C.), are apt. *Winner* involved provincial legislation purporting to regulate where interprovincial bus passengers could embark or disembark. Citing *Winner*, Binnie J. and Lebel J. commented that

2024 ONCA 174 (CanLII)

such legislation “would ‘destroy the efficacy’ of the federal undertaking” before saying, at para. 54:

> For a province to regulate that part of the undertaking would be to usurp the regulatory function of the federal government. Access to passengers and cargo, in other words, was absolutely indispensable and necessary to the carriers’ viability.

2024 ONCA 174 (CanLII)

[57] It follows, in my view, that the involvement of the trucks does not alter the function of the intermodal hub as an essential part of the railway undertaking. The intermodal hub serves the railway in the same way a more conventional railway station does, as a location to embark and disembark cargo. Trucks must use the intermodal hub to provide the railway with access to cargo, an indispensable and necessary function to the railway’s viability. This in no way undercuts the fact that the intermodal hub is a vital part of the railway installation.

[58] To be clear, I am not suggesting that the province and the municipalities cannot regulate the operation of the trucks that operate in conjunction with CN’s railway operations, as contemplated by s. 16(2) of the *CN Commercialization Act*. Of course, they can. The instant point is that the fact that trucks will use the intermodal hub to provide access to the cargo that CN will then transfer to its trains and move by rail does not alter the reality that the intermodal hub is a vital aspect of an interprovincial railway installation – a federal undertaking – and that the application judge made no error in considering it to be.

[59] Second, Halton argues that the application judge erred by finding there was "ample precedent for interjurisdictional immunity in relation to the location and operation of interprovincial railway undertakings and undertakings declared to be of national import". Halton takes a decidedly narrow view of the precedent requirement in supporting this submission. Its position is that absent precedents establishing that the construction and operation of an intermodal hub lies at the "core" of federal railway jurisdiction, the rigorous precedential limitation on the application of interjurisdictional immunity cannot be met, and it argues that the application judge erred by relying on analogous precedents dealing with aeronautics, specifically *COPA,* and *Greater Toronto Airports Authority v. Mississauga (City)* (2000), 50 O.R. (3d) 641 (C.A.), leave to appeal refused, [2001] S.C.C.A. No. 83, ["*GTTA*"].

[60] Halton's position is unduly rigid. Its submission that there must be a precedent that specifically addresses intermodal hubs is reminiscent of a failed argument advanced in *Rogers Communications Inc*, where the Attorney of General of Québec argued that the decision in *Toronto Corporation v. Bell Telephone Co. of Canada*, [1905] A.C. 52 (P.C.), was not a precedent relating to the siting of a radiocommunication antennae system because it dealt with placement of poles and cables. This submission was rejected because both cases concerned the location and installation of components that were necessary to the operation and

2024 ONCA 174 (CanLII)

maintenance of the communication systems: *Rogers Communications Inc.*, at paras. 63 - 64.

[61] It is therefore too rigid and simplistic for Halton to rely on the absence of precedents dealing with intermodal railway hubs as a basis for challenging the application judge's decision. The fact that there may not be precedents that do so is not enough on its own to oust interjurisdictional immunity, even leaving aside that in some case interjurisdictional immunity claims can be recognized without precedent. Given that intermodal hubs are railway installations not unlike train stations, the material inquiry for the application judge was whether, as a matter of precedent, the location, construction, and operation of installations that serve the railroad's operation have been recognized as vital or essential aspects of a railway undertaking that falls exclusively under federal jurisdiction. Such recognition extends back for more than a century. In *Canadian Pacific Railway Company v. Corporation of the Parish of Notre Dame de Bonsecours*, [1899] A.C. 367 (P.C.) at p. 372, the Privy Council said: "[T]he Parliament of Canada has, in the opinion of their Lordships, exclusive right to prescribe regulations for the construction, repair, and alteration of the railway, and for its management". In *Clark v. Canadian National Railway Co.*, [1988] 2 S.C.R. 680, at p. 708, the Court described "[t]he core federal responsibility regarding railways [is] to plan, establish, supervise and maintain the construction and operation of rail lines, railroad companies, and related operations." This constitutes authoritative recognition that

2024 ONCA 174 (CanLII)

the construction and operation of the intermodal hub is a vital aspect of the core federal responsibility regarding railways.

[62] Moreover, the doctrine of interjurisdictional immunity has been authoritatively recognized as applying to essential functions or vital parts of the operation of railways: *R. v. TNT Canada Inc.* (1986), 58 O.R. (2d) 410 (C.A.), leave to appeal refused, [1987] S.C.C.A. No. 149; *Ontario v. Canada Pacific Ltd*. (1993), 13 O.R. (3d) 389 (C.A.), at p. 394, aff'd [1995] 2 S.C.R. 1031; *Notre Dame de Bonsecours* at p. 372. Indeed, in *COPA*, at para. 26, McLachlin C.J. began with *Notre Dame de Bonsecours*, a railway case, in describing the development of interjurisdictional immunity in the context of federal undertakings.

[63] Even if there had not been precedents directly on point to rely upon, the application judge would not have erred by considering analogous precedents, as Halton asserts. In *Canadian Western Bank*, at paras. 54 - 63, in determining whether bank insurance is a core banking power in the absence of precedent, Binnie J. and Lebel J. looked by analogy at transportation cases, communication cases, maritime cases, cases in relation to "Indians and lands reserved for Indians" under s. 91(24), and management of federal institution cases to decide whether provincial insurance legislation intruded upon the core of the banking power. And in *Marcotte*, after noting that interjurisdictional immunity precedents have never considered the application of the doctrine to the credit card activities of banks at para. 63, the Supreme Court went on to assess whether this activity touched the

2024 ONCA 174 (CanLII)

core of the banking power, including by reasoning by analogy from the precedent in *Canadian Western Bank*. The two examples are sufficient to illustrate that the case law requires interjurisdictional immunity claims to be guided by precedent. It does not require relevant analogous precedents to be disregarded.

