

COURT OF APPEAL FOR ONTARIO

CITATION: Canadian National Railway Company v. Kitchener (City), 2026 ONCA  
257

DATE: 20260410

DOCKET: COA-25-CV-0244

Paciocco, George and Monahan JJ.A.

BETWEEN

Canadian National Railway Company

Plaintiff  
(Appellant)

and

The Corporation of the City of Kitchener, Public Utilities Commission of Kitchener  
and Hogg Fuel & Supply Limited\*

Defendants  
(Respondent\*)

Michael Beeforth, Dina Awad and Nicole Tzannidakis, for the appellant

Lana Finney and Leah Kelley, for the respondent

Heard: December 2, 2025

On appeal from the order of Justice Markus Koehnen of the Superior Court of  
Justice, dated January 6, 2025, with reasons reported at 2025 ONSC 73.

**George J.A.:**

[1] The appellant, Canadian National Railway Company (“CN”), appeals from  
an order granting partial summary judgment in favour of the respondent, Hogg Fuel

& Supply Limited (“Hogg”), dismissing CN’s claims relating to coal tar contamination on its property. For the reasons that follow, I would dismiss the appeal.

## A. BACKGROUND

### 1. 1989 Action

[2] CN owns land neighbouring land owned by Hogg. In 1989, CN commenced an action against Hogg, the Corporation of the City of Kitchener (“City”), and the Public Utilities Commission of Kitchener (“PUC”), alleging that CN’s property had become and continued to be contaminated with coal tar waste from Hogg’s property (“1989 Action”). In that action, CN advanced claims in negligence, nuisance, interference with the lawful and reasonable use and enjoyment of its lands and premises, strict liability under the rule in *Rylands v. Fletcher*, [1868] UKHL 1, L.R. 3 H.L. 330, trespass, and statutory liability under the *Environmental Protection Act*, R.S.O. 1980, c. 141 (“EPA”). In this action, CN specifically pleaded claims for both historical and continuing migration:

As a result of such inquiries by agents and servants of [CN], [CN] on or about February 21, 1989, confirmed that [CN’s] lands and premises had become and were continuing to be contaminated with coal tar wastes; oxide box wastes; and surface run-off sediments, high in pH levels; and possibly other wastes, flowing from or migrating off the lands and premises of [Hogg]. The coal tar, oxide box wastes and similar contaminants were further determined to be derived from the former activities of the [City], and [PUC], in connection with waste

generated by and transported from the former Kitchener Gas Works near Gaukel, Joseph and Charles Streets in the City of Kitchener.

...

The Kitchener Gas Works were operated by [PUC] in the period approximately 1924 to 1958, and were demolished in or about the fall of 1963. Coal tar, produced as a by-product of the manufacturing of gas, is a black to black-brown liquid or semi-solid which solidifies in contact with air, and chemically consists primarily of polynuclear aromatic hydrocarbons (PAHs) and other aromatic compounds and a number of individual components which are now known or suspected carcinogens. During the course of their operation of the Kitchener Gas Works, the [City] and [PUC], or either of them, transported coal tar wastes to the lands and premises now owned by [Hogg], during the period from 1932 to about 1958. Under gravitational influence and, in part, due to the weight of additional surcharge on the dumped waste materials caused by other materials placed by the Defendants, or by [Hogg] alone, the coal tar wastes have migrated and continue to migrate off site, contaminating the lands and premises of [CN].

...

[CN] states that it continues to sustain damages, by reason of the continued migration onto, into, or through the lands and premises of [CN] of, inter alia, coal tar wastes, and such materials are continuing to surface upon the railway's right-of-way and to constitute a continuing hazard to [CN's] employees, and other persons, and a hazard to all surface and groundwater supplies on and beyond the lands and premises of [CN], including the lands and premises alleged to have been affected in the Woodside National Historic Park operated by Environment Canada, National Park Services. [Emphasis added.]

[3] Hogg delivered a statement of defence, counterclaim, and crossclaim in the 1989 Action, which sought contribution and indemnity, and damages from the other parties.

