

CITATION: Halton v. CNR, 2018 ONSC 6095

COURT FILE NO.: CV-18-592382

DATE: 20181029

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 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:

Ministry of the Attorney General (Ontario), Intervener

BEFORE: Copeland J.

COUNSEL: *Michael S.F. Watson, Rodney V. Northey, and Brent J. Arnold*, for the Applicants/Respondents on motion

Sheila Block, Andrew Bernstein, and Jonathan Silver, for the Respondent/Moving Party

Rochelle Fox and Audra Ranalli, for the Intervener, Attorney General of Ontario

HEARD: September 12, 2018

ENDORSEMENT

Introduction

[1] The Canadian National Railway Company (“CNR”) brings a motion pursuant to s. 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, to stay an application brought by the Regional Municipality of Halton and its constituent municipalities and conservation authority (collectively, “Halton”), pending the outcome of a federal environmental assessment review process.

[2] CNR’s motion was initially framed as a motion to strike the application, or in the alternative to stay it; however, in oral argument, CNR abandoned the aspect of the motion

seeking to strike the application, and only pursued its motion seeking a stay pending the completion of the federal environmental assessment process.

[3] The facts underlying this motion involve a proposal by CNR to develop an intermodal rail hub in Milton, which is within Halton Region. In simple terms, an intermodal hub is a facility where shipping containers that may be carried by rail, truck, and ship can be transferred between rail and trucks.

[4] CNR proposes to build the intermodal hub on 400 acres of CNR-owned land adjacent to the existing CNR main line in Milton.

[5] CNR's proposal to build the intermodal hub is subject to federal environmental review under the *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52 ("The Act" or the "CEA Act"). The federal environmental assessment review of CNR's proposed development has been ongoing for approximately three years.

[6] Halton's application seeks a series of declarations in relation to the applicability of provincial and municipal laws of general application to the proposed intermodal hub development. In essence, it is about division of powers. CNR, as a railway, is a federal undertaking. Halton's application raises issues of whether provincial and local laws of general application apply to the proposed intermodal hub development.

[7] There was extensive evidence filed on the motion of the history of planning for the lands where CNR proposes to build the intermodal hub. It is not necessary for me to summarize it to decide this motion; although I will make some reference to this evidence in general terms in outlining the nature of Halton's division of powers claim.

[8] The merits of Halton's division of powers application are not before me today. I am a step removed, seized only of the issue of whether its application should be allowed to proceed and be heard by this court at this time.

[9] Stepping back, this motion involves different visions of cooperative federalism, the relationship between the courts and administrative bodies, and the appropriate use of judicial resources.

Positions of the parties

[10] I will outline the positions of the parties in very general terms at this stage. I will address more specific aspects of their arguments in the course of my analysis below.

[11] CNR argues that Halton's application should be stayed pending the outcome of the federal environmental review process for reasons related to the timing and factual basis for the application, efficient use of judicial resources, and the relationship between the courts and administrative bodies.

[12] First, CNR argues that the application is premature, and the factual basis is not “ripe” for decision. CNR argues that until the development is approved or not approved in the federal environmental review process, its specific contours cannot be known. The development may not be approved, or may be subject to conditions that will change its scope.

[13] Second, CNR argues that because the development may not be approved, or may change, judicial economy supports staying the application, because depending on the outcome of the federal environmental review process, the application may not be required. CNR argues that given this possibility that the development may not be approved, or may change, the courts should wait until the facts are known before expending the resources necessary to hear the application.

[14] Third, CNR argues that as a matter of administrative law, and “constitutional comity”, the federal environmental review process should be allowed to go first. CNR argues that railways are federal undertakings. The federal environmental review is necessary before this development can proceed. The federal process is ongoing, and Halton is participating in it. CNR argues that allowing Halton’s application to proceed at this time would undermine the federal environmental review process.

[15] Halton argues that its application should be allowed to proceed. Halton acknowledges that whether or not to stay a proceeding is a discretionary decision. Halton argues that the application is important because Halton wants to ensure that the federal review panel considers issues of mitigation of possible environmental harms, and whether the development is justified in all the circumstances. Halton is concerned about local issues such as conditions and circumstances for access to provincial and local roads, compliance with the provincial and local planning process and development charges, as well as environmental issues. Halton raises the spectre of the federal environmental review process reaching a conclusion that “gets it wrong” after a prolonged hearing, which would result in wasted resources (citing the recent Federal Court of Appeal decision involving the Trans-Mountain Pipeline environmental review process in *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153).

[16] Halton argues that neither the federal review panel, nor the Minister of the Environment or the federal cabinet, have the authority to decide the constitutional division of powers questions raised in its application. Halton argues that a ruling from this court on whether provincial laws of general application are applicable to the proposed development is not hypothetical or premature, since CNR was required to submit a detailed proposal for the project. Halton argues that declarations regarding the division of powers issues would be of great practical utility because such declarations would avoid the possibility of the review panel incorrectly (in Halton’s view) accepting CNR’s argument that provincial and local laws are not applicable, and the environmental review and ultimate decision by the Minister being made on an erroneous legal premise. Halton argues that this would not be an interference by the courts in the federal administrative process, but rather would assist the federal process.

[17] Ontario supports Halton’s position. Ontario stresses the preventive role of a declaratory judgment. Ontario argues that there is a present dispute between the CNR on the one hand, and

Halton and Ontario on the other, about whether provincial and local laws have any application to the proposed development. Ontario argues that Halton is entitled to have this dispute decided now. Ontario argues that there is a risk if the application is not heard and decided now, that the lengthy federal environmental review will proceed without properly considering the application of provincial and local laws. Ontario argues that if the application is allowed to proceed now, it would allow the federal review panel to proceed knowing which provincial and local laws apply to the development, which is relevant to the issue of adverse environmental effects that the federal review panel must consider. Ontario also argues that the federal review panel does not have the authority to decide constitutional questions.

The appropriate approach to the exercise of discretion to temporarily stay a proceeding under s. 106 of the *Courts of Justice Act* in this case

[18] Section 106 of the *Courts of Justice Act* grants the court a broad discretion to stay any proceeding in the court “on such terms as are considered just”.

[19] Despite the broad wording of s. 106, in some contexts, this discretion has been interpreted restrictively, and in other contexts, more broadly. Thus, the first issue before me is the appropriate approach to exercising the discretion under s. 106 in the circumstances of this case.