[64] In this case, the analogous precedents the application judge considered unquestionably supported his decision. He cited the *COPA* and *GTTA* decisions. In *COPA* at para. 37, McLachlin C.J. held that the location of aerodromes is "an essential and indivisible part of [the federal] aeronautics [power … as] aerodromes are 'an essential part of aeronautics and aerial navigation'" citing with approval from *Johannesson v. Rural Municipality of West St. Paul*, [1952] 1 S.C.R. 292, at p. 319. She continued, "[t]he location of aerodromes attracts the doctrine of interjurisdictional immunity because it is essential to the federal power, and hence falls within its core". Chief Justice McLachlin cited *GTTA* in support of that proposition. This, of course, is the reasoning the application judge used relating to the intermodal hub – the location of railway installations such as the intermodal hub is essential to the federal power and undertaking. In my view, he did not err in doing so.

[65] Third, Halton argues that the application judge erred by applying interjurisdictional immunity where there is a "double aspect" that arises from the concurrent jurisdiction that CN has over railroads, on the one hand, and municipalities have, on the other hand, over local environmental matters. I need

2024 ONCA 174 (CanLII)

not resolve whether there is a double aspect in this case because, contrary to Halton's key position, the doctrine of interjurisdictional immunity applies even where the double aspect doctrine applies. The theory that it does not was thoroughly debunked by McLachlin C.J. for the majority in *COPA*, at paras. 54 - 60, and see *Rogers Communications*, at para. 119, *per* Gascon J. (concurring). In *COPA,* McLachlin C.J. cautioned that the suggestion to the contrary made by Binnie J. and Lebel J. at para. 4 in *Lafarge,* must be read in context, noting that after they themselves found a double aspect, Binnie J. and Lebel J. went on to consider interjurisdictional immunity. Not only can interjurisdictional immunity apply in double aspect cases but a finding of interjurisdictional immunity can even obviate the need to resolve double aspect issues. In *COPA,* McLachlin C.J. concluded that it was unnecessary for the court to consider the double aspect issue because of her interjurisdictional immunity finding: at para. 59.

[66] I would therefore reject this submission.

[67] Fourth, Halton relied on the recital in the Minister Decision Statement that Ministry approval did "not relieve [CN] from any obligation to comply with other legislative or other legal requirements of the federal, provincial, or local governments" as supporting its position that interjurisdictional immunity should not be applied. This statement is irrelevant. The Minister did not purport to describe what provincial or local laws qualify as legal requirements relating to this project. It is plain that the Minister was simply expressing the caveat that Ministry approval

2024 ONCA 174 (CanLII)

did not absolve CN from complying with any other legal requirements that apply. Questions about what legal requirements the proponent of a federal undertaking must comply with are to be resolved by courts, "the final arbiters of the division of powers": *Canadian Western Bank*, at para. 24. That, of course, is what this litigation is about.

[68] In sum, none of Halton's objections to the potential application of interjurisdictional immunity can carry the day. The sole question remaining under the first step of the inquiry is whether the three bylaws intruded upon this vital part of the federal undertaking, the construction and operation of the intermodal hub. To avoid duplication, I will address that issue while examining the second step in the analysis.

Did the application judge err in determining that the three bylaws "impair" the core of the federal undertaking?

[69] The application judge found that all three bylaws impair CN's core function relating to the construction and operation of the intermodal hub. He based his decision on his conclusion that in order to comply with those bylaws "prior to building the intermodal hub CN is required to apply for exemptions from curb cut and grading bylaws by applying for and obtaining official plan amendments." He held that the bylaws "cannot apply to require CN to seek official plan amendments prior to building its intermodal hub" without impairing the core federal powers at

2024 ONCA 174 (CanLII)

issue. I see two strains of reasoning in this explanation. First, the official plan approval that he found to be required under each of the three bylaws confers broad discretion on municipal officials that effectively authorizes them to prohibit the construction of the intermodal hub, since official plan amendments are highly discretionary. The power to prevent the project is impairing. Second, he found that the official plan approval will require years of proceedings. Although he did not articulate it, it is clear from his reasoning that he found this delay would itself constitute an impairment of the core federal power.

[70] In coming to the first of these conclusions, the application judge adopted the law as expressed before him by the Attorney General of Ontario, that "[s]chemes that give provincial officials open-ended discretion to prohibit or intrusively regulate federal undertakings are more likely to trigger interjurisdictional immunity," and that bylaws "may rise to the level of impairment" where they "confer broad discretion on decision-makers to approve the location or impose restrictions or prohibitions on vital and essential aspects of a federal undertaking." The Attorney General of Canada agreed with these propositions. I do, as well.

[71] By way of example, in *Attorney General of Quebec v. IMTT-Québec Inc.*, 2019 QCCA 1598, 79 Admin. L.R. (6th) 1, the Quebec Court of Appeal found that several provisions of the *Quebec Environment Quality Act*, C.Q.L.R. c. Q-2, were inapplicable relating to a federally regulated harbour installation because of interjurisdictional immunity. This decision turned on the fact that the impugned

2024 ONCA 174 (CanLII)

sections gave provincial authorities broad discretion to prohibit the project by refusing to authorize it: *IMMT*, at paras. 208, 218. This effectively gave provincial authorities decision-making and regulatory power over port and maritime infrastructures, thereby impairing a core federal power.

