Federal Court of Appeal | Cour d'appel fédérale

Date: 20240502

Docket: A-121-24

Citation: 2024 FCA 84

Present: **LOCKE J.A.**

BETWEEN:

CANADIAN NATIONAL RAILWAY COMPANY

Appellant

and

REGIONAL MUNICIPALITY OF HALTON, THE CORPORATION OF THE TOWN OF MILTON, THE CORPORATION OF THE TOWN OF HALTON HILLS, THE CORPORATION OF THE CITY OF BURLINGTON, THE CORPORATION OF THE TOWN OF OAKVILLE and THE HALTON REGIONAL CONSERVATION AUTHORITY

and

CANADA (MINISTER OF THE ENVIRONMENT) and ATTORNEY GENERAL OF CANADA

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on May 2, 2024.

REASONS FOR ORDER BY: LOCKE J.A.

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REASONS FOR ORDER

LOCKE J.A.

I. Overview

[1] This decision concerns a motion by the appellant, Canadian National Railway Company (CN), for an Order staying the Federal Court decision at issue in the present appeal until this Court renders a final judgment thereon.

[2] The respondents Canada (Minister of the Environment) and the Attorney General of Canada consent to CN's motion.

[3] The respondents the Regional Municipality of Halton, the Corporation of the Town of Milton, the Corporation of the Town of Halton Hills, the Corporation of the City of Burlington, the Corporation of the Town of Oakville and the Halton Region Conservation Authority (the Halton Region Respondents) oppose the motion. Importantly, their responding motion record includes an affidavit of Dr. Rakesh Singh, which addresses motor vehicle emissions that will result if the stay is granted.

[4] CN has submitted a reply motion record in which it has included, in addition to its reply written representations, an affidavit by Allan Prits responding to Dr. Singh's affidavit. This reply motion record was accompanied by a letter in which CN recognizes that it does not have a right to adduce affidavit evidence in reply, and seeks leave of the Court in that regard. The Halton Region Respondents oppose this leave request, which gives rise to a separate issue that I will address before I consider the merits of the stay motion.

II. Background

[5] In 2021, following a six-year approval process, CN began construction of a large terminal on its land in Milton, Ontario that will facilitate the transfer of standard-sized (intermodal) containers between rail cars and trucks (the Project).

[6] The Halton Region Respondents commenced an application for judicial review of three decisions that led to approval of the Project. On March 1, 2024, the Federal Court (2024 FC 348, *per* Justice Henry S. Brown) granted the application in respect of two of the impugned decisions, setting them aside and remanding them for redetermination. The Federal Court's decision brought a stop to CN's construction of the Project.

[7] CN has since appealed the Federal Court's decision, and brought the present motion for a stay.

III. Legal Test for Stay Pending Appeal

[8] Paragraph 50(1)(*b*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, provides the authority for this Court to grant a stay where "it is in the interest of justice that the proceedings be stayed." Rule 398(1)(*b*) of the *Federal Courts Rules*, S.O.R./98-106 (the Rules), provides that, "[o]n the motion of a person against whom an order has been made, … (b) where a notice of appeal of the order has been issued, a judge of the court that is to hear the appeal may order that it be stayed."

[9] The parties agree that the legal test applicable to CN's stay motion is as contemplated in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385 (*RJR-MacDonald*). The moving party must establish (i) a serious question to be tried, (ii) that it will suffer irreparable harm if the stay is not granted, and (iii) that the balance of convenience favours granting the stay.

[10] The threshold for establishing a serious question to be tried is generally a low one. The Court must be satisfied that the appeal is not frivolous or vexatious: *RJR-MacDonald* at 348.

[11] With regard to irreparable harm, the moving party must adduce clear, compelling and non-speculative evidence to establish, on a balance of probabilities, that it will suffer "harm which either cannot be quantified in monetary terms or which cannot be cured": *RJR-MacDonald* at 341; *Sheldon M. Chumir Foundation for Ethics in Leadership v. Canada (National Revenue)*, 2023 FCA 242 at paras. 6–8. The Supreme Court of Canada in *RJR-MacDonald* had additional comments concerning harm to the public interest at page 346:

> In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

[12] The issue of the balance of convenience involves "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits": *RJR-MacDonald* at 342.