## **2. Dismissal of the 1989 Action**

[4] In 2014, Myers J. of the Superior Court of Justice dismissed the 1989 Action for delay: *Canadian National Railway Co. v. Kitchener (City)*, 2014 ONSC 4929, 122 O.R. (3d) 372. He held that the 25-year delay from the commencement of the action in 1989 was “inordinate” and “inexcusable”. According to Myers J., this delay gave rise to a presumption of prejudice, which CN had not rebutted. He explained that CN had done nothing to preserve the evidence of several witnesses who were available when the litigation commenced, but had since passed away. Myers J. determined that, without this evidence, “the trial [could not] fairly assess the key factual issue in the litigation”, namely, how coal tar waste found its way onto CN’s property.

[5] Myers J. noted that “[t]here does not appear to be any real dispute that” some pollutants continued to migrate from Hogg’s property onto CN’s property, but that the ongoing migration was a “side issue”. In dismissing this action, he concluded that a trial would be unfair given CN’s delays and failure to preserve evidence:

In all, the absence of witnesses, or the availability of testimony of just a very few in very fragmented form,

renders a trial unfair. The judge may be able to make findings based on what is put before him or her. But what exists is not complete and is little more than a sampling of evidence. Due to CN's delays and its failure to preserve evidence to rebut the presumption or inference of prejudice, the parties have been denied the ability to put before the trial judge the evidence needed to paint a fair and complete picture. A trial in these circumstances would not be a fair and just resolution of the dispute.

[6] In 2015, this court dismissed CN's appeal and the Supreme Court of Canada subsequently dismissed CN's application for leave to appeal: *Canadian National Railway Company v. Kitchener (City)*, 2015 ONCA 131, 33 M.P.L.R. (5th) 173, leave to appeal refused, [2015] S.C.C.A. No. 158.

### **3. 2014 Action**

[7] After the 1989 Action was dismissed, and while the appeal from that order was outstanding, CN commenced a new action against Hogg, the City, and the PUC ("2014 Action"). Like the 1989 Action, this suit advanced claims for negligence, nuisance, strict liability under the rule in *Rylands v. Fletcher*, and relief under the EPA. And, as it did in the 1989 Action, CN pleaded that coal tar had migrated and continued to migrate onto its property:

Coal tar consists primarily of polycyclic aromatic hydrocarbons (PAH), a toxic compound, and other compounds that are known or suspected carcinogens.

PAH and other compounds have migrated and continue to migrate from the Hogg Fuel Lands onto CN Lands, resulting in significant and continuing contamination of the soil and groundwater on the CN lands.

[8] The 2014 Action also pleads that petroleum hydrocarbon contaminants, including benzene, have migrated and continue to migrate onto CN's property.

[9] In a letter that accompanied service of the statement of claim, CN's counsel advised that this action was commenced, in part, to protect CN's rights in the event its appeal of the order in the 1989 Action was dismissed. CN also advised that it was seeking "damages arising from any historical coal tar contamination that occurred during the applicable limitation period and from the on-going migration of coal tar contaminants onto CN's land." In December 2016, CN discontinued the 2014 Action against the City and PUC.

## **B. DECISION BELOW**

[10] The motion judge granted Hogg's motion for summary judgment and dismissed CN's claims relating to coal tar contamination as an abuse of process. He found that the allegations with respect to benzene were entirely separate from the coal tar claims in the 1989 Action and that "[t]he issues surrounding benzene contamination do not give rise to the same trial fairness concerns that the allegations about coal tar did." As such, this appeal concerns only the dismissal of the coal tar contamination claim.

[11] The motion judge rejected Hogg's argument that the coal tar contamination claims were *res judicata*. He reasoned that because a final determination on the merits was not made in the 1989 Action, this doctrine did not apply. He was

satisfied, however, that the coal tar contamination claims amounted to an abuse of process and accordingly dismissed them, concluding that “[i]f those claims were impossible to try fairly in the 1989 [A]ction, they are equally impossible to try fairly in this action.” He explained that the abuse of process doctrine is a flexible one that focuses on “the integrity of the administration of justice and the court’s inherent power to prevent the misuse of its procedure in a way that would bring the administration of justice into disrepute.”

### **C. POSITIONS OF THE PARTIES & ISSUES**

[12] CN’s position on appeal is that the coal tar contamination claims in the 2014 Action are distinct and separate from those in the 1989 Action. It points out that it is only seeking damages in relation to ongoing contamination of its property that has occurred since 2012. CN argues that these claims have not been exhausted and that the fairness concerns animating the dismissal of the 1989 Action are not present here. In other words, it does not matter, for the purposes of the 2014 Action, who originally dumped the coal tar and where, since this action is concerned only with the continuing migration of coal tar onto CN’s property. Hogg’s position is that CN’s claim for continuing coal tar contamination was exhausted by the dismissal of the 1989 Action.