[72] Similarly, in *Commission de Transport de la Communauté Urbaine de Québec v. Canada (National Battlefields Commission)*, [1990] 2 S.C.R. 838, at p. 860, Gonthier J. concluded that the application of provincial permitting requirements for bus services at a national historic site (a federal undertaking) "affected" an essential aspect of the management and operation of that federal undertaking. He found that authority under the permitting regime to refuse, change, suspend or revoke permits impinged on the "very existence" of the federal service and placed the National Battlefields Commission "at the mercy of the largely discretionary decisions of the [provincial authority] on fundamental aspects of the service it offers the public under its mandate": at p. 859. Although the decision in *National Battlefields Commission* preceded the current requirement that an impugned law must impair and not merely affect the exclusive jurisdiction over a federal undertaking before interjurisdictional immunity can operate, the essential point illustrated in *National Battlefields Commission* remains apposite. Just as the discretion claimed relating to provincial permitting requirements in that case did, the official plan amendment process in this case places the intermodal hub at the mercy of the highly discretionary decisions of the municipalities.

2024 ONCA 174 (CanLII)

[73] To be clear, not all local or provincial legislation requiring permits will impair the exercise of the federal power or a vital or essential part of an undertaking. In *TNT Canada Inc*., for example, provincial legislation requiring TNT Canada Inc., a federally regulated undertaking engaged in interprovincial transportation, to secure a certificate of approval before carrying chemical waste, did not render the application of the provincial law *ultra vires*. The conditions for obtaining a certificate of approval did not contain broad discretion to prevent TNT Canada Inc. from engaging in transportation. They simply required confirmation of the exact composition of the waste, a certificate of insurance, and the inspection and approval of the equipment: *TNT Canada Inc.*, at pp. 413 - 414. Therefore, the legislation never threatened the core of the federal undertaking.

[74] Halton does not appear to take issue with the general proposition I have just outlined, that the scope and nature of the discretion associated with a required permit can cause that legislation to impair the core of a federal power. Instead, it argues that: (1) impairment cannot be based on hypothetical concerns that a permit may “possibly” be denied or take an extended period of time; (2) there is no evidence that the bylaws carry broad discretion that would impair the “location and siting of the federal undertaking”, and (3) the application judge erred in concluding that Halton bylaw 32-17, relating to constructing access to a regional road, requires official plan approval. It concedes that the Milton bylaws, 33-2004 and 035-2020 do so. Halton’s point relating to bylaw 32-17, of course, is that because it does not

2024 ONCA 174 (CanLII)

require official plan approval, bylaw 32-17 does not impair a core federal power. I disagree with all three of these submissions, which I will address in turn.

[75] The decision in *IMTT-Québec Inc.* provides a complete answer to Halton's objection that impairment in this case is no more than hypothetical. In *IMTT-Québec Inc.*, the Attorney General of Québec argued that the court can and should assume that provincial authorities will exercise their discretionary power so as not to interfere with the federal head of power by withholding their authorization or imposing conditions that would frustrate the projects. The Québec Court of Appeal said this argument does not withstand analysis "because its direct result would be to circumvent the exclusive federal jurisdiction over federal public property used for federal purposes": *IMTT-Québec Inc*, at para. 220. Put otherwise, the mere empowerment of provincial authorities to withhold approval for construction impairs exclusive federal regulation by asserting authority to intrude on that exclusive federal jurisdiction.

[76] The same reasoning applies to Halton's "wait and see" position taken before us. Interjurisdictional immunity is about jurisdiction. If a provincial law purports to claim the authority to impair a federal undertaking, the doctrine is available, especially in the context of a case such as this where Halton has asked a court to grant prophylactic declarations and injunctions on the strength of its assertion of authority to regulate. I therefore reject Halton's position that a finding of impairment is premature.

2024 ONCA 174 (CanLII)

[77] With respect to the suggestion that there was insufficient evidence before the application judge about the breadth of discretion operating under the bylaws, the application judge's concern was with the requirement for official plan amendments. In my view, there can be no realistic issue taken with the breadth of discretion that operates when an official plan amendment is being considered. Official plans, by their very nature, reflect planning objectives and priorities that local governments choose, an inherently discretionary determination. The application judge cannot be faulted for not stating the obvious in his decision, nor did he have to plumb the other details of the bylaws to recognize how broad the discretion to deny an amendment, and thereby frustrate the construction of the project, truly is.

[78] I see no error in the application judge's interpretation of bylaw 32-17 as requiring official plan compliance. Although bylaw 32-17 itself does not specify that official plan compliance is needed to obtain a permit, it incorporates municipal guidelines, which are informed by and consistent with the official plan. Specifically, the Access Management Guideline states that it "builds upon the Region's policies contained in its Official Plan" and that the official plan "sets general practice for access approval" within certain contexts. There was also evidence before the application judge through the reply affidavit of Curtis Benson, the Chief Planning Official for the Regional Municipality of Halton, that one of the deficiencies in CN's access plan was its failure to demonstrate that the proposed access road complies

2024 ONCA 174 (CanLII)

with the Regional Official Plan. Barbara Koopmans, the former Commissioner of Development Services at The Corporation of the Town of Milton, testified in her affidavit that neither Milton nor Halton can support the “2015 Project” – the intermodal hub – until Halton and Milton Official Plans are amended to authorize an expansion of the urban boundary to include CN lands, which are not entirely within the urban boundary.

[79] Therefore, I am not persuaded that the application judge erred in finding that the relief Halton sought under all three bylaws impaired the core of exclusive federal jurisdiction, which includes CN’s constructing and operating the intermodal hub in a location approved by the federal government.

