CITATION: Regional Municipality of Halton v. Canadian National Railway Company, 2022 ONSC 4644
COURT FILE NO.: CV-18-592382
DATE: 20220810

ONTARIO

SUPERIOR COURT OF JUSTICE

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	)	Kent E. Thomson, Rodney Northey, Steven G. Frankel, and Chenyang Li for the Applicants
– and –	)	
CANADIAN NATIONAL RAILWAY COMPANY	)	
Respondent	)	Sheila Block, Andrew Bernstein, Yael Bienenstock, and Jonathan Silver for the Respondent
– and –	)	
ATTORNEY GENERAL OF ONTARIO	)	
Intervener	)	Padraic Ryan and Otto Ranalli for the Intervener
	)	
	)	**HEARD:** May 30 to June 3, 2022

FL MYERS J:

REASONS FOR JUDGMENT

The Application

[1] CN is building an intermodal hub in the Town of Milton in the Regional Municipality of Halton. The intermodal hub is a huge train station at which freight trains will load and unload shipping containers directly to trucks for local transport to customers in and around the Greater Toronto Area.

[2] An intermodal hub can be contrasted with a more traditional terminal where freight trains used short spur lines to deposit freight at warehouses owned or operated by customers or short haul shippers. In an intermodal hub, there are no warehouses clustered around the train station for customers to receive freight directly from a train. Rather, there are a number of parallel tracks with massive cranes and other equipment to load and unload shipping containers to and from transport trucks. The trucks then take the freight to customers throughout the region.

[3] Local politicians, expressing the views of their constituents, oppose the construction of CN's intermodal hub in their back yards. They opposed it in federal environmental and transport hearings. They opposed it at the federal cabinet. And they continue to oppose it in this proceeding.

[4] The federal government disagreed and has approved the location and construction of the intermodal hub as sought by CN.

[5] The town and region rely on the doctrine of cooperative federalism and especially the principle of subsidiarity. They submit that under the constitution, despite the federal government approvals, federal railway undertakings must still comply with local laws. Therefore, they submit that before CN can construct the intermodal hub, CN needs to apply for local approvals under applicable local laws.

[6] In this proceeding, the local authorities seek an injunction to prohibit CN from constructing and operating the intermodal hub pending compliance with all local laws. They also ask for a declaration that in building and operating the intermodal hub, CN is required to comply with all potentially applicable provincial and municipal laws and bylaws.

[7] For its part, CN submits that as a federal railway undertaking it has obtained all proper approvals under federal planning, environmental, and transportation laws. It argues that it does not need the approval of local authorities before proceeding to construct and operate its intermodal hub. It does not deny that local laws may apply to the intermodal hub. But CN rejects the notion that the local authorities have a right to require it to seek their approval before constructing and operating the intermodal hub as claimed.

The Outcome

[8] Because of the view that I take of this matter, this decision will be relatively brief. I do not intend to make many findings that could impact future proceedings. I am making one very narrow and limited constitutional holding. On the whole, I am adopting the position advanced by counsel for the Province of Ontario who correctly expresses the current state of the doctrine of cooperative federalism and its constituent principles.

[9] NIMBYism is not cooperative. I make no criticism of politicians carrying out their perception of their mandates. Neither do I make any finding that anyone is necessarily biased in any future decision-making process that may occur. I am equally not insulating anyone from claims of bias either.

[10] The simple point is that our complex constitutional division of powers is based on the need for the various levels of constitutional authority to cooperate in the public interest. The federal government has its role. The provincial governments (and their municipalities) have their own roles. There are large swaths in which the roles of both levels of authority overlap. Laws from both levels may apply and may affect works or undertakings within the primary competency of the other level of government. That is where the "cooperative" part comes in.

[11] Despite their opposition to CN's intermodal hub, as the Province of Ontario agrees, the applicants lack constitutional competency to require CN to submit to their discretionary approval processes before it builds its facility. CN has obtained all the federal approvals it needs to construct and operate its intermodal hub at the proposed location.

[12] I want to make clear how narrow this holding is. There are only three municipal laws that have been properly placed before the court at this time. I will discuss below the procedural problem that precludes the

applicants from seeking a generalized injunction or declaration based on "all" of their laws and all provincial laws. I deal only with the laws that are before me that deal with (a) where CN makes its curb cuts to locate road access to and from the intermodal hub on to neighbouring roads; and (b) whether CN needs municipal approval to bring fill, remove topsoil, or change grading on the site of the intermodal hub.