[20] CNR relies on the body of case law relating to staying court proceedings pending the completion of administrative proceedings. The cases CNR relies on include: *Volochay v. College of Massage Therapists of Ontario*, 2012 ONCA 541, 111 O.R. (3d) 561, at paras. 68-80; *C.B. Powell Limited v. Canada (Border Services Agency)*, 2010 FCA 611, [2011] 2 F.C.R. 332, at paras. 30-33; *Coalition of Citizens for a Charter Challenge v. Metropolitan Authority* (1993), 108 D.L.R. (4th) 145 at paras. 15-22, 35-43 (NSCA); and *Drennan v. K2 Wind Ontario Inc.*, 2013 ONSC 2831 at paras. 10-11, 36-63. This body of case law focuses on the following types of factors as relevant to whether a judicial proceedings should be stayed pending the outcome of a related administrative proceeding:

- respect for a legislative decision to create an administrative body to consider a particular issue or issues;
- the appropriate relationship between the courts and administrative bodies;
- the relative overlap between the court proceeding and the matter before the administrative body;
- whether administrative proceedings already are in progress, and if it is premature for the courts to intervene;
- efficient use of judicial and legal resources, and avoiding a multiplicity of proceedings.

[21] In their written arguments, Halton and Ontario did not significantly brief the issue of what legal standard should be applied in considering a motion for a temporary stay of a proceeding. I suspect this is because the focus of CNR's written argument was on striking the application, rather than temporarily staying it. As I note above, in oral argument CNR abandoned the request to strike the application, and instead focused on a request for a temporary stay of the application, pending the outcome of the federal environmental review process. Nor did CNR's written materials address case law under s. 106 of the *Courts of Justice Act* in relation to temporarily staying a proceeding pending the outcome of another proceeding.

[22] As a result, during the hearing I requested additional written submissions on the body of case law developed under s. 106 of the *Courts of Justice Act*, exemplified by cases such as: *Hollinger International Inc. v. Hollinger Inc.*, 2004 CanLII 7352 at para. 5 (ONSC); *Canadian Standards Association v. P.S. Knight Co. Ltd.*, 2015 ONSC 7980 at paras. 25-26 (and see generally at paragraphs 22-26); *Hathro Management Partnership v. Adler*, 2018 ONSC 1560 at paras. 7-13; *Gowling Lafleur Henderson LLP v. Meredith*, 2011 ONSC 2686 at paras. 13, 17-18 (Master's decision).

[23] This body of case law developed under s. 106 holds that the decision to temporarily stay a proceeding is discretionary, and is a case-specific decision to be exercised taking into account all of the circumstances in a particular case. The party seeking the stay bears the burden to show it is justified. This body of case law supports the position that the power to stay a proceeding should be exercised sparingly. Some cases speak of a high burden to be met before one proceeding is stayed in favour of another. However, it also is clear that the decision whether or not to grant a stay is a discretionary decision, and will depend on all of the circumstances.

[24] This body of case law supports the consideration of the following types of factors in considering whether to grant a temporary stay of a proceeding:

- whether there is substantial overlap of the issues in the two proceedings;
- whether the two proceedings share the same factual background;
- differences in the substantive scope and remedial jurisdiction as between the two proceedings;
- the comparative progress of the two proceedings;
- whether issuing a temporary stay will prevent unnecessary and costly duplication of judicial and legal resources, and concern to avoid a multiplicity of proceedings;
- the balance of convenience as between the parties if the stay is granted or denied.

[25] Not all of these factors will be relevant in every case, and this list of factors is not exhaustive.

[26] Comparing the two bodies of case law, the body of case law relied on by CNR, which focuses on the relationship between administrative proceedings and the courts, tends to favour allowing administrative proceedings to be completed prior to intervention by the courts. It does not speak to a high burden on a party seeking to stay a court proceeding pending the completion of an administrative proceeding. By contrast, the body of case law developed under s. 106 of the *Courts of Justice Act* speaks to there being a high burden to be met by a party seeking to stay a proceeding. Many of these cases do not address the issue of the relationship between courts and administrative bodies, but that it because on their facts, many of these cases involve whether to grant a stay as between two court proceedings.

[27] I am also conscious of the fact that many, but not all, of the cases relied on by CNR arise in the context of judicial review, and thus involve the issue that judicial review is a discretionary remedy. That said, a stay is also a discretionary remedy. As a result, the fact that this case does not involve an application for judicial review does not, in itself, remove the relevance of cases arising in the judicial review context.

[28] Further, although there are differences between these two bodies of case law, there is also much commonality. Both involve how a court should exercise a discretion to allow one proceeding to go before another. Each body of case law is clear that the decision to stay one proceeding in favour of another is a discretionary decision, which is fact-specific, and must be made taking into consideration all of the circumstances of a particular case.

[29] Both of these bodies of case law also share a concern that similar types of factors are relevant in assessing how to exercise the discretion, although they do not necessarily use the same language in describing those concerns. These factors include:

- considering the legal and factual overlap between the two proceedings;
- considering the remedial jurisdiction as between the two proceedings;
- considering the comparative progress of the two proceedings;
- considering the impact of granting or not granting a stay on the parties;
- considering whether a temporary stay will prevent inefficient use of judicial and legal resources.

[30] The issue in each case is how to appropriately balance these types of concerns on a particular set of facts. I do not find it helpful in the particular circumstances of this case to focus on how high or low the threshold is to temporarily stay a proceeding. However, I accept that among the variety of factors that should be considered in this case, is the relationship between the courts and administrative proceedings, where a legislature has made a decision to create a specialized administrative body to review or consider a particular issue or set of issues. This is a factor which will weigh in favour of caution on the part of the courts before taking action that will have the effect of the court stepping into the administrative proceeding.

[31] This factor of the appropriate relationship between the courts and administrative bodies is a factor which in this case mitigates the discussion in some of the case decided under s. 106 about a high threshold for a stay to be granted. However, I underline that the case law is clear that the decision to temporarily stay a proceeding pending the outcome of another proceeding is a discretionary decision. It must be made considering all of the circumstances, and balancing the types of factors outlined at paragraphs 28-29 above. The relationship between the courts and administrative bodies is but one factor to be considered.

Should a stay be granted in this case?

[32] I turn then to various factors that I consider in assessing whether it is appropriate to stay Halton's application pending the completion of the federal environmental review process.

(i) Nature of the federal environmental assessment process

[33] As noted above, the federal environmental assessment review for CNR's proposed development is ongoing. I will briefly outline what this process involves, the applicants' ongoing participation at each stage of the federal environmental review, and the current status of the review.

[34] The *Canadian Environmental Assessment Act* governs the environmental assessment process.

[35] Section 4(1) of the Act sets out the purposes of the Act. In addition to the various purposes relating to protection of the environment that one would expect, s. 4(1) includes a number of other purposes. Section 4(1)(c) provides that one of the purposes of the Act is "to promote cooperation and coordinated action between federal and provincial governments with respect to environmental assessments". Section 4(1)(e) provides that another purpose is "to ensure that opportunities are provided for meaningful public participation during an environmental assessment". I note as well that s. 4(1)(d) sets out a purpose of promoting communication and cooperation with Indigenous peoples with respect to environmental assessments. Taken together, these provisions make clear that the federal environmental process includes in its purposes cooperation and consultation with provincial governments, the public, and Indigenous peoples.