[80] I would also note, for the sake of completeness, that even in the absence of a broad discretion to refuse permit approval, imposing an overlong approval delay pending official plan amendments is sufficiently serious to constitute an impairment. In *Rogers Communication*, at para. 45, Wagner J., as he was then, and Côté J. looked at the effect of legislation from a “practical standpoint” and found that a two-year construction prohibition under a notice of a reserve would effectively prevent construction, thereby usurping the federal power. I therefore take no issue with this aspect of the application judge’s reasoning, either.

2024 ONCA 174 (CanLII)

Additional Considerations

[81] Before I leave this issue, as the application judge did, I will reaffirm the limited application that I am recognizing for interjurisdictional immunity. As I hope I have made clear, I agree with the application judge, and all of the interveners before us, that "federal undertakings are not enclaves immune from provincial laws of general application", and that interjurisdictional immunity does not render provincial laws inapplicable if they do not impair a vital or essential aspect of a federal undertaking: *Canadian Western Bank,* at para. 48. By way of example, a bylaw requiring everyone, including a railway company, to clean a ditch besides its rail line was found not to have impaired the core of a railway undertaking in *Notre Dame de Bonsecours*. Also, consider *Canada Pacific Ltd*., where environmental legislation preventing the discharge of contaminants which had the effect of preventing a railway from choosing to use a "controlled burn" to maintain the area around its tracks was found not to impair the core of the federal power.

[82] I also agree with the application judge that there can be little doubt that CN will be legally required to obtain some permits and comply with some provincial, municipal, and regional laws and bylaws. As I explain below, I can provide no more precise guidance than this, given the application record.

2024 ONCA 174 (CanLII)

D. DID THE APPLICATION JUDGE ERR BY FAILING TO APPLY THE STAY MOTION JUDGE'S FINDING THAT HALTON'S APPLICATIONS WERE NOT HYPOTHETICAL OR PREMATURE?

[83] The application judge did not err by "ignoring" the stay motion judge's conclusion that Halton's application was not "premature" or "too hypothetical or lacking a concrete factual foundation". The underlying principles of *res judicata*, issue estoppel and abuse of process that Halton is invoking do not apply. Issue estoppel, the branch of *res judicata* designed to prevent re-litigation of issues previously decided in another court proceeding, requires the issue to be the same as the one that was decided in the prior decision: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 23; *Catalyst Group Inc. v. VimpelCom Ltd.*, 2019 ONCA 354, (2019) 145 O.R. (3d) 759, at para. 25. To determine whether the issue is the same, a court is to ask whether "on careful analysis ... the answer to the specific question in the earlier proceeding can be said to determine the issue in the subsequent proceeding": *Heynen v. Frito Lay Canada Ltd.* (1999), 45 O.R. (3d) 776 (C.A.), at para. 20; *Dosen v. Meloche Monnex Financial Services Inc. (Security National Insurance Company),* 2021 ONCA 141, 457 D.L.R. (4th) 530, at para. 59. The stay motion judge's decision that the application before her was not premature or too hypothetical does not determine whether the application before the application judge was too hypothetical or premature because the applications sought different relief, and the

2024 ONCA 174 (CanLII)

positions of the parties had evolved. The issue the stay motion judge resolved was whether the declarations Halton sought in its initial, narrower application were too premature or too hypothetical on the record before her to permit that application to proceed to a hearing, on the premise that CN was claiming absolute immunity as a federal undertaking from all provincial legislation.[4] In contrast, the application judge's task was to determine if, on the factual record before him, the much broader declarations sought in the second revised application were premature or too hypothetical to adjudicate after the hearing, where CN was not claiming absolute immunity as a federal undertaking from all provincial legislation.

[84] In *C.U.P.E.*, at para. 37, Arbour J. does recognize that even where the technical requirements of issue estoppel are not met, it may be appropriate to bar re-litigation using the more flexible abuse of process doctrine. However, given the starkly different issue the application judge was facing, there can be no principled basis for holding based on the principles of abuse of process that he erred in failing to prevent re-litigation as an abuse of process.

[85] I would not give effect to this ground of appeal.

---

[4] Despite its claim before her that some provincial legislation could apply, the stay motion judge decided the motion on the assumption that CN would advance what she found to be its historical position that the intermodal hub project was immune from all provincial legislation. That being the case, she did not require a case specific factual record relating to the application of each of the local laws that were at issue.

2024 ONCA 174 (CanLII)

E. DID THE APPLICATION JUDGE ERR IN LAW OR IN FACT IN DECLINING TO ADDRESS THE CONSTITUTIONAL APPLICABILITY AND OPERABILITY OF THE OVERWHELMING MAJORITY OF THE LISTED LOCAL LAWS?

[86] In this ground of appeal Halton argues that the application judge erred by denying its requests for declaratory relief without addressing the applicability and operability of most of the listed local laws it had identified. I do not understand this ground of appeal to relate to his decision to deny injunctive relief to Halton. I say this because Halton advised us in its submissions that it confined its application for injunctive relief before the application judge to the three bylaws it featured in its submissions, and the application judge gave those listed local laws close attention. He certainly did not decline to address the constitutional applicability and operability of those three bylaws. This ground of appeal therefore focuses on the application judge's conclusions that Halton's application for declaratory relief lacked not only the factual underpinnings to demonstrate a live controversy that warranted declaratory relief, but also lacked the specific information required to resolve whether interjurisdictional immunity applied to these remaining laws, leading him to decline to consider the "premature" "hypothetical questions" that Halton had posed.