[13] In this proceeding I do not decide whether any of the laws of any of the applicants or the province apply to CN's intermodal hub. Rather, I find only that the applicants cannot use curb cut and grading bylaws to require CN to apply for and obtain official plan amendments with all that that entails prior to proceeding with construction of the intermodal hub.

[14] CN is entitled to build its intermodal hub in the location approved by federal authorities under applicable federal law.

[15] But that does not mean that CN is immune to any or all local or provincial laws. If there is a curb cut issue or a grading issue, those can be discussed between the relevant officials of the relevant bodies. If CN violates a local law that applies to its intermodal hub, the local authority may seek enforcement proceedings. Those proceedings may involve constitutional issues or perhaps not.

[16] Currently however, the applicants have instructed their 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. That is not cooperative federalism or subsidiarity in action. The officials' evidence is that they have meaningful comments to make to CN about some of its technical plans but that they have been instructed by their political masters to refuse to engage with CN until it submits to their authority by applying for exemptions from bylaws and the consequent official plan amendment(s).

[17] 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. Whether the curb cut and grading bylaws laws in issue may apply otherwise, they cannot apply to require CN to seek official plan amendments prior to building its intermodal hub.

The Procedural Issue

[18] The applicants correctly plead that in any constitutional case in which CN seeks to be exempted from the application of a local or provincial law, CN will bear the burden of proof. The applicants have listed more than 50 laws that might apply to CN or its intermodal hub. They submit that in this application CN is required to establish that each law does not apply to it.

[19] I agree with Mr. Bernstein that one cannot foist a constitutional burden on another party in the manner sought by the applicants. It is correct that a litigant that seeks a constitutional exemption from a law bears the burden of proof. But CN is not here asking to be exempted from any laws other than the three dealt with below.

[20] Had CN come to court to say that the 50-plus laws do not apply to it, then it would be required to prove its case on the facts for each and every one. But here, the applicants have purported to bring a hypothetical dispute involving a multitude of listed laws that may or may not ever be applicable.

[21] Today, there is no actual dispute before the court for the bulk of the listed laws. If an applicant later believes that one of the listed laws has become relevant to the intermodal hub, it is possible that CN may not contest that conclusion. The multitude of evidence adduced by the applicants in this proceeding essentially repeats the environmental and planning considerations that the applicants advanced unsuccessfully before federal regulators to oppose the approval of the intermodal hub. There is much evidence about the nature of the planning and environmental concerns raised by the applicants, but not about issues arising from breaches taking place on the ground right now (other than the three laws discussed below).

[22] To take an extreme example, might CN be bound by provincial pesticide laws if one day down the road it decides that it needs to use pesticides at its intermodal hub? The answer will depend on the facts of whether or how CN decides to use pesticides. The court may be required to make findings on evidence about whether the law that limits the use of pesticides in the manner proposed by CN impacts on the federally regulated core of the undertaking and whether compliance with the pesticide laws that do impact the core of the federal head of power or undertaking significantly impairs CN's ability to operate the undertaking as intended.

[23] The factual effect of an impugned law is a key constitutional determinant or factor. Absent a factual dispute, the court will not determine constitutional issues in the abstract. *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31 (CanLII), at para. 46.

[24] The burden might well be on CN in any case in which a constitutional dispute of the type under discussion is properly before the court for consideration. But, 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. Except as dealt with below, there is no factual dispute before the court on which CN shoulders a burden of proof.

[25] Another way to say the same thing is that the bulk of this application is premature. When and if a dispute arises on provable facts, then someone can seek relief and burdens of proof can be discussed. I decline to undertake a constitutional analysis of interjurisdictional immunity or paramountcy in relation to a law in the absence of a live factual controversy.

[26] Moreover, the relief sought is not available in the absence of a live factual controversy. The applicants seek an injunction under s. 440 of the *Municipal Act*, *2001,* SO 2001, c. 25. To qualify for that relief, the applicant must show that someone has contravened a bylaw. That requires factual proof.

[27] Similarly, the law concerning the availability of the remedy of a declaration of right also requires that there be a factual dispute before the court. *Teck Corp. v. Red Lake*, 2001 CarswellOnt 4437 (ONCA).