IV. Affidavit Evidence in Reply

[13] As alluded to above, I cannot consider CN's reply until I have resolved the dispute over its content.

[14] The parties agree that the decision in *Amgen Canada Inc. v. Apotex Inc.*, 2016 FCA 121, 266 A.C.W.S. (3d) 12, is helpful on the subject of reply evidence in a motion. The Rules do not provide for reply evidence in a motion, but the Federal Courts have discretion to admit such evidence by virtue of:

1. Rule 55, which permits varying a rule in special circumstances;

2. Rule 3, which provides that the Rules are to be applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits;

3. Rule 4, often called the gap rule, which permits reference to other rules when a procedural matter is not provided for in the Rules (Rule 312, which provides for the filing of additional affidavits in the context of an application, may be helpful); and

4. The plenary powers of the Federal Courts to regulate its procedures.

[15] CN recognizes that it must establish unusual circumstances to be allowed to rely on its reply evidence. Relevant considerations are procedural fairness and the need to make a proper determination.

[16] CN argues that consideration of its reply evidence, Mr. Prits's affidavit, is necessary because Dr. Singh's affidavit relies on out of date modelling and incorrect measures of emissions as they relate to human health in asserting that continued construction of the Project would cause significant safety risks. CN also argues that it could not have reasonably anticipated that the Halton Region Respondents would put in evidence that raises these concerns.

[17] The Halton Region Respondents respond that CN has failed to demonstrate unusual circumstances. They argue that CN cannot show that Dr. Singh's affidavit (dealing with the harmful consequences of a resumption of construction of the Project) raises new issues since the goal of CN's motion is the resumption of construction.

[18] I agree with the Halton Region Respondents. Though CN might not have been able to anticipate the precise nature of the Halton Region Respondents' evidence in response to the stay motion, it should have expected some evidence concerning the environmental impacts of resuming construction of the Project, including emissions arising therefrom. CN elected not to adduce evidence in chief in this regard, and to rely instead on an argument that, during the pendency of the judicial review proceeding before the Federal Court, the Halton Region Respondents had acted in a manner that suggested that they did not consider emissions from construction to be an important issue. Moreover, with regard to CN's concern that Dr. Singh relied on information that was out of date, it can state its position in argument; it need not have reference to reply evidence.

[19] I will order CN's reply written submissions to be filed (together with the accompanying book of authorities and proof of service), but I will exclude Mr. Prits's affidavit. Fortunately, CN prepared its reply written representations with a clear indication of which portion thereof concerns Mr. Prits's affidavit. Accordingly, it is not necessary to require that CN prepare and file amended reply written representations. I will simply consider CN's existing reply written representations as if paragraph 36 thereof was not included.

V. Analysis

A. *Serious Issue*

[20] Since this proceeding involves an appeal of a decision on an application for judicial review, the standard of review to be applied by this Court will be as described in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at para. 45. This Court will consider (i) whether the Federal Court selected the correct standard(s) of review of the impugned decisions, and (ii) whether the Federal Court correctly applied that(those) standard(s) of review. This Court will effectively step into the shoes of the Federal Court, and focus on the administrative decisions in issue.

[21] The Federal Court selected a standard of review of reasonableness, and found that the two decisions in issue in the appeal were unreasonable. Unless a party takes issue with applying the reasonableness standard of review, this Court's task will be to consider whether those decisions were indeed unreasonable.

[22] Given the low threshold for establishing a serious question, and in view of the issues raised in the notice of appeal and the fact that reasonableness is a deferential standard of review, I am convinced that CN has met this part of the test for a stay.

B. *Irreparable Harm*

[23] CN argues that it will suffer irreparable harm if the stay is not granted. It also argues that the public interest likewise stands to suffer irreparable harm.