[13] This appeal gives rise to the following issues:

- (i) What is the standard of review?

- (ii) Did the motion judge fail to properly consider and apply the law on continuing causes of action?
- (iii) Did the motion judge err by failing to recognize that the trial fairness concerns relating to the 1989 Action are not present in the 2014 Action?
- (iv) Did the motion judge err by failing to give sufficient weight to CN's expert evidence?
- (v) Did the motion judge err in concluding that the dismissal of the 1989 Action precluded the coal tar claims in the 2014 Action as an abuse of process?
- (vi) Did the motion judge err in concluding that to permit the coal tar claims in the 2014 Action to proceed would bring the administration of justice into disrepute?

## **D. DISCUSSION**

### **1. Standard of Review**

[14] The parties both submit that abuse of process is a finding of mixed fact and law, which, if they are right, would mean it is owed deference on appeal absent an extricable error of law: *Davies v. Clarington (Municipality)*, 2023 ONCA 376, 167 O.R. (3d) 33, at para. 48.

[15] However, as Favreau J.A. recently explained in *Pine Glen Thorold Inc. v. Rolling Meadows Land Development Corporation*, 2025 ONCA 604, 178 O.R. (3d) 241, at para. 37, leave to appeal requested, [2025] S.C.C.A. No. 459, although this court has previously held that a finding of abuse of process is a question of mixed fact and law, the Supreme Court has held that abuse of process is a question of law alone:

This court has characterized abuse of process as a question of mixed fact and law subject to the palpable and overriding standard of review absent an error of law: *SIF Solar Energy Income & Growth Fund v. Aird & Berlis LLP*, 2024 ONCA 946, at para. 19; *Davies v. Clarington (Municipality)*, 2023 ONCA 376, 167 O.R. (3d) 33, at para. 48. In contrast, the Supreme Court has stated that abuse of process is a question of law alone and that the applicable standard of review is correctness: *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29, [2022] 2 S.C.R. 220, at para. 30; *Saskatchewan (Environment) v. Métis Nation – Saskatchewan*, 2025 SCC 4, 500 D.L.R. (4th) 279, at para. 31.

[16] However, because this court in *Pine Glen Thorold* had to determine the abuse of process question *de novo*, Favreau J.A. saw no need to address this discrepancy.

[17] In this appeal, there is likewise no need to resolve this discrepancy. That is because, on either standard, this appeal fails. Which is to say, the motion judge committed no palpable and overriding errors and his finding that CN's claim for continuing coal tar contamination is an abuse of process is correct.

## 2. Abuse of Process Doctrine

[18] Abuse of process is a flexible doctrine rooted in the court's power to prevent the misuse of its procedure. It applies in a variety of contexts and is unencumbered by specific requirements: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 37; *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29, [2022] 2 S.C.R. 220, at paras. 33-35. One such context is to prevent relitigation of the same issue: see *Abrametz*, at para. 34. Relitigation can undermine important principles at the heart of the justice system, including principles of "judicial economy, consistency, finality and the integrity of the administration of justice": see *C.U.P.E.*, at para. 37; *Saskatchewan (Environment) v. Métis Nation – Saskatchewan*, 2025 SCC 4, 500 D.L.R. (4th) 279, at para. 35.

[19] When determining whether there is an abuse of process the court must consider all of the relevant circumstances: *SIF Solar Energy Income & Growth Fund v. Aird & Berlis LLP*, 2024 ONCA 946, at para. 35, and look beyond the motive and status of the parties and concentrate on the integrity of the adjudicative process: *C.U.P.E.*, at para. 51.

## 3. Continuing Tort Law Claims

[20] CN argues that the motion judge failed to properly consider and apply the law on continuing causes of action. It submits that when the act of a party creates a continuing injury, a new cause of action arises each day the damage remains unabated. CN's position is that the continuing migration of coal tar from Hogg's

property to its property gives rise to a new cause of action every day it persists, and that the motion judge erred by deciding otherwise.

[21] Continuing torts are those in which a defendant's impugned acts continue, causing the plaintiff damages. However, as Hourigan J.A. explained in *Albert Bloom Limited v. London Transit Commission*, 2021 ONCA 74, 40 C.E.L.R. (4th) 161, at para. 50, for a claim to be continuing the conduct causing the legal injury and "the legal injury itself must continue, not merely the ill effect of the prior legal injury".