[28] Whether premised on constitutional justiciability, prematurity, or the prerequisites of the remedies sought, it is not appropriate to embark on consideration of cooperative federalism and paramountcy issues in the absence of factual underpinnings.

[29] The identification of the core of a federal power in a particular case and the degree of impairment proposed are fact specific and nuanced questions. Cooperative federalism does not present a matrix of neat, mutually exclusive pigeonholes into which the court can assign various

laws. Rather, defining the boundaries of the overlapping legislative authority (to define the limits of one side's jurisdiction without unduly impairing the other) is a messy sausage-making endeavour to promote the public interest. It is not simple.

[30] Except as dealt with below, I decline 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.

The Legal Framework

[31] I would not normally set out extensive quotations from a party's factum to state the law. However here, the Province of Ontario takes no position on the outcome. Rather, it has set itself up as the honest broker with a lesson about cooperative federalism for both sides. As a primary constitutional actor, the province has experience in the *realpolitik* of engaging in the messy deliberations required by cooperative federalism as it plays out on the ground.

[32] I have read the factum and heard the argument of the Attorney General for Ontario and agree with it to the extent set out below. I quote it because I can do no better job of summarizing the applicable principles. I accord the factum no weight simply because of its source. I am not engaging in the debate over whether an intervention by one level of government (or the failure to intervene) ought to have some greater weight or implication in a constitutional proceeding such as this one.

[33] Rather, I adopt the following paragraphs (and only these paragraphs) as correct and expressing my views and findings. The bolded and italicized emphasis below is mine. I note that counsel used the defined term "Development" to refer to the intermodal hub:

> 3. Ontario takes no position on whether the specific declarations sought by Halton should be granted. Ontario regrets that the federal government did not place greater weight on the concerns expressed by local residents in making its decision to approve the Development. ***However, given that the federal government has done so, Ontario accepts that it is a clear matter of constitutional law that provincial and municipal law cannot block the Development's construction or operation.***

6. Federal undertakings do not operate as enclaves immune from provincial laws of general application. The norm is overlapping federal and provincial laws, each regulating the matters that fall within their respective jurisdictions and not special treatment for federal undertakings such as the Development. Only exceptional cases depart from that norm. Co-operative federalism is essential to preserving the important role that provincial laws play in protecting Ontarians and our natural environment in a way that also facilitates economic growth. A broad application of interjurisdictional immunity is "not acceptable in the Canadian federal structure". An extensive application of the doctrine is unnecessary and "undesirable in a federation where so many laws for the protection of workers, consumers, and the environment (for example) are enacted and enforced at the provincial level". [Citing *Canadian Western Bank v Alberta*, 2007 SCC 22 at paras. 38 and 45]

7. ***At the same time, provincial laws will be inapplicable under interjurisdictional immunity where the high threshold of impairment of a vital or essential aspect of a federal undertaking is met***. ***A complete prohibition on the construction or operation of such an undertaking will meet this standard.*** A regulatory scheme that prohibits these activities in the absence of a permit or other regulatory decision ("prohibit and permit" schemes) may or may not, depending on the structure of the scheme. Schemes that give provincial officials open-ended discretion to prohibit or intrusively regulate federal undertakings are more likely to trigger interjurisdictional immunity, while schemes that employ narrowly targeted administrative discretion to achieve technical objectives are less likely to. The Court's role in this case is to decide which of the provincial laws at issue fall into the former category and which fall into the latter category.

11. CN received approvals under the *Canadian Environmental Assessment Act* and the *Canada Transportation Act* to proceed with the Development. A Joint Review Panel was struck by the federal Minister of the Environment and Climate Change ("Federal Minister") and the Canadian Transportation Agency ("CTA") ("Joint Review Panel") on December 6, 2016. Three years later, on January 27, 2020 the Joint Review Panel prepared a report for the Federal Minister and Cabinet containing its

conclusions as to the environmental effects of the Development and required mitigation measures. The Report concluded that the Development is likely to cause six significant adverse environmental effects, including risks to air quality and human health.

12. A further year later, on January 20, 2021, the Governor in Council permitted the federal approvals process associated with the Development to proceed. On January 21, 2021, the Federal Minister released a Decision Statement in which he concluded the federal environmental process by attaching 325 conditions to the Development to mitigate some of its significant adverse environmental and health effects. Ontario expects the Development to comply with the conditions and that enforcement measures will be taken against it under federal laws in the event of non-compliance.