[24] With regard to CN, it argues that it will have to bear irreparable costs in relation to (i) preparing the construction site for shutdown, (ii) monitoring the site during the shutdown, (iii) protecting it from environmental harm during that time, and (iv) in the event that the appeal is successful, preparing for resumption of construction. CN also argues that there will be an irrecoverable loss of profits because of the delay in completing the Project.

[25] With regard to the public interest, CN cites the irreparable harm resulting from the delay in completion of the Project, as approved by the public authorities in the impugned decisions.

[26] The Halton Region Respondents take issue with the quality of CN's evidence concerning the irreparable financial harm it stands to suffer if the stay is not granted. Regardless of the quality of that evidence, however, I find it difficult to imagine that CN will not suffer some irreparable harm. While it is reasonable to scrutinize the amounts of money at stake as alleged by CN, it seems clear that CN will have to incur some costs in each of the categories noted in paragraph 24 above, and that those costs will not be recoverable.

[27] The Halton Region Respondents argue that CN engaged in its construction activities to date despite the ongoing judicial review application, and hence CN incurred the costs of construction at its own peril. The Halton Region Respondents argue that these costs were avoidable and are therefore not irreparable.

[28] I hesitate to criticize CN for commencing construction of the Project, even in the face of legal proceedings, after it had obtained the necessary government approvals following six years of efforts in that regard. Certainly, it took a risk that the judicial review would be successful, but this does not alter the fact that it stands to suffer irreparable harm if the stay is not granted and its appeal is ultimately successful.

C. *Balance of Convenience*

[29] The Halton Region Respondents argue that the balance of convenience favours refusing to grant a stay. Specifically, they argue that:

1. The emissions that would result from continued construction of the Project have not been addressed in CN's motion materials, and they would be significant;

2. Demand for the additional intermodal facilities that would be offered by the Project is lower than CN argues;

3. CN is a large company acting in its private interest, and continuing the construction halt until a decision on its appeal would have a negligible, and purely financial, effect on its business; and

4. CN's submission that the public interest favours granting a stay are speculative and unsupported.

(1) Emissions from Construction

[30] As indicated above, with regard to emissions resulting from continued construction of the Project, the Halton Region Respondents rely on the evidence of Dr. Singh. He analyzed the effects of such emissions relying on the 2015 Environmental Impact Statement that CN submitted to the Environmental Review Panel (the Panel), which was tasked with considering the relative merits of the Project.

[31] In its reply written representations, CN notes that the data in the 2015 Environmental Impact Statement is out of date, and the Panel relied on updated data and modelling. The Panel and the Decision Statement that followed also imposed air quality mitigations not mentioned in the 2015 Statement. CN also notes that the Halton Region Respondents know that the data in the 2015 Statement is out of date. Further, CN takes issue with Dr. Singh's focus on the total amount of emissions without providing information about how they would be dispersed in the atmosphere. Such information would be useful to assess human exposure to the emissions.

[32] The Halton Region Respondents argue that CN's failure to address emissions during construction of the Project is "highly peculiar". However, it does not strike me as peculiar. As mentioned at paragraph 18 above, CN explains why it did not address this category of emissions, arguing that the Halton Region Respondents' conduct following commencement of the judicial

review proceeding suggested relatively little concern about construction emissions. Effectively, CN asks this Court to infer this lack of concern from the failure of the Halton Region Respondents to seek a stay of construction of the Project during the three years between commencement of the judicial review proceeding and the Federal Court's decision thereon.

[33] I agree with CN that Dr. Singh's evidence is based principally on data from the 2015 Environmental Impact Statement, and this data seems indeed to be out of date. While I recognize that there will indeed be increased emissions resulting from the resumption of construction of the Project if the stay is granted, I do not have reliable evidence as to the degree of harmful effects therefrom. I am prepared to infer that emissions from construction activities were not top of mind for the Halton Region Respondents during the judicial review proceeding before the Federal Court. They sought neither to stop construction pending judicial review, nor to expedite the proceeding.