[36] Section 19(1) of the Act sets out a number of factors that the environmental assessment of a project must take into account. These factors include: the environmental effects of the project, including the possibility of accidents or malfunctions, and cumulative environmental effects; the significance of any environmental effects; comments from the public; measures which could mitigate any significant adverse environmental effects of the project; alternative means of carrying out the project and the environmental effects of any alternative means; and any other matter that the Minister requires to be taken into account.

[37] The federal environmental review process involves a number of steps. Initially, the proponent of a project must submit a project description to the Canadian Environmental Agency (“the Agency”) (s. 8 of the Act). The project description is made available for public comment (s. 9 of the Act). Then, based on a review of the project description and the public comments, the Agency makes a screening decision to decide if an environmental assessment is required (s. 10 of the Act).

[38] Once the Agency has decided that an environmental assessment is required, the Minister of the Environment has the authority to decide whether to refer the environmental assessment to a review panel (s. 38 of the Act). The effect of this authority of the Minister is that a decision is made between two types of review, an internal review, or an independent panel review. The latter is a more involved process.

[39] In this case, a decision has already been made by the Minister to refer the environmental assessment of CNR’s proposed development to an independent panel review, and that review panel has commenced its work.

[40] The proponent of the project (in this case, CNR) must then prepare an Environmental Impact Statement (“EIS”). This is a report addressing the environmental effects of the proposed development and measures to mitigate those effects. The Agency has guidelines for what must be included in an EIS.

[41] The Agency then reviews the EIS to ensure that it conforms to the guidelines in terms of content.

[42] Once the independent review panel is appointed, it begins its review of the EIS. Section 42(1) of the Act requires that the federal Minister of the Environment must establish the review panel’s terms of reference, and appoint the members of the review panel, who must be “unbiased and free from any conflict of interest relative to the designated project and who have knowledge or experience relevant to its anticipated environmental effects”.

[43] The first stage of the review by the panel is the sufficiency review (s. 44 of the Act). At this stage the review panel may make information requests to the proponent of the project. The review panel also solicits and receives information from the public. At this stage, the review panel must satisfy itself that it has enough information to move forward with the review. As I outline below, the environmental review of CNR’s proposed project is currently in this stage of the process.

[44] The next stage of the review is public hearings (generally, ss. 43-46 of the Act).

[45] After the public hearings are completed, the review panel considers the record before it, and writes a report with its findings and recommendations. The recommendations will include whether the review panel recommends that the development be approved, or not. If the review panel recommends that the development proceed, the recommendations may include mitigation measures, that is, recommended changes or conditions to the development to address environmental or local concerns (ss. 44(d)-(f) of the Act).

[46] The review panel does not have any powers of decision. Rather, the decision-making powers rests with the Minister of the Environment and the federal cabinet.

[47] The next step is for the federal Minister of the Environment to consider if the proposed development is likely to have any adverse environmental effects, and is so, whether those effects are significant (ss. 47 and 52 of the Act).

[48] If the Minister decides that the proposed development is likely to have significant adverse environmental effects, then she must refer it to the Governor-in-Council (i.e., the federal cabinet). It is then up to cabinet to decide whether the environmental impacts are justified in the circumstances (s. 52 of the Act).

[49] The Minister then issues a decision on whether the project is approved. If the project is approved, the Minister's decision statement must specify any mandatory conditions for mitigation of environmental effects (ss. 53 and 54 of the Act).

[50] I note a number of aspects about the federal environmental review process that are relevant considerations in assessing CNR's request for a stay of Halton's application. First, the review panel has no decision-making authority. Its function is limited to assessing the proposed development, and making findings and recommendations to the Minister and the federal cabinet. Decision-making authority rests with the Minister and the federal cabinet.

[51] Second, neither the review panel, nor the Minister, nor the federal cabinet has the authority or jurisdiction to grant a declaration in relation to division of powers issues as they relate to the proposed development.

[52] Third, the expertise of the review panel is in environmental issues. It has no expertise or experience in considering legal issues relating to the constitutional division of powers. Nor does the Minister or the federal cabinet have this expertise. That is not to say that the review panel or the Minister or the Cabinet will not consider local issues and local impact. Indeed, the record before me shows that the review panel is mandated to consider various local concerns and impacts, which I outline in more detail below.

[53] These aspects of the nature of the federal environmental assessment process are relevant to considering whether to grant the stay requested by CNR. However, as with any set of factors in the analysis, they are not determinative and must be balanced in the context of other factors relevant to whether or not to grant a stay.

[54] Halton has participated extensively in the federal environmental review process for this project since 2015, and continues to do so.

[55] In March 2015, CNR submitted a project description to the Agency. The record before me shows that the CNR listed the applicants at stakeholders in its project description submitted for the environmental review.

[56] The Agency requested written comments early in the process in relation to whether an environmental assessment should be required. In April 2015, the five constituent municipalities among the applicants and Halton Region Conservation Authority each made submissions in response to this request for comments. In these submissions, the applicants took the position that an environmental assessment of the project was necessary, and that it should be referred to a review panel. Following public consultation, on May 22, 2015, the Agency decided that a federal environmental assessment would be required.

[57] In May 2015, the Agency released draft guidelines for the preparation of the EIS for CNR's proposed project, and invited public comments on the draft guidelines.

[58] In June 2015, the five constituent municipalities of the applicants, and the conservation authority, wrote to the Agency to provide comments on the Agency's draft EIS Guidelines to the CNR for the project. This submission included proposed additions or clarifications to the draft EIS Guidelines.

[59] Following these submissions, on July 20, 2015, the federal Minister of the Environment decided to refer the environmental assessment of the project to a review panel, the more in-depth type of environmental review. In the Minister's letter to counsel for the applicant municipalities, she encouraged them to participate in the review panel process, including the public hearing. She also invited them to identify potential candidates for consideration for appointment by the Minister as members of the federal review panel. I note as well that the Minister indicated as follows:

In response to issues raised through the recent public comment period, the Environmental Impact Statement Guidelines for the Project will include additional information requirements as part of the federal environmental assessment, including requirements in relation to:

- municipal land use, including present and approved land uses;
- human safety in relation to motor vehicle safety and pedestrian/bicycle safety; and
- human health, including potential changes in air quality, drinking water quality and noise exposure in the Project vicinity.