13. The Decision Statement provides that the 325 conditions do not "relieve [CN] from any obligation to comply with other legislative or other requirements of the federal, provincial, or local governments", and "[n]othing in [the] Decision Statement shall be construed as reducing, increasing, or otherwise affecting what may be required of [CN] to comply with all applicable legislative or legal requirements". Therefore, Ontario similarly expects the Development to comply with applicable provincial laws.

14. On November 22, 2021, the CTA approved the Development under s. 98 of the *Canada Transportation Act*, which requires the CTA to consider whether, taking into account requirements for railway operations and services and the interests of affected localities, the location of the planned railway is reasonable. The decision provides that "[the CTA's] approval of a section 98 application does not relieve a federally regulated railway company from complying with other applicable legislative or legal requirements, if any".

22. The doctrine [of interjurisdictional immunity] is premised on the idea that each head of power in ss. 91 and 92 of the *Constitution Act, 1867* has a "basic, minimum and unassailable content" that must be protected from impairment by the other level of government in order to make the power effective for the purposef or which it was conferred. In the context of federal undertakings,

the doctrine holds that those undertakings have "vital or essential" aspects that must be protected from impairment by provincial laws.

23. In practice, and in particular since [*Canadian Western Bank v Alberta*, 2007 SCC 22] (and the companion case of *Lafarge*), it is clear that interjurisdictional immunity is of limited value in our system of co-operative federalism. Interjurisdictional immunity is not essential to make federal powers under s. 91 effective for the purposes for which they were conferred.

24. In *Canadian Western Bank,* the Court limited the doctrine in two ways. First, the doctrine should not always be available in every federalism case. Rather, it should only be applied to circumstances established by precedent. Courts have consistently followed this rule. Railways are one of the circumstances well covered by precedent.

43. …[T]here are three categories of cases where provincial law has been found to be constitutionally inapplicable to federal undertakings.

44. First are the 1988 trilogy of cases finding that provincial laws regulating labour relations or management are inapplicable to federal undertakings. For example, in [*Bell Canada v. Quebec (Commission de la Santé et de la Sécurité du Travail),* 1988 CanLII 81 (SCC),] the Supreme Court held that provincial occupational health and safety legislation was constitutionally inapplicable to Bell Canada, a federal undertaking, as the legislation would "enter directly and massively into the field of working conditions and labour relations… and… management and operation", including by imposing a "system of partial co-management of the undertaking by the worker and the employer". In *Canadian National Railway Co v Courtois*, [1988 CanLII 82 (SCC)] the same provincial act was declared inapplicable to CN. In *Alltrans Express Ltd. v British Columbia (Workers' Compensation Board)*, [1988 CanLII 83 (SCC)] certain aspects of the BC provincial *Workers Compensation Act* could not apply to a cross-border trucking undertaking because it would intrude on the management of the undertaking, including the "B.C. Board's power to order an employer to close down all or part of the place of employment to prevent injuries".

45. Second are the cases, generally dealing with provincial and municipal planning and zoning laws, which would regulate the location of federal undertakings or prohibit the construction of a federal undertaking entirely (including "prohibit and permit" schemes where construction is illegal unless planning approval has been obtained). In *Quebec v Lacombe,* [[2010] 2 SCR 453] a Quebec municipality passed a by-law prohibiting the use of lakes in part of the municipality as aerodromes. The Court held that the by-laws was invalid for being in relation to aeronautics. In the alternative, if the law had been valid, it would have been inapplicable under interjurisdictional immunity. In the companion case, *Quebec v Canadian Owners and Pilots Association*, ["*COPA*"] a provincial law that designated various areas of the province as agricultural zones from which all non-agricultural use was prohibited, was found inapplicable to the extent that it presumptively prohibited the locating of aerodromes in agricultural zones.