[87] I see no error in the application judge's decision to deny declaratory relief on this basis. He applied the correct legal tests, including by placing the burden on

2024 ONCA 174 (CanLII)

Halton to establish the evidentiary foundation for the declarations it sought. His conclusion that the necessary factual underpinnings were lacking was supported by the record and arrived at without palpable and overriding error, and it provided an appropriate basis for his decision to deny the relief requested. Halton argues that the application judge failed to engage with or ignored the evidentiary record, but there is no basis for this submission. As I will explain, I agree with the application judge that Halton failed to provide the information it needed to support the relief it sought and failed to discharge the onus it bore.

2024 ONCA 174 (CanLII)

[88] In any event, as I will explain, the decision whether to grant declaratory relief is highly discretionary. Even if there had been sufficient evidence to permit adjudication and to demonstrate a live controversy relating to some of the laws at issue, the application judge was entitled to choose not to adjudicate those claims, particularly given how the application before him was argued.

(1) The Applicable Legal Principles

[89] In Ontario, declarations are issued pursuant to s. 97 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, which states that the Court of Appeal for Ontario and the Superior Court of Justice "may make binding declarations of right". The decision to grant a declaration is therefore discretionary. Indeed, the law allows for "the broadest judicial discretion" in deciding whether to provide declaratory relief: *Strickland v. Canada (Attorney General)*, 2015 SCC 37, [2015] 2 S.C.R. 713, at

para. 37. The discretion is so broad that a court "may refuse [to make a declaration], even if the case for it has been made out": *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441, at p. 482; see also Lazar Sarna, *The Law of Declaratory Judgments*, 4th ed. (Toronto: Carswell, 2016) at p. 21. Once made, decisions on whether to grant declaratory relief are entitled to "significant deference" on appeal: *Hofer v. Hofer et al*., 2022 MBCA 99, at para. 25.

2024 ONCA 174 (CanLII)

[90] Although declarations "declare" rights, "no 'injury' or 'wrong' need have been actually committed or threatened in order to enable the plaintiff to invoke the judicial process; he need merely show that some legal interest or right of his has been placed in jeopardy or grave uncertainty": *Operation Dismantle,* at p. 457, citing Edwin Borchard, *Declaratory Judgments*, 2nd ed. (Cleveland: Banks-Baldwin Law Publishing Co., 1941) at p. 27. Declarations may therefore serve a "preventative function".

[91] In *S.A. v. Metro Vancouver Housing* Corp, 2019 SCC 4, [2019] 1 S.C.R. 99, at para. 60, the Supreme Court of Canada described the elements that should be present before a judge exercises discretion to grant a declaration:

> Declaratory relief … may be appropriate where (a) the court has jurisdiction to hear the issue, (b) the dispute is real and not theoretical, (c) the party raising the issue has a genuine interest in its resolution, and (d) the responding party has an interest in opposing the declaration being sought. (citations omitted).

[92] Only prerequisite (b) – the requirement that the dispute is real and not theoretical – is in issue. In *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 S.C.R. 99, at para. 11, the Supreme Court elaborated upon this prerequisite by directing that "[a] declaration can only be granted if it will have practical utility, that is, if it will settle a 'live controversy.'" This passage appears to assert that a declaration can never be granted unless the dispute is real and not theoretical but the language used in *Solosky v. The Queen*, [1980] 1 S.C.R. 821, at p. 832 is more permissive in stating that a declaration will "not normally be granted when the dispute is over and has become academic, or where the dispute has yet to arise and may not arise". I need not address whether proof that a dispute is real and not theoretical is a necessary condition to obtaining declaratory relief or simply a typical expectation. That uncertainty does not matter for the purpose of this appeal since even the permissive formulation would, as a matter of law, allow an application judge to deny a declaration after finding that it would not settle a live controversy.

[93] It should also be said that there is no inconsistency between the call for a "real" or "live controversy" as opposed to theoretical or hypothetical dispute, and the preventative function that declarations may be serve. In *Operation Dismantle*, at p. 457, Dickson J., as he was then, made clear that "the preventative function of the declaratory judgment must be based on more than mere hypothetical

2024 ONCA 174 (CanLII)

consequences; there must be a cognizable threat to a legal interest before the courts will entertain the use of its process as a preventive measure."

[94] These principles support entirely the decision made by the application judge to deny the relief requested relating to the remaining laws. I will explain this conclusion by identifying the problems with each of Halton's submissions to the contrary, in light of this body of law.

(2) Halton misidentifies the controversy at issue

[95] Halton argued before us that "CN's extraordinary claim of blanket immunity created a very real, longstanding and extant dispute that cried out for resolution," in other words, a real or live and not just theoretical or hypothetical controversy. It argues that the application judge erred in failing to recognize this. I would not accept this submission.

[96] First, as I have explained, the application judge found that CN did not assert absolute immunity before him. He cannot be faulted for not providing declaratory relief to settle a controversy that he found not to be ongoing at the time the declaration was sought.

[97] Second, and of broader consequence to this appeal, even if the application judge had accepted that CN was claiming absolute immunity, his decision that Halton had not showed that the issues raised in its application were live would still have been correct. The question of whether a request for a declaration raises live

2024 ONCA 174 (CanLII)

issues must be answered according to the issues raised in the application. Halton did not ask the application judge for a declaration that CN does not have absolute immunity. Instead, Halton sought declarations that CN had to affirmatively comply with the listed local laws, without constitutional limitation pursuant to the doctrines of interjurisdictional immunity and paramountcy. To secure the broad declarations it asked for, Halton therefore had to persuade the application judge not simply that CN was claiming blanket immunity, but also that there were real and not theoretical controversies about the application of each and every one of those more than 65 individual listed local laws.[5]

[98] Contrary to Halton's submissions, this case is not like *Daniels*, where the applicants sought a declaration that Métis and non-status Indians are "Indians" pursuant to s. 91(24) of the *Constitution Act, 1867*. That definitional issue was a matter of general controversy, the settlement of which would resolve a jurisdictional controversy that had broad implications for whether the federal Crown owed a fiduciary duty to Métis and non-status Indians. Had Halton asked for a resolution of the general dispute as to whether CN could claim blanket immunity (which I do not intend to suggest would have succeeded) the two cases may have been comparable. But, as I say, it asked instead for declarations relating to the

[5] To be sure, if Halton succeeded in establishing live controversies for some but not all of the more than 65 local listed laws, the application judge could have modified the order and provided a narrower declaration then the one sought, but I will address that issue below, at para. 124.