[60] On the same date, the Agency released its final guidelines for the EIS to be prepared by CNR for the proposed project. The final guidelines for the EIS include requirements to assess effects of the proposed project related to air quality, drinking water quality, noise exposure; municipal and regional land use planning; as well as human safety in relation to motor vehicle safety and pedestrian and bicycle safety within the entry points of the project site (i.e., road safety issues).

[61] Thus, the Minister's decision referring the project to a review panel mandated that the panel include in its assessment consideration of municipal land use, human safety in relation to

motor vehicle safety, and human health, including air quality, water quality, and noise exposure. In addition, the Agency's guidelines for the EIS, which CNR was required to prepare about the project, required it to address these issues in its EIS.

[62] In August 2015, the Agency made funding available to groups and members of the public to assist in their participation in the environmental assessment. Among the groups granted funding was the applicant conservation authority.

[63] The CNR submitted its EIS in December 2015. The Agency posted it online and notified interested parties in January 2016.

[64] In June 2016, while the Agency was still engaged in the conformity review of the CNR's EIS for the proposed project, the federal government posted for public comment a draft agreement to establish a joint panel to review CNR's proposed project, both for the environmental review under the CEA Act, and pursuant to s. 98 of the *Canada Transportation Act*, S.C. 1996, c. 10. The reason for the involvement of the Canada Transportation Agency is that s. 98(2) of the *Canada Transportation Act* requires that in considering whether to approve a railway line, the Canada Transportation Agency must decide if the location of the proposed railway line is reasonable, taking into consideration "requirements of railway operations and services and the interests of the localities that will be affected by the line".

[65] In July 2016, the five constituent municipalities of the applicants and the conservation authority made submissions to the Minister and the Agency in response to the draft terms of reference for a joint review panel to conduct the environmental assessment and consider the issue of the approval under s. 98 of the *Canada Transportation Act*.

[66] In December 2016, the Minister of the Environment and the Chair of the Canada Transportation Agency formally announced the agreement to appoint a three-member joint panel to review CNR's proposed project, both for the environmental review under the CEA Act, and pursuant to s. 98 of the *Canada Transportation Act*.

[67] Following the appointment of the joint panel, in December 2016, the municipalities among the applicants submitted to the Agency a three volume brief addressing provincial and municipal land use standards relevant to the project, and addressing the relationship between the CEA Act environmental assessment framework and the provincial and municipal land use and planning regimes. The municipalities took the position that provincial and municipal land use and planning standards are relevant to assessing "significant adverse environmental effects" under the CEA Act (and continue to do so).

[68] Since December 2016, the review panel has been engaged in the sufficiency review of the EIS submitted by the CNR about the project. As part of the sufficiency review, the review panel has made more than 200 information requests to CNR, some of which were based on public and Agency input to the review panel.

[69] In January 2017, the review panel wrote to the applicants inviting their submissions on whether there was sufficient information available for the environmental review before it

proceeds to a public hearing, and inviting them to participate in an orientation session for the review process to be held in March 2017. This request for submissions included a specific request that the applicants comment on the project's EIS and associated records from the perspective of the applicants' mandates and expertise, and provide their views on whether there was sufficient valid information before the review panel for the panel to consider the likelihood that the project would cause significant adverse effects, the predicted effectiveness of proposed mitigation measures, and the appropriateness of proposed follow-up programs. In addition, the review panel requested that the applicants provide the details of legislative, policy, or other directives under the responsibility of the applicants that may relate to the project or the environmental assessment. I take this last request to refer to provincial and local laws, policies, or by-laws that are relevant to the project and its impacts.

[70] In response to these requests, the municipalities and the conservation authority each made lengthy submissions to the federal review panel in February 2017 addressing local impacts. The local impacts addressed in the submissions included a wide variety of provincial laws and local laws, including those affecting planning, roads, and the environment.

[71] The applicants made further significant submissions regarding the sufficiency review of CNR's EIS for the project in March 2017.

[72] Halton's participation in the federal environmental review process included making submissions to the review panel about division of powers issues. I discuss these submissions by Halton in more detail below at paragraphs 89-94.

[73] The public hearings regarding CNR's proposed development had not yet been scheduled or started at the time of the hearing of this motion. I was advised at the hearing of the motion that it was anticipated that the public hearings would take place in late 2018 or early 2019. I suspect that late 2018 is optimistic.

[74] In January 2018, the review panel issued draft public hearing procedures for purposes of public comment. The applicant municipalities made a submission in response to the draft hearing procedures addressing various submissions about how the hearing should be conducted. In addition, Halton has indicated that it proposes to call 23 witnesses during the public hearings. Counsel for CNR advised at the hearing of the motion that CNR may seek to call three times as many witnesses.

[75] As this summary makes clear, throughout the environmental review process to date, both the Agency and the review panel have invited public comment, including specific invitations to the applicants to comment at various stages of the proceedings. The review panel has been specifically mandated by the Minister to consider local concerns as part of its environmental assessment, including municipal land use, human safety in relation to motor vehicle safety, and human health, including air quality, water quality, and noise exposure. The requests for submissions from the Agency and the review panel have included requests to address these issues, and the submissions made by the applicants both to the Agency and to the review panel have addressed these issues.

[76] In light of this, I find that on the record before me, I am satisfied that the federal environmental assessment process will consider the local concerns raised by the applicants in relation to issues such as municipal land use planning, human safety in relation to motor vehicle safety, and human health, including air quality, water quality, and noise exposure. I appreciate that this is not the same as ruling on a division of powers issue, and I discuss how that weighs into my exercise of the discretion whether to grant a stay below.

(ii) Nature of Halton's division of powers application

[77] The reason that Halton brought the underlying application is a difference of position between it and the CNR regarding application to the proposed project of provincial and local laws of general application.

[78] The CNR is a railway, and as such, is a federal undertaking, subject to federal jurisdiction. This does not end the question of whether it is also subject to provincial and local laws of general application.

[79] Halton's application seeks five declarations. All of the declarations sought relate to the applicability of provincial and local laws of general application to the proposed development. Without listing all of the provincial and local laws about which Halton seeks a ruling in relation to their application to the proposed project, they include laws relating to provincial and regional land use planning, roads and road safety, and environmental laws such as those relating to water, waste, waste-water, soil contamination, and noise.

[80] I will not expand on local concerns in relation to the environment, water, waste, waste-water, soil contamination, and noise caused by CNR's proposed project and related issues, as the local interest in these issues is obvious.

[81] In relation to roads, the local concerns as they relate to this project arise from the fact that, by its nature, an intermodal rail hub will have impacts on roads. This arises from the need for the project to connect to local and provincial roads for trucks to access the facility, and the impact of increased truck traffic on provincial and local roads because of the number of trucks that will access the facility.