[22] As CN points out, continuing torts do generally give rise to a new cause of action each day the tort continues. CN draws on the jurisprudence which establishes this point, in support of its position that the motion judge failed to distinguish between its current claims, which it says are based on new causes of action arising from Hogg's continuing wrongful acts, and its prior claims, which are not.

[23] I reject this argument. To start, in the 1989 Action CN specifically pleaded that coal tar was continuing to migrate onto its property from Hogg's property. The problem for CN is that Myers J. dismissed that claim, concluding that CN could not recover damages in respect of it. In my view, to allow CN to resurrect this claim in a subsequent action would do an end run around Myers J.'s decision and be an

abuse of process. The motion judge was right to dismiss the continuing coal tar contamination claim on this basis.

[24] CN argues further that because Myers J. dismissed the 1989 Action for delay, and did not adjudicate it on the merits, there can be no abuse of process in seeking relief for the coal tar that has migrated since 2012. Put another way, because Myers J.'s decision did not "exhaust" CN's present claims for continuing migration by either dismissing the claims on the merits or awarding damages for the ongoing harm, that claim should be allowed to proceed because it is "separate and distinct from the claim that was before" Myers J.

[25] In support of this argument CN relies on the British Columbia Court of Appeal decision in *Zhang v. Davies*, 2021 BCCA 196, 50 B.C.L.R. (6th) 1 where the court held that if future harm for a continuing nuisance is addressed in a prior action, the cause of action is exhausted. In that case, the appellant claimed her neighbours' roof reflected sunlight into her house causing a glare. She was awarded damages for interference with the enjoyment of her property, but was denied an injunction. The Court of Appeal held that she could not bring a second action which claimed the glare continued, because the issue of continuing harm had already been decided. At paras. 8-9, the court explained how the appellant's continuing nuisance claim was exhausted by the first action:

The judge accepted the continuing cause of action can be, as she put it, exhausted by earlier litigation. Whether

that has occurred depended on an examination of the earlier claim decision and award. I do not think that the proposition that a continuing nuisance can be exhausted, in the sense that a remedy can take into account and compensate for future harm bringing to an end the right to sue on the continuing harm, is contested or in doubt.

The judge reasoned, correctly in my view, that an interference may constitute a continuing nuisance, but not merit an injunction. Equally, a damage award may compensate for continuing harm. As she explained:

The absence of an order enjoining a nuisance is not telling in and of itself. However, where an injunction was sought and denied, it can be concluded that the issue of future harm was raised before the court as an issue. Thus, it may be more readily inferred that a damages award included damages in lieu of an injunction, where an injunction was expressly sought. However, it may also be evident from the reasons or order in the earlier litigation that the damages included an award for future harm.

Where it can be concluded that the damages awarded included damages for future harm, the cause of action is exhausted and the nuisance's continuation has, in the words of Justice Bull, been effectively "licenced". Where future harm was addressed in a prior claim, the eventual occurrence of that harm cannot found a "separate and distinct" cause of action; to conclude otherwise would enable a plaintiff to sue for the same compensation twice.

[26] Even if I were to consider *Zhang* as persuasive authority, I fail to see how CN's continuing coal tar contamination claims were not exhausted even though

they were dismissed for delay rather than on the merits. I acknowledge that *Zhang* is distinguishable in that the first action in that case was not dismissed for delay but resolved after a trial. However, that does not necessarily mean the 1989 Action in our case was not exhausted upon its dismissal, whatever the basis for doing so.

[27] In my view, CN is essentially asking for an exception to the abuse of process doctrine such that claims dismissed for delay are treated differently than those decided on the merits. There is no principled reason to create such a carve out. In fact, to do so would undermine many of the principles underlying the doctrine, such as judicial economy, consistency, finality, and the integrity of the administration of justice.

[28] I agree with Hogg's submission that to accept CN's argument on this point would be to invite courts to rehear a claim it has already dismissed and allow a plaintiff to perpetually renew a claim alleging a continuing tort until it has been decided in their favour. It would also result in inconsistency if a plaintiff were successful in a second action on a claim that had already been dismissed, which would also be an affront to the principle of finality. Lastly, it would undermine the integrity of the administration of justice by discouraging a defendant from moving to dismiss a lingering action for delay and reward a plaintiff who sleeps on their rights by permitting them to bring a second action.