(2) Demand for Intermodal Facilities

[34] I turn now to the Halton Region Respondents' argument that the demand for the Project is lower than CN argues. Here, the Halton Region Respondents rely on the affidavit of John Vickerman. He questioned the figures provided by CN's witness, Darren Reynolds, concerning the capacity of existing intermodal facilities and the expected demand in the future. The Halton Region Respondents argue that intermodal volumes are actually declining, and that CN's forecast for demand is based on old numbers. They assert that cargo carried by Canadian railways dropped 8.5% from January 2023 to January 2024.

[35] In reply, CN notes that its figures are more reliable since they are specific to CN's business and they are more consistent with the findings of the Panel. At page 288 of its report dated January 27, 2020, the Panel observed as follows:

> The Panel believes that CN, port authorities, transport companies and other parties involved in supply chain management made a convincing case that, as long as current rates of growth continue, there is a need for additional intermodal terminal capacity in the Greater Toronto and Hamilton Area.

[36] I agree with CN that I should give more weight to its evidence, which is consistent with the Panel's findings, than to that of the Halton Region Respondents, which suggests not only that demand for intermodal facilities is not growing at the rate that CN suggests, but that it is actually dropping. I am dubious of any suggestion of reduced demand for the Project over the medium or long term. In my view, CN and the Panel are better placed to assess demand for intermodal facilities.

(3) Consequences to CN of Refusing Stay

[37] The Halton Region Respondents argue that a continued stoppage of construction on the Project pending appeal will have no effect on CN's long-term viability, its market share or its business reputation. Even if CN stands to suffer harm that is irreparable if the stay is not granted, it does not amount to an existential risk. The Halton Region Respondents also argue that this Court should not accept that CN is acting in anything other than its own private interests.

[38] I agree with the Halton Region Respondents' arguments. However, they do not alter the fact that the government bodies tasked with assessing the Project in the public interest have

given it permission to proceed. Based on that, it would seem that the public interest favours granting the stay to permit construction of the Project to proceed.

(4) Whether CN's Submissions Concerning the Public Interest are Speculative and Unsupported

[39] The Halton Region Respondents challenge CN's assertions concerning the harm to the public interest that will result from further delay in construction of the Project. They criticize CN's evidence in this regard.

[40] As indicated, the government bodies tasked with assessing the Project concluded that it is in the public interest after weighing the competing evidence. Despite the Federal Court's decision granting judicial review, that is strong evidence of the public interest in the Project. Moreover, it is axiomatic, in my view, that any delay in completion of a project that is in the public interest is detrimental to the public interest.

(5) Conclusion on Balance of Convenience

[41] There will certainly be some negative effects if the stay is granted, and construction of the Project resumes, in the event that the present appeal is ultimately dismissed. Principal of these is increased emissions from construction activities. These increased emissions will clearly have some effect on the population located near the Project, though the extent of this effect is unclear.

[42] These negative effects of granting the stay must be balanced against the negative effects of not granting it. As indicated above, these include necessary measures related to the shutdown of the construction site, as well as possible reopening later if the appeal is successful. In addition, the public interest appears to favour the Project, and with a minimum of delay.

[43] In my view, the balance of convenience favours granting the stay. The evidence provided by the Halton Region Respondents concerning emissions from construction activities appears to be out of date. The Panel considered more recent information when it prepared its report, which led to permission to proceed with the Project. The harmful effects of construction emissions appear to be outweighed by the costs to CN of suspending its construction activities, and more importantly, the public interest in the completion of the Project.

VI. Conclusion

[44] I will grant CN's motion for a stay of the Federal Court's decision until this Court renders a final judgment on the present appeal. The costs of this motion shall be in the cause.

"George R. Locke"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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STYLE OF CAUSE:	CANADIAN NATIONAL RAILWAY COMPANY v. REGIONAL MUNICIPALITY OF HALTON, THE CORPORATION OF THE TOWN OF MILTON, THE CORPORATION OF THE TOWN OF HALTON HILLS, THE CORPORATION OF THE CITY OF BURLINGTON, THE CORPORATION OF THE TOWN OF OAKVILLE and CANADA (MINISTER OF THE ENVIRONMENT) AND ATTORNEY GENERAL OF CANADA

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES:

REASONS FOR ORDER BY:	LOCKE J.A.
DATED:	MAY 2, 2024

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