47. Third are the cases dealing with provincial and municipal planning and zoning laws which would regulate the physical structure of federally regulated undertakings in a way that would impair vital or essential aspects of their operation. In *Orangeville Airport Ltd v Caledon (Town)*, [1976 CanLII 743 (ON CA)] a municipal zoning by-law was constitutionally inapplicable to an airport. The by-law would have had the effect of preventing the building of new hangars. In *Re Walker and Minister of Housing*, [1983 CanLII 1966 (ON CA)] orders imposing height restrictions on lands adjacent to an airport, made under the provincial *Planning Act*, were invalid for being in relation to aeronautics. The purpose of the height restrictions was to ensure aircraft would not be impeded in their flight paths. In *Greater Toronto Airports Authority v Mississauga* [(2000) 50 OR (3d) 641] ("*GTAA*"), it was held that a municipality could not impose its land use development controls (and charges) on the planned expansion of terminal facilities at Toronto's Pearson Airport.[61]

> [61] In *Canadian Western Bank*, the Supreme Court explained the rationale for *GTAA* as connected to the fact that interprovincial and international carriers have a vital and essential interest in being able to land at an airport or have access to a safe harbour, and aircraft cannot remain aloft

> indefinitely awaiting planning permission from other levels of government. The GTAA case was decided before *Canadian Western Bank* raised the threshold for interjurisdictional immunity from "affects" to "impairs".

56. Ontario agrees with Halton that if Halton can establish that certain aspects of the Development are not "vital and essential" to its operations, they do not lie at the core of s. 92(10)(a) or (c). As such, provincial laws remain applicable to these aspects.

57. Other aspects of the Development are "vital and essential". The location of the development, for example, is "vital and essential" to make the federal power over railways effective. ***Ontario agrees with CN that the provincial laws at issue cannot prevent the Development from proceeding in the location that CN has chosen. If they did, that would constitute impairment.***

59. However, the law is clear that federal undertakings are not enclaves immune from provincial laws of general application. Provincial laws may properly apply to the Development, including its vital or essential aspects, as long as they do not reach impairment. ***Provincial laws are more likely to apply outside of the Development property; by definition, surrounding lands are not part of the Development's "core".***

60. A provincial or municipal law is not rendered constitutionally inapplicable whenever it requires approval for a vital and essential aspect of a federal undertaking. ***Instead, the question is whether the provincial law purports to give open-ended discretion to provincial officials to block such aspects of the Development, or whether the law merely empowers an official to ensure compliance with narrow and specific statutory objectives.*** In the former case, the law may well be inapplicable. In the latter case, the law often can remain applicable.

64. ***In contrast, provincial and municipal laws that confer broad discretion on decision-makers to approve the location or impose restrictions or prohibitions on vital and essential aspects of a federal undertaking may rise to the level of impairment, such that federal undertakings may not be required to apply for a permit or approval. Typically,***

> ***planning and zoning laws regulating the location or construction of federal undertakings fall into this category of laws.***[64]
>
> > [64] ***More modest planning or zoning requirements may not amount to impairment. The question is not what area of law the provincial statute falls into, but rather what impact a particular provision has on the undertaking.***
>
> 66. Provincial laws are not rendered constitutionally inapplicable whenever they place some limitations on the operation of vital and essential aspects of a federal undertaking. In *Canadian Western Bank*, the Court noted that RCMP officers, for example, are required to observe provincial highway traffic laws, even though, logically speaking, those laws place limits on the extent of their ability to operate. Those laws do not impair the core of "what they do and what they are" that is of federal interest.
>
> 67. ***However, where provincial laws place significant restrictions on the physical structure of vital and essential aspects of the Development, that impair the operation of the activities of the Development that lie at the core of the federal powers at issue, then impairment is reached and the provincial law will be inapplicable. But only to the extent of the impairment.*** [Footnotes omitted except 61 and 64 quoted above]

The Issues before the Court

[34] Milton bylaw 33-2004 prohibits anyone from placing or removing fill, removing topsoil, and altering the grading of any land without a permit. Para. 10 (j) of the bylaw provides that a permit may be issued when, among other things, planning approval has been obtained.

[35] Milton bylaw 035-2020 requires people to obtain a permit to construct or widen an entrance to a road. Para 19 (c) of the bylaw provides that an applicant for a permit must demonstrate compliance with "Town Standards". That term is defined in para. 1 (26) of the bylaw to include applicable zoning laws.

[36] Halton bylaw 32-17 requires people to obtain a permit to construct an access to a regional road. The bylaw incorporates guidelines implemented from time to time by the region. The current guidelines provide that the region's official plan sets the general practice for access approval.

[37] There is no doubt that CN has commenced construction of the intermodal hub. As part of doing so, it has moved topsoil, altered a Milton road, and added an entrance to a regional road. That is, factually, it has acted without permits under the three bylaws quoted above.

[38] Initially, CN proposed that the principal access to its intermodal hub be located on Tremaine Road. Halton officials expressed a preference that the entrance be located on Britannia Road. CN altered its plan accordingly.