[82] I want to briefly outline the context of the issues in relation to land use planning, as they are clearly important to the applicants. In general terms, the relevant planning legislation and regional planning frameworks for the area where CNR's proposed project would be located impose various requirements on the applicant municipalities. These planning documents are developed on a multi-year basis. In Milton, where this development is proposed, the planning framework must accommodate a massive amount of population growth in the area in recent years, which is projected to continue.

[83] One aspect of the planning framework is designating sufficient lands for various purposes to meet provincial employment targets, and population density targets. The proposed intermodal

hub would conflict with the employment and density targets currently in place as a matter of provincial and local law, because an intermodal rail hub involves a relatively small number of jobs in relation to the amount of land it occupies.

[84] I note that the cause of this conflict, at least in part, is that CNR had previously (in 2008) proposed a different use for this land as a direct rail-serviced industrial park. That use would have involved a much larger number of jobs for the property than CNR's current proposal to build an intermodal rail hub. This is because a direct rail-serviced industrial park involves a variety of businesses locating on the property, and then being served by the rail lines there. Each of these businesses would have its own employees, and thus would generate more jobs on the property than the intermodal rail hub, which has relatively far fewer employees, as the only business is the movement of containers from rail to truck, or truck to rail. The regional planning based its high employment targets for the area on that previous different proposed use, which involved many more jobs on the property.

[85] A further concern of the applicants is development charges. Development charges are part of how the region plans and finances municipal services, such as water services, waste-water services, roads, police services, etc. Under the local development charges by-law in the area where CNR's proposed development would be located, development charges are based on the total floor area of the building or buildings on a property. The difficulty that the applicants have with CNR's proposed development is that a rail intermodal hub has very few buildings, particularly as compared to the direct rail-serviced industrial park that CNR had proposed in 2008. Thus, the proposed intermodal hub would generate a relatively limited amount of money in terms of development charges compared to other possible uses of the land.

[86] The reason that the applicants seek a ruling from this court on the division of powers issues is that the CNR has taken the position in submissions to the review panel that as a railway, 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.

[87] I note that in oral submissions on this motion, CNR argued that its position on division of powers is not as black and white as that, and directed me to places in the record where it has indicated that it will seek provincial or local approvals as required.

[88] It is true that from time to time CNR has said it will consider seeking provincial and local approvals on a case-by-case basis as needed. But given CNR's clear statements in a response to a request for information from the federal review panel that it is only subject to federal jurisdiction, I consider the issue of whether to grant a stay assuming that CNR's position is that it is not subject to provincial jurisdiction.

[89] I will not summarize every statement made by CNR or the applicants about their respective positions on division of powers and the application of provincial and local laws to the proposed project. But a reference to a few portions of the proceedings in the federal environmental review shows the differences of position.

[90] In its EIS, submitted to the Agency in December 2015, CNR took the position that as a federally regulated railway, it is subject to applicable federal legislation. It further took the position that provincial and local legislation that encroaches on CNR's core activities, or that is inconsistent with federal legislation does not apply to it (in particular at pp. 8-11 of the EIS). The EIS did not specify what provincial or local legislation, if any, CNR considered did apply to it.

[91] When the review panel was appointed, in response to concerns raised by stakeholders, including the applicants, the review panel required information from CNR to clarify the position taken in the EIS on the applicability of provincial and local laws to the proposed development. The review panel posed a series of questions relating to what provincial and local laws CNR had taken into consideration in planning the proposed project (and how these laws had been considered), and specifically, what provincial and local law CNR considers to encroach on its core activities or be inconsistent with federal legislation, and why (Information request Package 2, May 5, 2017, sections 2.1 to 2.5). These information requests clearly engage the issue of what CNR's position is about the application of provincial and local laws to the project, CNR's position on the extent to which local laws encroach on its core activities, and what CNR considers to be its core activities (and why). These questions clearly engage the division of powers concerns that the applicants have raised in their application to this court.

[92] CNR responded to this information request in August 2017. In its response, CNR took the position that as a federal undertaking, the decision of where to locate an intermodal rail hub is entirely within federal jurisdiction, based on the doctrines of interjurisdictional immunity, and paramountcy. The submission is quite lengthy, but a short excerpt gives a flavor of the nature of the submission:

It is CN's view that all aspects of the construction and operation of an interprovincial railway (which includes any terminal integrated with that railway) fall within the exclusive powers of the federal government and, as such, any valid provincial (or municipal) law that might otherwise apply to the Milton Logistics Hub project is rendered constitutionally inapplicable under the doctrine of interjurisdictional immunity.

Even if there was no exclusivity protection – no law of interjurisdictional immunity – the same basic result would follow from a paramountcy analysis under the conflict of purpose branch of that doctrine. A conflict of purpose will arise where the purpose of the federal law is to vest decision-making authority with respect to a project on a federal agency, and the provincial law interferes with this purpose. Any attempt by the Province (or a local authority acting under the delegated authority of the Province) to exercise approval authority over whether the Project can proceed at all, or on what terms it may be constructed or operated, would be inconsistent with the express federal intent to do just that under the *Canada Transportation Act*.

[93] Although the CNR took the position that it had “considered” various provincial and local laws in planning for the proposed project, its position was that none of these provincial and local laws actually applied to the project, because it was exclusively within federal jurisdiction.

[94] By contrast, Halton has taken the position continuously in its submissions to the Agency and the review panel that provincial and local laws of general application are applicable to this project, including laws affecting land use planning, human safety in relation to motor vehicle safety, and human health, including air quality, water quality, and noise exposure. Halton takes the position that the scope of interjurisdictional immunity is narrower than CNR argues. Halton takes the position that federal and provincial laws of general application apply to a federal undertaking, unless they impair a vital aspect of the management or control of the federal undertaking. With respect to paramountcy Halton takes the position that although provincial and local laws as they apply to CNR’s proposed project may in some cases add additional requirements, they do not conflict with federal law, and thus both can apply. They further take the position that the provincial and local laws that apply to the proposed project do not frustrate the purpose of any federal law, and thus do apply to the project (see for example, the Halton Municipalities Brief filed in December 2016 at pp. 14-16).

[95] The merits of the respective division of powers positions of Halton and the CNR are not matters I need decide on this motion, other than to comment that Halton’s position is certainly arguable. Federalism jurisprudence in Canada for the last approximately 30 years, has been marked by a recognition that the spheres of jurisdiction of the federal and provincial governments overlap, and are not water-tight compartments: *British Columbia v. Lafarge Canada*, 2007 SCC 23, [2007] 2 S.C.R. 86, at paras. 36-37; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3; *Chatterjee v. Ontario*, 2009 SCC 19, [2009] 1 S.C.R. 624, at para. 2.

[96] Although the federal review panel does not have a specific mandate in relation to the constitutional division of powers, it does have a clear mandate to consider local issues, and as I have outlined above, is engaged in considering those issues.