2024 ONCA 174 (CanLII)

specific application of the more than 65 listed local laws, which necessarily required proof that each of these enactments presented live issues, a point I will return to below.

[99] In my view, the application judge therefore framed the “live issue” question appropriately by focusing on the sufficiency of the record relating to each of the laws in question, and by rejecting Halton’s submission that all it had to show was disagreement over the general reach of CN’s immunity.

(3) The Application Judge did not misapprehend the nature of declaratory relief

[100] Halton argues that the application judge erred by failing to recognize that pre-emptive declarations have been made where no underlying litigation or other proceeding has commenced. The application judge made no such error. As I have described, even where a declaratory judgement is sought for preventative purposes, the application must be based on more than a hypothetical consequence: *Operation Dismantle*, at p. 457. The application judge denied the relief requested, not because it was pre-emptive and no underlying litigation or other proceeding had been commenced, but because of his finding that the outcomes Halton sought to prevent were hypothetical on the record it offered.

[101] In arguing that the application judge misapprehended the nature of declaratory relief Halton also submits that the application judge erroneously

2024 ONCA 174 (CanLII)

advanced the “novel proposition that a request for a constitutional declaration is hypothetical or premature unless it is sought as part of an enforcement proceeding”. The application judge did not advance this proposition. In the impugned passages relied upon by Halton to establish that the application judge did so, the application judge was simply making the point that even though he was denying the application, Halton will not be without a chance to seek relief and raise constitutional issues “when and if a dispute arises on provable facts.” The opportunity to raise those constitutional issues might occur in the course of enforcement proceedings, as the application judge recognized, but it could also occur through properly framed requests for declaratory relief or injunctive relief relating to disputes that are shown to an application judge to have actually arisen or to be likely to arise.

[102] I see no basis for finding that the application judge misapprehended the nature of declaratory relief.

(4) The application did not commit a reversible error by erroneously “foisting” the onus on Halton

[103] Halton also submits that the application judge erred by reversing the burden. It does not point to any case law where an onus of proof has been put on a respondent during an application for a declaration. Instead, Halton argues that in the unusual circumstances of this case, the onus of proof should have been put on

2024 ONCA 174 (CanLII)

CN. This argument is based on the fact that ordinarily applications for declarations relating to interjurisdictional immunity or paramountcy are launched by a proponent of a federal undertaking – as the party challenging the constitutional validity of an impugned law – in which case the proponent will bear the burden of establishing the interjurisdictional immunity or paramountcy it seeks to invoke. Halton says that in this case CN has unfairly attempted to foist that burden onto Halton by claiming blanket immunity, thereby leaving Halton with no choice but to initiate the application on issues that CN should rightly bear the burden of proving. It is on this footing that Halton argues that the application judge should have put the burden on CN to establish interjurisdictional immunity or paramountcy, if it chooses to rely on those doctrines to resist Halton's application for declaratory relief. Accordingly, Halton argues that to meet its burden of providing a factual foundation, all it needs to show is that the listed laws apply to the project.

[104] With respect, this reasoning is misconceived. It is trite law that the party seeking declaratory relief bears the burden of establishing that the perquisites to such relief are satisfied. Naturally, if a proponent of a federal undertaking seeks an affirmative declaration that interjurisdictional immunity or paramountcy applies it will be up to that federal proponent, as the applicant, to establish this, as the application judge recognized. But in the application under appeal, Halton is the applicant. It must discharge the burden of establishing the factual record supporting its claim that the declarations it seeks should be made.

2024 ONCA 174 (CanLII)

[105] Moreover, given the particular declarations that Halton is seeking as the applicant, it cannot reasonably argue that CN should bear the onus relating to interjurisdictional immunity and paramountcy. After all, in its requests for declaratory relief Halton is seeking affirmative declarations, in turn, that paramountcy and interjurisdictional immunity have “no impact on the applicability or operability of the [listed] laws”. Even the requested declaration that CN is “obligated to seek and obtain all requisite approvals under each of the provincial laws” could not possibly be made without the application judge ruling out the operation of both paramountcy and interjurisdictional immunity. The burden is not on the respondent to negate the legal conclusions that Halton wishes to have declared. The relevant burden is on Halton, whose application it is, to establish them.

[106] In my view, given the issues it has raised, in order to establish successfully that the dispute is real and not theoretical or hypothetical, Halton’s onus included providing the application judge with sufficient factual detail to: (1) show that each law would likely be applied to the intermodal hub project; (2) enable the application judge to assess whether each of those laws impairs a core of the federal undertaking (interjurisdictional immunity), or frustrates the purpose of the federal legislation or there was an impossibility of dual compliance (paramountcy); and (3) show that CN was likely to breach each of those laws.