[39] Halton began working on an expansion of Britannia Road in 2019. The project had an expected completion date in 2022. In 2020, the parties were exchanging information and cooperating on developing plans for the access point for the intermodal hub onto Britannia Road. In late 2020 or early 2021, Halton officials ceased responding. The applicants requested that all communication go through counsel. By email dated August 6, 2021, Halton clarified that it would not continue to review information until CN made a formal application for a permit under the applicable bylaw.

[40] Halton has now completed its expansion project on Britannia Road near CN's proposed location of the access gate to the intermodal hub. Halton did not rough-in any infrastructure for the proposed access route.

[41] As mentioned above, Halton officials confirm that they have useful information to convey to CN. But they have been told not to do so until CN applies for permits from the applicants.

Analysis

[42] Each of the three bylaws is clear that the permitting process is not a narrow discussion of a specific local concern about road access or grading. Rather, the process to apply for a permit requires, in each case, official plan compliance more generally.

[43] Barbara Koopmans is the former Commissioner of Development Services for the Town of Milton. She provided much of the background evidence for the town. At para. 171 of her affidavit sworn November 12, 2021, she laid out the town's basic position as follows:

> It is the position of Milton that it is essential to Town planning that ***CN be prevented from proceeding with the 2015 Project*** unless and until it conforms with all applicable official plans, including the Town Official Plan. [Emphasis added.]

[44] The 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. Ms. Koopmans explains further at para. 190 of her affidavit and in cross-examination that planning process will require official plan amendments at both the town and the regional levels.

[45] Lest there be any doubt about the years of administrative proceedings proposed by the applicants, Ms. Koopmans testified:

> 174. A portion of the 2015 Project, however, lies outside the urban boundary. Urban development on these lands – including construction of the 2015 Project – is therefore contrary to the Halton and Milton official plans.
>
> 175. Under section 24 of the *Planning Act*, Halton and Milton cannot pass any by-law that does not conform with the applicable official plans. As Ontario municipalities exercise their powers by By-law, ***Milton cannot support the 2015 Project unless and until the Halton and Milton Official Plans are amended to authorize an expansion of the urban boundary to include these CN Lands.***
>
> 176. The Region is the sole entity with authority to adopt an expansion of the urban boundary and the Province retains the sole authority to approve an adopted expansion. Moreover, except in very limited circumstances which do not apply here, t***he Region can initiate such an expansion only during a "Municipal Comprehensive Review." Such a Review entails consideration of multiple criteria set out in provincial policies to demonstrate the need to expand this boundary.*** The most recent example of a Municipal Comprehensive Review in

> Halton occurred with ROPA 38. If the Halton Council supports amending its Official Plan to expand its urban boundary and obtains provincial approval of this amendment, Milton Council would then amend the Milton Official Plan to reflect that expanded boundary. ***The Region is currently undergoing a municipal comprehensive review and contemplating urban boundary expansions however, the CN lands within the "Future Strategic Employment Area" overlay are not being considered for such expansion through the Region's preferred growth option.***

[46] Even for the three bylaws in issue, the applicants seek injunctions and declarations to prevent CN from proceeding with construction and operation of the intermodal hub until CN applies for and successfully concludes a full zoning and official planning amendment process. Part of that process will require Milton to expand its boundaries and that requires the region to undertake a "comprehensive review" that it chose not to undertake in its current boundary expansion project.

[47] In other words, the municipalities are requiring 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.

[48] I am not finding that the *Planning Act* does not apply to the intermodal hub. The province's factum indicates that the full local planning process is unlikely to apply especially given the multi-year comprehensive federal processes already undertaken by CN with the applicants' full involvement. Perhaps that is why the applicants did not bring *Planning Act* issues forward expressly.

[49] Instead, the applicants submit that narrow issues of road access and grading do not impact or impair the core of the federal undertaking. That too may or may not be the case. But that too is not really what is before me.

[50] Rather, the applicants are 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. In the guise of making discretionary permitting decisions for seemingly narrow local

issues, the applicants seek to prevent CN from constructing and operating the intermodal hub at the approved location. Ms. Koopmans makes clear that the expansion of municipal boundaries and zoning of the location will necessarily be part of the required permitting processes.

[51] The finding that the applicants' proposed injunctions and declarations under the three bylaws will substantially impair the core of the federal undertaking and federal head of power follows readily and I do so find. In this proceeding, the applicants seek to exercise unbridled discretionary control over the existence, location, and construction of CN's intermodal hub.