[97] I do consider it to be relevant to assessing CNR’s request for a stay that although the federal review panel does not have the power to decide division of powers issues, it is specifically mandated to consider local concerns and impacts. On the record before me, it is clear that the review panel is considering division of powers concerns as part of its assessment of local concerns and local impacts. In considering these issues, the review panel has invited participation from Halton. And Halton has extensively participated, and put its positions, and evidence, forward to the review panel about its local concerns, including the division of powers issues and the application of provincial and local laws of general application. On the record before me, the review panel is welcoming Halton’s participation in the public hearings, and Halton is intending to participate.

[98] As a practical matter, the review panel’s consideration of local issues and local impact will touch on many of the issues that are the substance of Halton’s application before the court,

including, provincial and regional land use planning, human safety in relation to motor vehicle safety, and human health, including air quality, water quality, and noise exposure.

[99] Thus, I find on the record before me that the federal environmental review panel is engaged in the local concerns raised by Halton, including the issues arising out of provincial and local laws of general application. Again, I appreciate that this is not the same as ruling on a division of powers issue, and I discuss how that weighs into my exercise of the discretion whether to grant a stay below.

(iii) Are the declarations sought too hypothetical or lacking concrete facts at this stage?

[100] I do not agree with the portion of the CNR's submission that argues that the application for a declaration should be stayed because the issues are hypothetical, or lacking concrete facts at this stage.

[101] On this issue, the CNR argues that the division of powers issues cannot (or should not) yet be determined by this court because the contours of its proposed development may change based on the results of the environmental assessment process. CNR argues, for example, that the project may not be approved, or that if it is approved, the environmental review panel may recommend, and the Minister may impose, changes to the proposal as conditions of approval.

[102] One example given by the CNR during the argument of the motion was that a truck gate at a particular location might be changed, and for that reason the facts are not sufficiently fixed for the court to hear and decide Halton's application now.

[103] With respect, CNR's argument on this issue overstates the level of factual detail necessary for a court to determine an issue of division of powers. There is a concrete proposal for the intermodal hub. The CNR was required to submit a concrete proposal as part of the environmental review process. Although there may be changes required to that proposal as a result of the environmental review process, it seems to me extremely unlikely that the changes would be such as to change the character of the development for purpose of analyzing questions of division of powers. Issues such as the location of a particular truck gate are far more granular than would be of concern to a court considering the division of powers issue of whether particular provincial or local laws of general application apply to the development of an intermodal rail hub. The location of a particular truck gate is unlikely to affect the analysis of whether building or operating an intermodal rail hub is a "vital aspect" of a railway as a federal undertaking.

[104] Rather, in considering the division of powers issues raised in Halton's application, a court would be looking at a bigger picture level – for example, is the manner in which a railway facility connects to provincial or municipal roads a "vital aspect" of the federal undertaking, such that provincial or local laws of general application relating to roads do not apply to it? Or whether applying provincial laws regarding construction of water and waste-water works, or storm-water and drainage works creates an express contradiction with an applicable federal law,

or impairs a vital aspect of a railway as a federal undertaking? The types of conditions that might be placed on this development as conditions of environmental approval are unlikely to change the factual matrix sufficiently to change the answers to those questions.

[105] Thus, I do not accept CNR's argument that the declarations sought are too hypothetical or lacking a concrete factual foundation at this stage.

[106] However, my finding that the facts in relation to the development are sufficiently concrete that a court could consider the division of powers questions without them being hypothetical does not end the concerns about prematurity in this case. As I discuss further below, the fact that the federal environmental review is still ongoing, and that it is unknown at this stage if CNR's proposed project will be approved, and if it is approved, what conditions that approval may be subject to, has relevance to the issues of whether this court should hear Halton's application at this time, and efficient use of judicial resources. I address those issues further below at paragraphs 115-146.

(iv) The Ability of the administrative process to grant remedy sought in the proceedings sought to be stayed

[107] As I have outlined above, it is not in dispute that the review panel under the federal environmental assessment process does not have the authority to grant a declaration in relation to the division of powers issues, or any similar remedy. Nor do the Minister of the Environment and the federal cabinet, which are the ultimate decision-makers in whether the intermodal hub will be approved, and whether conditions or changes will be imposed, have authority to grant a declaration in relation to division of powers.

[108] Further, I find that the review panel does not have expertise in division of powers, or in any event, not such expertise that the court should defer for that reason. The same is true of the Minister and the federal cabinet.

[109] I also accept that declarations on constitutional issues can serve a future-oriented or preventive function, in that they can set the constitutional ground-rules for future policy-making or law-making without the court dictating an precise outcome: see for example, *Solosky v. The Queen*, [1980] 1 S.C.R. 821 at pp. 830-33; *Operation Dismantle Inc. v. Canada*, [1985] 1 S.C.R. 441 at p. 457; *Daniels v. Canada*, 2016 SCC 12, [2016] 1 S.C.R. 99, at paras. 11-15.

[110] Ontario put significant weight in its argument on the inability of either the federal review panel or the Minister to grant a declaration on division of powers as a reason to refuse the stay. In this respect, Ontario cited: *Toronto (City) v. AT & T Canada Inc.*, [2001] O.J. No. 4144 (SC); and *Dene Tha' First Nation v. Canada (Minister of the Environment)*, 2006 FC 307, 289 F.T.R. 71. Ontario argues that the inability of the review panel or the Minister to grant a division of powers declaration should lead the court to refuse the stay sought by CNR.

[111] I accept that it is relevant to my assessment of whether a stay should be granted that the federal review panel does not have the jurisdiction to grant declarations in relation to the division of powers questions raised in Halton's application. Thus, I weigh that factor as part of my assessment of whether to exercise my discretion to stay Halton's application. But it must be balanced with the other circumstances in the case. Ontario's argument effectively treats the remedial differences as determinative of whether to grant a stay. With respect, the case law regarding stays under s. 106 of the *Courts of Justice Act* is clear that the discretion is to be exercised taking into account all of the circumstances.

[112] There are aspects of the federal environmental assessment process that I find also warrant being weighed in the balance of whether to grant a stay. As I have outlined above, it is clear that the federal review panel is considering the local concerns, including applicability of provincial and local laws of general application, raised by Halton within the federal process. In particular, I am satisfied that the federal environmental assessment process will consider the local concerns raised by the applicants in relation to issues such as municipal land use, human safety in relation to motor vehicle safety, and human health, including air quality, water quality, and noise exposure.