[29] CN's argument that exhaustion requires a decision on the merits also fails to recognize the flexibility of the abuse of process doctrine, which is unencumbered by the specific requirements of concepts like issue estoppel, which does require a final judicial decision to preclude relitigation of previously decided issues: see *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 19, rev'd on other grounds, 2002 SCC 63, [2002] 3 S.C.R. 307.

[30] In sum, the motion judge did not err in his treatment of CN's continuing tort claim. He acknowledged that continuing torts give rise to new causes of action when the conduct causing the legal injury, and the legal injury itself, are continuing, but also recognized that continuing torts are not shielded from the abuse of process doctrine. As the continuing tort claims were exhausted in the 1989 Action, the subsequent 2014 Action in respect of the same claims is an abuse of process.

#### **4. Trial Fairness Concerns**

[31] CN submits that the motion judge erred by failing to recognize that the trial fairness concerns relating to the 1989 Action are not present in the 2014 Action. It argues that, while the main issue in the 1989 Action concerned how the historic migration of coal tar onto CN's property had occurred, the 2014 Action concerns the ongoing migration that has occurred since 2012. CN's position is that Myers J. did not squarely address whether the issue of liability for the ongoing migration of coal tar onto its land could be tried fairly, which he said was a 'side issue' unrelated to the key issue of the historic coal tar migration. CN argues further that in the 2014

Action it does not need to prove how or where the coal tar was initially deposited to establish Hogg's liability because the issue of ongoing coal tar contamination concerns only Hogg and its conduct since 2012.

[32] I am unpersuaded by this argument. In dismissing the 1989 Action, Myers J. held that CN's delays and failure to preserve evidence would render a trial of the action unfair. There is simply no basis to conclude that Myers J., in so finding, thought the fairness concerns he identified applied only to the claims for the historical coal tar migration. Had he thought the continuing coal tar migration claims could be tried fairly, he would have surely made this distinction and allowed those claims to proceed as opposed to wholly dismissing the action.

[33] CN's argument, which relies on this court's decision in *Sorbam Investments Ltd. v. Litwack*, 2022 ONCA 551, 52 C.E.L.R. (4th) 1, that Hogg could be liable for continuing coal tar migration even if it did not cause the deposit of the contaminants in the first place is a red herring. The issue is not whether Hogg could be liable for continuing migration, but rather whether a trial on such claims would be an abuse of process given Myers J.'s earlier conclusion that such a trial would be unfair. As the motion judge observed, Hogg can no longer crossclaim against the City and PUC for dumping coal tar on its property because of the delay. This renders a trial on the continuing coal tar claims unfair.

## 5. CN's Expert Evidence

[34] CN argues that the motion judge erred by failing to give any weight to its expert evidence. It submits this evidence establishes that coal tar continues to migrate from Hogg's property onto CN's property, which is relevant to the question of whether the continuing coal tar claims can be tried fairly.

[35] The issue of whether coal tar continued to migrate from Hogg's property, and the rate of migration, was of no moment on the summary judgment motion.<sup>1</sup> At the risk of repeating myself, irrespective of whether coal tar continued to migrate, the continuing coal tar claims were dismissed in the 1989 Action, which exhausted that claim. In any event, the weight to be given to an expert opinion was within the motion judge's discretion and is entitled to deference on appeal: *2089322 Ontario Corporation v. Des Roches*, 2025 ONCA 17, at para. 38.

[36] There is no basis for appellate intervention.

## 6. Dismissal of the 1989 Action Precludes the 2014 Action

[37] CN contends that the motion judge erred in concluding that Myers J.'s dismissal order precludes the coal tar contamination claims in the 2014 Action as an abuse of process. I reject this argument as well.

---

<sup>1</sup> Hogg advised that the motion judge could assume for the purposes of the motion only that coal tar continued to migrate onto CN's property.

[38] CN's position is that the motion judge erred by relying on *Mintz v. Wallwin*, 2009 ONCA 199, 73 C.P.C. (6th) 6, which it says is distinguishable because (i) *Mintz* was not a case where the second action asserted a continuing cause of action; and (ii) the second *Mintz* action involved claims identical to those advanced in the first action. CN's position is that for a second action to be an abuse of process it must be identical to the one that has already been dismissed for delay: see also *2027707 Ontario Ltd. v. Richard Burnside & Associates Ltd.*, 2021 ONSC 5746, 92 C.B.R. (6th) 261, at para. 44. According to CN, because the 2014 Action is not 'identical' to the 1989 Action it should be permitted to proceed.