2024 ONCA 174 (CanLII)

[107] Even if these hurdles had been cleared, to succeed in securing the declarations sought Halton would also have been required to affirmatively establish that the things it sought to have declared are legally correct conclusions. The application judge never got to this last stage because of his ruling that Halton had not established the requisite factual record to show that the issues were live, or to analyse whether paramountcy and/or interjurisdictional immunity applied.

[108] The application judge did not err by reversing the onus.

(5) Halton did not provide a sufficient record to show that the issues it raised were live

[109] Halton claims that it provided the application judge with the requisite factual foundation. The parties filed more than 27,000 pages of documents. Included in that record were roughly 500 pages that, according to Halton, listed with particularity every relevant provision of each statute, regulation, and bylaw that CN must comply with" as well as three affidavits showing that "CN would inevitably breach numerous … enactments". It argues that the application judge erred by failing to recognize this and by concluding that Halton merely listed laws that apply when it did much more. I disagree. I see no error in the application judge's conclusion that Halton's record was inadequate.

[110] In its pleadings, Halton did not attempt to address the factual foundation needed to show how each of the more than 65 listed local laws would apply to the

2024 ONCA 174 (CanLII)

intermodal hub. Indeed, in these documents, with the exception of the list of the more than 65 listed local laws attached as an appendix to the application, it barely referred to any of the listed local laws that were the subject of the application. Moreover, its written materials failed to provide a roadmap through the 27,000 pages of material that would realistically enable the application judge to identify and assess evidence Halton was relying upon to meet its onus. Halton was unable to confirm before us in oral argument that it made submissions taking the application judge through the listed local laws to explain why and how they would apply to the intermodal hub project, or how they would be breached. And the written material made no attempt to provide the application judge with the factual foundation needed to determine whether interjurisdictional immunity and/or paramountcy would apply. As indicated, Halton appears to have proceeded on the mistaken assumption that it needed only to list the laws, allude generally to some of the issues that would arise, and show that CN claimed absolute immunity.

[111] The materials that Halton filed before the application judge and directed us to in attempting to establish otherwise, including the compendium titled “Applicable Laws CN Must Comply With” that was put before the application judge, have been reviewed, as Halton requested. That review confirms that the application judge was right in concluding that Halton’s material is insufficient to support the relief it is requesting.

2024 ONCA 174 (CanLII)

[112] For some of the listed local laws, there is no factual basis in the materials to which Halton directed this Court confirming that those statutes would even be engaged. I will use the *Pesticides Act*, R.S.O. 1990, c. P.11 and its associated regulations that the application judge referred to, by way of illustration. That legislation would only be engaged if CN would be using pesticides on the project. Yet there is no factual foundation in the record for concluding that it would.

[113] For some of the listed local laws, there is no foundation in the materials to which Halton directed this Court showing that CN is likely to breach them. For example, property tax bylaws are among the listed laws, but there is no basis offered for concluding that CN intends not to pay those taxes.

[114] For the remainder, no doubt because of Halton's mistaken view as to where the onus lay, the application judge was not provided with sufficient information as to how the listed local laws would affect the intermodal hub project. Without this information the application judge could not affirmatively declare that neither interjurisdictional immunity nor paramountcy would have any impact on the application of those listed local laws. Indeed, with respect to O. Reg 162/06, a regulation of wetlands, shorelines, and watercourses by the Halton Region Conservation Authority, the Benson affidavit discloses that Halton claims the kind of broad permit issuing discretion and infrastructure regulations under this law that could conflict with the intermodal project and trigger an interjurisdictional immunity claim. Ironically, the underlying factual foundation that Halton provided relating to

2024 ONCA 174 (CanLII)

this statute therefore supports the conclusion that the broad, general declarations sought should not issue.

[115] I believe the point has been made. The factual foundation Halton offered was insufficient to support the declaratory relief requested, and the application judge did not err in finding that this was so.

(6) The application judge did not fail to engage with the record

[116] Halton argued that the application judge erred by "refusing to engage with the record," and ignoring "entirely the parties' broader submissions and the extensive evidentiary record before him". It suggests that this error is demonstrated, in part, by the "cursory" Reasons for Judgment the application judge provided.

[117] There is no basis for this claim. As I have explained, the application judge's conclusion that the record is insufficient finds ready support in an examination of the pleadings and documents Halton asked us to review. The focused Reasons for Judgment provided by the application judge do not support an inference that he failed to consider the evidentiary record. He was not required to review the evidence relating to each law, something Halton itself did not do, in order to explain his decision. In my view, his reasons provide absolutely no support for the assertion that he did not engage with the record.

2024 ONCA 174 (CanLII)

(7) The application judge did not misunderstand Halton's use of the three bylaws

[118] Halton submits that the application judge misunderstood its use of the three bylaws by basing his decision to deny declaratory relief on his analysis of those bylaws.

[119] If Halton's suggestion is that it was not in fact relying on the three bylaws in support of its application for declarations, then I am confused by it. Not only was Halton's request for injunctive relief inextricably linked to the issues it raised in its declaration requests, but in its application, Halton sought declarations relating to its list of "Applicable Laws", what I have been referring to as the "listed local laws". All three bylaws are included in that list. It is not surprising that the application judge considered them in determining whether to grant the requested declarations. He would have been remiss had he not done so.

[120] If Halton's suggestion is that the application judge relied only on the three bylaws in denying its application for declaratory relief, it should be evident from my description of the application judge's decision that I disagree. As I have explained, he denied the declarations not on the basis of his analysis of the bylaws alone, but on the insufficiency of the record in support of the sweeping declaratory requests that were being made.

2024 ONCA 174 (CanLII)

(8) Even if there was a sufficient factual foundation in the materials, the application judge was entitled to exercise discretion to deny the injunction.