[113] Thus, although the federal environmental review process cannot grant the exact remedy sought in the application, it is considering the factual and policy issues that underlie Halton's application. And the federal process is designed to allow the ultimate decision-maker, the Minister of the Environment and the federal cabinet, to have the information they need in order to consider the concerns raised by Halton. I find on the record before me, that there is a reasonable likelihood that the federal review panel will address Halton's concerns within the federal process, such that the ultimate decision-maker, the Minister and the federal cabinet, will be in a position to make a decision that addresses the local concerns (either by way of not approving the project, or by way of conditions on its approval). The situation would be different if the record supported a finding that the federal process was refusing to consider the local issues raised by Halton.

[114] Further, I find it is also relevant that what is under consideration at this stage before me is a temporary stay of Halton's application. If as a matter of substance Halton still has concerns about the application of provincial and local laws once the federal environmental review process is completed, and the Minister makes her decision, whatever division of powers issues still remain can be considered by this court.

(v) The Relationship between administrative bodies and the courts

[115] The two factors which I find weigh heavily in the balance, and lead me to exercise my discretion in favour of granting the stay sought by CNR are the relationship between the courts and administrative bodies, and the efficient use of court resources. These factors also engage the balance of convenience, a factor which is relevant to considering whether or not to stay a proceeding.

[116] One unusual aspect of Halton's application is that Halton is not simply arguing that its application should run in parallel with the federal environmental review. Rather, Halton is asking this court to hear its application now, and rule on the division of powers issues now, so that that ruling can be used to delineate the division of powers issues within the federal environmental review.

[117] Halton and CNR conceptualize the effect of this court hearing and deciding Halton's application at this time differently. CNR views the prospect of this court hearing Halton's division of powers application now as the court interfering in the federal environmental review process. CNR argues that for this court to hear and decide Halton's division of powers application at this time would be disrespectful of the federal environmental review process, would circumvent the federal environmental review process, and would involve the court imposing on that process.

[118] By contrast, Halton argues that this court deciding the division of powers issues raised in its application at this time would "assist" the federal environmental review process by giving it a legal ruling on how the division of powers applies to the proposed project. Halton argues that the court should hear the application now in order to prevent the federal review process proceeding on an erroneous understanding of whether and how provincial and local laws of general application apply to the proposed development.

[119] The assessment of how a court deciding a particular matter at a particular time would impact on an administrative proceeding is a very fact-specific exercise. Halton's argument is not without merit; however, in this case, I find that as a practical matter, CNR's characterization is more appropriate. Although I would not go so far as to say that this court hearing Halton's application now would "circumvent" the federal environmental review process, I am concerned that allowing Halton's application to proceed at this time is not appropriate in terms of the relationship between the courts and administrative bodies. In effect, Halton is seeking a ruling from the court that it can use within the federal environmental review process. In my view, for the court to hear and decide Halton's application now would undesirably interfere in the federal environmental review process. It would involve this court injecting itself into the ongoing federal environmental review process before it is completed. And it would do so in a context where the record supports that the federal review panel is alive to and will consider the local issues Halton is raising about the development.

[120] I have considered the argument made by Halton and Ontario that the administrative law cases relied on by CNR are different than this case because the relief sought in Halton's application is declaratory, rather than an order directing the administrative body to take or refrain from taking some action, as is often the case in the judicial review context.

[121] In particular, Ontario notes that in many of the cases where the courts allow administrative proceedings to complete before the courts intervene, what is at issue is a court process that would effectively halt the administrative proceeding. By contrast, the relief that Halton seeks in the application which CNR seeks to stay is declaratory relief. Halton and Ontario argue that if Halton's application is allowed to proceed, it will not stop the CEA Act

process, rather it will inform and assist the CEA Act process, by providing guidance from the court about how the constitutional division of powers applies to the proposed project.

[122] I agree with Ontario that the nature of the relief sought in Halton's application, and how that proposed relief interacts with the administrative proceeding at issue (here the federal environmental review) is a relevant factor for the court to consider in assessing whether to grant a stay. Thus, it is relevant to consider that if Halton's application were allowed to proceed at this time, it would not halt the federal environmental review process. However, this factor has to be weighed with other factors relevant in the circumstances.

[123] Further, in my view, the nature of the effect on the administrative proceeding of the remedy sought in the other proceeding is a question of degree. If Halton's application were permitted to proceed now, and assuming that at least some of the declarations Halton seeks were granted, these would not be orders directing the federal review panel to take any specific action, or prohibiting the federal review panel from taking any specific action. However, the clear purpose of the application is to get a ruling from this court, so that the ruling can be taken to the federal review panel to say, in effect, "here is how the division of powers issue must be addressed". In my view, where the federal review panel is clearly considering the local issues raised by Halton, including the issue of applicability of provincial and local laws of general application, it would be an unwarranted intrusion of this court into the federal review to play this role at this time.

[124] Further, the fact that allowing Halton's application to proceed would not halt the federal environmental review process does not address the issue of efficient use of court resources as a factor in the balance, which I address below.

[125] I acknowledge that, to some extent, the administrative law framework of the courts deferring to allow administrative proceedings to be completed before stepping in sits uncomfortably with division of powers concerns. I say this for two reasons. First, given our system of cooperative federalism, why does the federal process, in this case the federal environmental assessment, get to go first? Second, does granting a stay and allowing the federal administrative process to go first involve a s. 96 court, traditionally the forum to resolve division of powers issues, abdicating that role?

[126] Both of these issues need to be resolved case by case. On the record before me, I find that considering the balance as a whole, there are answers to these questions, and that the record as a whole favours granting a stay. I consider these issues as an aspect of considering the balance of convenience as part of the assessment of whether to grant a stay.

[127] On the question of why the federal process gets to go first, I note three factors. First, railways are a federal undertaking. I say this not to suggest that provincial and local laws of general application do not apply to them, but to say that at a minimum we know that federal jurisdiction applies to them. One consequence of this is that a federal environmental assessment is a pre-requisite to CNR's proposed development going ahead.

[128] Second, as I have outlined above, it is clear that the federal review panel is considering the local concerns, including applicability of provincial and local laws of general application, raised by Halton within the federal process. Thus, on the record before me, the federal administrative process (the environmental review) is providing a forum to address Halton's concerns. It may not be a perfect forum. It may or may not in the end address all of Halton's concerns. But I find that on the record before me, there is at least a reasonable likelihood that the federal review panel will address Halton's concerns in its process. The situation would be different if the record supported a finding that the federal process was refusing to consider the local issues raised by Halton. Thus, on the record before me, as a practical matter, I find that the balance of convenience favours allowing the federal environmental review to proceed before Halton's application.

[129] Third, in this case, the federal environmental review of this project has been ongoing for over three years. Halton's division of powers application was filed only in February of this year.