[39] Any insistence on strict identity ignores the similarities between the two actions at issue in the present appeal and is an interpretation that is, yet again, incompatible with the flexible nature of the abuse of process doctrine. In my view, the two actions are identical in that they both advance claims for continuing coal tar migration. Just as it did in the 1989 Action, CN pleaded in the 2014 Action that coal tar is migrating onto its property from Hogg's property and causing damage.

[40] Even if not identical, the claims in the two actions cover the same harm and are not materially different. And, as this court stated in *Pine Glen Thorold*, at para. 59, "[t]he doctrine of abuse of process is flexible and does not require that the two sets of proceedings be identical".

[41] Accordingly, the motion judge did not err in finding that the dismissal in the 1989 Action precluded the continuing coal tar claims in the 2014 Action.

## **7. Bringing the Administration of Justice into Disrepute**

[42] Nor did the motion judge err in concluding that allowing the 2014 Action to proceed would bring the administration of justice into disrepute. To begin, CN's argument that there are no finality concerns in this case must be rejected. As the motion judge observed, CN is seeking to advance claims that Myers J. has already found could not be tried fairly and to accept CN's argument would obviously undermine the finality of that decision.

[43] Further, I am not convinced that fairness concerns would ultimately weigh in CN's favour. To be sure, dismissing the coal tar claims might result in some unfairness to CN in that coal tar could continue migrating onto its property. However, in failing to advance the 1989 Action in a timely fashion, CN is clearly the author of its own misfortune. Because of its delay in advancing the 1989 Action, it is now not possible to identify the source and location of the original coal tar deposit. Put another way, any consideration of unfairness to CN must be weighed against the unfairness to Hogg, which has lost the ability to claim against the original polluter. While Hogg is also responsible for not diligently advancing its crossclaim and counterclaim in the 1989 Action, this must be considered in the wider context of the 1989 Action, which was commenced by CN.

[44] Allowing CN to litigate claims that have already been dismissed is an abuse of process. CN had the opportunity to have its continuing coal tar claims tried on

the merits, but as Myers J. noted, it delayed for 25 years and failed to preserve evidence, rendering it impossible to have the claims adjudicated fairly.

[45] Significantly, the cover letter CN's counsel sent when serving the 2014 Action, which preceded the dismissal of the appeal in the 1989 Action, advised that CN had commenced the 2014 Action in part to protect CN's rights in the event Myers J.'s order was not overturned on appeal. This suggests that had the 1989 Action been allowed to proceed, the 2014 Action would not have been necessary, which reveals the 2014 Action as a poorly veiled attempt by CN to resurrect arguments the court has already rejected.

[46] This cover letter also raises an interesting limitations issue that is not clearly answered in CN's submissions on this appeal. In the letter, counsel writes that CN is seeking damages in the 2014 Action from the historical coal tar contamination that occurred during the applicable limitation period as well as the ongoing contamination. However, CN's statement of claim in the 2014 Action contains no such restriction and its reply and defence to the counterclaim pleads that the 2014 Action is not barred by operation of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B and alternatively that the *Limitations Act* "would only apply to damages that became due and payable more than two years prior to the issuance of the Notice of Action". Given that the notice of action was issued on September 23, 2014, CN's position appears to be that it can recover damages back to September

2012. If so, CN is claiming damages for the two-year period before Myers J.'s dismissal of the 1989 Action.

[47] Indeed, in its factum on this appeal, CN seeks damages relating to coal tar migration that has occurred since 2012. At the oral hearing, however, CN variably suggested that it seeks damages since 2012 or 2014; which represents a very important distinction as CN is potentially seeking damages for migration that occurred before the dismissal of the 1989 Action. All of which is to underscore the difficulty with CN's claims and why they, as presently constituted, must be treated as an abuse of process.

[48] The motion judge did not err in concluding that the administration of justice would be brought into disrepute if the coal tar claims in the 2014 Action were allowed to proceed.

#### **E. DISPOSITION**

[49] For these reasons, I would dismiss the appeal.

[50] Costs are payable by CN to Hogg in the agreed upon all-inclusive amount of \$40,000.

Released: April 10, 2026 "D.M.P."

"J. George J.A."

"I agree. David M. Paciocco J.A."

"I agree. P.J. Monahan J.A."