[121] Even had it been possible to dredge an evidentiary foundation for the declarations that Halton sought from the more than 27,000 pages that were filed, I would still have upheld the application judge's decision to deny the relief requested. As I have explained, an application judge's decision to grant or deny a declaration is highly discretionary, entitled to great deference: *Strickland*, at para. 39. Although that discretion should not be exercised arbitrarily or even unreasonably, the application judge had sound reason for exercising his discretion not to grant those declarations.

[122] First, he found, in effect, that Halton was using its application for improper purposes, namely: (1) to repeat the challenges it had unsuccessfully advanced before the federal regulators, and (2) to prevent the project from being constructed and operated. As I have found, the application judge was entitled to make these findings. In those circumstances it was entirely appropriate for the application judge to exercise his discretion to deny the application.

[123] Second, the application judge was critical of how Halton argued the application before him. As I have indicated, he found that Halton attempted to support its case by: (1) "simply listing 50 or more laws that might apply one day";

2024 ONCA 174 (CanLII)

(2) expecting CN to carry the onus on interjurisdictional immunity and paramountcy; and (3) treating the broad application that was advanced as “simple”, when it was not. As I have also pointed out, Halton provided the application judge with no roadmap through the 27,000 pages of evidence to use in resolving each of the discrete issues its declaratory requests entailed. It has been recognized by the Court of Appeal for British Columbia in *obiter dictum* that “the inadequacy of the arguments presented” is an appropriate basis for exercising discretion to deny a declaration: *Gook Country Estates Ltd. v. Quesnel (City of)*, 2008 BCCA 407, 50 M.P.L.R. (4th) 161, at para. 10. This passage has been quoted with approval on two recent occasions by this Court, in *Bunker v. Veall*, 2023 ONCA 501, at para. 22, and *Bryton v. Capital Corp GP Ltd. v. CIM Bayview Creek Inc.*, 2023 ONCA 363, at para. 64. In my view, when the arguments presented leave an application judge in a position where they must dig randomly through mounds of filed material with little or no guidance, in order to eliminate or confirm the speculative possibility that the material required to resolve complex constitutional issues could be buried inside, a discretionary decision by the application judge to deny the application is not only reasonable, but it should be expected. A litigant who brings a complex application on a large record such as this without providing the application judge with a roadmap does so at their peril.

[124] I will make one final point. I recognize that an application judge faced with an application for a declaration has discretion to provide a declaration that is less

2024 ONCA 174 (CanLII)

sweeping than the one sought: *William v. British Columbia*, 2012 BCCA 285, 33 B.C.L.R. (5th) 260, at paras. 114 - 117, reversed on other grounds in *Tsilhqot'in Nation v. British Columbia* 2014 SCC 44, [2014] 2 S.C.R. 257; Lazar Sarna, *The Law of Declaratory Judgements*, 4th ed. (Toronto: Carswell, 2016) at p. 114. The application judge would not have erred by taking a piecemeal approach and examining for each of the listed local laws, whether a declaration should be issued. However, this, too, is a discretionary determination. Given the state of the record and how this case was argued, I can find no fault in the application judge's decision not to do so.

[125] In my view, the application judge did not err in law or in fact in declining to address the constitutional applicability and operability of the overwhelming majority of the listed local laws.

F. SHOULD LEAVE TO APPEAL THE COSTS AWARD BE GRANTED AND THE APPEAL ALLOWED?

[126] I would not grant Halton leave to appeal the costs award, despite the imposing amount of that award. As always, costs decisions are highly discretionary and afforded significant deference: *Doria v. Warner Bros. Entertainment Canada Inc.*, 2023 ONCA 321, at para. 24; *Feinstein v. Freedman*, 2014 ONCA 205, 119 O.R. (3d) 385, at para. 52. An appeal court should intervene in a costs order only where the application judge makes an error in principle, or the costs award is

2024 ONCA 174 (CanLII)

plainly wrong: *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303, at para. 27; *Association des parents de l'école Rose-des-vents v. British Columbia (Education),* 2015 SCC 21, [2015] 2 S.C.R. 139, at para. 83.

[127] Halton's claim that the application judge erred in principle by refusing to characterize the application as public interest litigation is without merit. This decision by the application judge is entirely understandable given his findings that Halton's application was overreaching, and that Halton was using the litigation to shut down "the construction of the intermodal hub".

[128] Halton also argues that the application judge erred by concluding that "success was not divided". It submits that success was divided because CN failed to establish its claim to absolute immunity. I disagree. CN's claim to absolute immunity was not litigated. CN conceded during the litigation, as it had before the stay motion judge, that it did not have absolute immunity and it ultimately prevailed on all of the issues that were in dispute.

[129] Finally, Halton asserts that the costs award is clearly excessive and inflated, however it offers no factual basis for that claim other the directing this court to its submissions, which contain a bald assertion that CN's legal research and drafting time is excessive given that it has litigated the same constitutional issues before. Halton made a tactical decision to raise more than 65 laws for consideration in its application and to seek sweeping relief relating to a project of obvious importance.

2024 ONCA 174 (CanLII)

In my view, if it wishes to claim that the legal work done in opposition, or the accompanying fees, are clearly excessive and inflated it would need to do more than allude to CN's general litigation experience.

CONCLUSION

[130] I would dismiss the appeal and the application for leave to appeal costs. I would order the appellants to pay partial indemnity costs to the respondents on this appeal of $60,000, inclusive of disbursements and applicable taxes, as agreed to by the parties.

Released: March 7, 2024 "J.S."

"David M. Paciocco J.A."
"I agree. Janet Simmons J.A."
"I agree. Thorburn J.A."

2024 ONCA 174 (CanLII)