[130] Regarding the role of the courts in protecting the constitutional division of powers, for similar reasons, I find that granting a stay is not inconsistent with the role of the courts in adjudicating division of powers issues. The stay being sought, and which I grant, is not permanent. It is temporary, pending the completion of the environmental assessment, and the Minister's decision. It is made in a context where I find, based on the record before me, that the federal review panel is engaged in the local issues raised by Halton, including the applicability of provincial and local laws of general application.

[131] Thus, the court is delaying its process based on a record that gives the court a strong reason to believe that the federal administrative process can address Halton's concerns. But, the court remains available to address Halton's concerns if they are not addressed, as they relate to division of powers, in the federal process. It is not this court's role to supervise the federal environmental assessment process. However, if that process yields a result which is inconsistent with the constitutional division of powers, this court has a role to play.

[132] As I have outlined, I find that there is strong reason to believe, on the record before me, that the federal environmental review panel will carefully consider Halton's local concerns about the proposed development. However, even if it turns out that I am wrong about this, and when the Minister makes her decision on the proposed development, all of Halton's concerns are not addressed, Halton will not be left without a remedy. The remedy I am granting is a stay of Halton's application until the Minister makes a decision on the approval of CNR's proposed development. If Halton still has concerns relating to division of powers if and when the development is approved, it may bring those concerns before this court.

(vi) Efficient use of court resources

[133] Another factor which is relevant to considering whether or not to stay a proceeding is the likelihood of duplication of or inefficient use of court resources if a proceeding is not stayed.

[134] I find that this is a factor which weighs heavily in favour of granting a stay of Halton's application.

[135] As I have already outlined, the record before me is clear that the federal review panel has a mandate to consider local concerns and impacts. The record is clear that the panel is engaged on these issues, and is receiving submissions on these issues, and intends to receive evidence on these issues. The record is clear that Halton is participating in the review process on these issues, through submissions, and through its intended participation at the public hearings, including calling witnesses. Further, the record is clear that the review panel is considering the issue of application of provincial and local laws of general application to this development, and has requested submissions on this issue, and received submissions from parties including CNR and Halton.

[136] As noted above, the review panel does not have the authority to decide division of powers issues, nor does it have expertise in division of powers. However, I find that it is clear that the review panel's mandate to consider local concerns and issues, will, as a practical matter, address the types of issues that Halton is concerned to have addressed in its application to this court.

[137] The issue for the court at this stage in considering the stay application is not whether Halton will necessarily get an outcome it wants from the federal environmental review process, but whether there is a reasonable prospect that the federal review process will yield an outcome that would make proceeding with Halton's application now an inefficient use of court resources. I find that there is sufficient factual overlap that the risk of inefficient use of court resources is a factor that weighs in favour of granting a stay.

[138] This could happen in two possible ways. First, if the intermodal hub project is not approved by the Minister following the federal environmental review process, then any resources spent hearing Halton's application now will have been wasted. Second, if the project is approved, but with conditions or modifications that address Halton's concerns, then any resources spent hearing Halton's application now will be wasted.

[139] Indeed, even if Halton still wishes to pursue the application after the environmental review process is completed, depending on the outcome of the environmental review process, the issues in the court application may be narrowed.

[140] And the issue of use of the court's resources to decide Halton's application is not insignificant. Although I disagree with CNR's argument that the declarations sought are too general or hypothetical to be useful, I am concerned about the breadth of provincial and local laws that need to be considered to decide Halton's application.

[141] The Notice of Application in Halton's application requests five declarations. The first two declarations sought are in very general terms. However, the third, fourth and fifth declarations sought address specific areas of provincial or municipal jurisdiction that are likely to be affected by the development, as well as specific provincial and local laws that Halton argues are of general application and apply to the CNR. The third declaration addresses issues related to roads, modification of roads, and traffic planning. The fourth declaration addresses whether a

number of specific activities or works that would form part of the proposed project are or are not vital elements of a railway undertaking. And the fifth declaration addresses whether 18 specific pieces of legislation or by-laws apply to the development to the extent that aspects of the proposed project are not vital components of a railway undertaking. A judge deciding Halton's application would have to consider the division of powers issues as they relate to each of these 18 laws or by-laws, and each aspect of the proposed development raised by Halton.

[142] I also expect that the record for Halton's application, and the responding record, would be voluminous. I note that the record filed before me on the motion for a stay comprised 19 volumes, 6 filed by CNR, and 13 filed by Halton. It appears that much of the material filed by Halton on the motion is the same material they have filed to date on the main application. One would expect a similar volume of materials, if not more, to be filed for the application on the merits. In addition to addressing the nature of the proposed intermodal hub, the evidence on the main application would have to address the extent to which aspects of the intermodal hub which are touched by provincial or local laws are a "vital aspect" of a railway (as a federal undertaking). A judge deciding the main application would have to consider and assess this lengthy record.

[143] There was no discussion at the hearing of the motion of how many court days the hearing of the main application would take. In the absence of the full record, I cannot reliably estimate the amount of court time the hearing would take, other than to say it would certainly take more than the one full day which the stay motion took.

[144] And of course, all of these court resources expended would also entail parallel resources expended by the parties' counsel to prepare.

[145] These are the court resources I refer to when I say that court time could be saved and used more efficiently if the federal environmental process proceeds first, because it may lead to an outcome that either removes the need for the hearing of Halton's application (either because the project is not approved, or because the scope of the approval addresses Halton's concerns), or streamline the issues in the application.

[146] I acknowledge that it is not certain that the federal environmental assessment process will in substance address Halton's concerns about local issues. That is in the nature of the weighing and balancing of the various factors in considering whether to grant a stay. It may turn out that the project is approved, with or without modifications or conditions, such that Halton still has concerns relating to the application of provincial or local laws of general application. If that is the case, Halton can proceed with its application. There will have been delay. But I find that the balance of convenience favours staying the application pending the completion of the federal environmental review process, particularly in light of the fact that the review panel is clearly engaged in and prepared to consider the local concerns and issues raised by Halton.

Conclusion

[147] For these reasons, I grant CNR's motion. The application brought by Halton is stayed pursuant to s. 106 of the *Courts of Justice Act* pending the decision by the Minister of the Environment and/or cabinet regarding approval of the proposed intermodal rail hub project under ss. 52-54 of the *Canadian Environmental Assessment Act, 2012*.

Costs

[148] I did not hear submissions regarding costs during the hearing of the motion. If the parties are unable to come to agreement regarding costs, I will receive submissions in writing on the following schedule. CNR may file its costs outline and written submission within 30 days of this decision. Halton and Ontario may file their costs outlines and submissions within 20 days after the CNR's submission is filed. All costs submissions are limited to a costs outline, and three pages of submissions. I request that all parties address the public interest aspect of the underlying application in their costs submissions.

Copeland J.

Date: October 29, 2018