[52] There is ample precedent for interjurisdictional immunity in relation to the location and operation of interprovincial railway undertakings and undertakings declared to be of national import. *COPA* and *GTAA* provide analogous precedents as well. Operating a railway includes building stations to load and unload freight just the same as airports.

[53] As noted at the outset, this application reduces to a very narrow question. The applicants are 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. The approval of an intermodal hub to be built at the location is the very core of the federal power at issue. The applicants seek veto authority over the heart of the decisions that the constitution assigns to the federal government.

[54] This does not mean that the applicants have no constitutional ability to have input into the location of curb cuts onto roads or the movement of fill or topsoil. The mounds of material before me do not really address concerns or enforcement efforts by the relevant municipal authorities related to narrow, specific bylaw issues. Municipal officials have been prohibited from actually engaging with CN on the merits of the local issues until CN applies for municipal approval of the location and construction of the intermodal hub.

[55] Rather, the huge amount of material filed deals with the applicants' complaints about the merits of the federal approvals. Right or wrong, I cannot re-try the federal approval process. Neither can the applicants.

[56] I agree as well with the Province of Ontario that constitutional relief should be narrowly tailored. What is constitutionally offensive in this proceeding is the applicants' effort to preclude CN from constructing the

approved intermodal hub at its approved location. Halton has refused to discuss its curb cut issues. It does not seek to enforce a specific concern about access to Britannia Road. Milton is not here discussing topsoil or its roadway issues. The applicants want to force CN to apply for their permission to build the intermodal hub at the proposed location. I do not need to rule that curb cut and grading bylaws are constitutionally invalid to find that the request for an injunction to prohibit a breach pending a permit being sought under the bylaws as written is overbroad and would significantly impair the core aspect of the federal power and undertaking.

[57] In my view, this application cannot succeed. If the applicants assert that CN is breaking a law and they want to enforce the law against CN, they or any of them are free to try to do so. If they want to enforce their zoning laws, they can try that one on. If they want to control CN's curb cut location, they can try to do that too. They may find CN quite amenable to technical requests. I make no findings about whether some degree of local regulation of the precise location of the entrance to the intermodal hub or the quality or quantity of fill or topsoil that may be moved in or out during construction might significantly impair the core of the undertaking or the federal power at play.

[58] The Attorney General's factum above expresses the holding that I make as follows:

> **…it is a clear matter of constitutional law that provincial and municipal law cannot block the Development's construction or operation.**
>
> **…provincial laws will be inapplicable under interjurisdictional immunity where the high threshold of impairment of a vital or essential aspect of a federal undertaking is met. A complete prohibition on the construction or operation of such an undertaking will meet this standard.**
>
> **Ontario agrees with CN that the provincial laws at issue cannot prevent the Development from proceeding in the location that CN has chosen. If they did, that would constitute impairment.**

[59] The applicants do not have the right to prevent CN from proceeding with the intermodal hub as asserted by Ms. Koopmans. They cannot require CN to apply for permits that will subject CN to an unconstrained discretionary administrative process as to whether and where it can locate its intermodal facility. Rather, the applicants' roles are to engage in cooperative federalism; to bring to bear the best of their applicable local authority with due regard and respect for the decisions that have been made by the federal government in the national interest.

[60] Cooperative federalism may require tolerance and cooperation where people may not wish to be tolerant or to cooperate. But that is our uniquely Canadian system of division of powers under the constitution.

[61] The application is dismissed.

Costs

[62] CN may deliver no more than five pages of costs submissions by September 2, 2022. The applicants may deliver no more than five pages of costs submission by September 16, 2022. To be considered, each submission shall be accompanied by a Costs Outline. Submissions and Costs Outlines shall be uploaded to Caselines.

FL Myers J

Released: August 10, 2022

CITATION: Regional Municipality of Halton v. Canadian National Railway Company, 2022 ONSC 4644
COURT FILE NO.: CV-18-592382
DATE: 20220810

ONTARIO

SUPERIOR COURT OF JUSTICE

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

– and –

CANADIAN NATIONAL RAILWAY COMPANY

Respondent

– and –

ATTORNEY GENERAL OF ONTARIO

Intervener

REASONS FOR JUDGMENT

FL Myers J

Released: August 10, 2022