

ONTARIO
SUPERIOR COURT OF JUSTICE
IN THE COURT OF THE DRAINAGE REFEREE

B E T W E E N:

THE CORPORATION OF THE MUNICIPALITY OF CHATHAM-KENT

Applicant

- and -

CANADIAN PACIFIC RAILWAY COMPANY

Respondent

- and -

OTHERS WHO MAY BE GRANTED PARTY STATUS UPON APPLICATION

Respondents

ACTING DRAINAGE REFEREE
ANDREW C. WRIGHT

) HEARD ON WEDNESDAY,
) THE 18th DAY OF SEPTEMBER, 2024
)
)

ORDER

The Court of the Drainage Referee fixed this date for a pre-hearing case management conference, to address the following:

- (a) Providing for the delivery directly to the presiding Referee of anything a party files with the Court concurrently with its filing with the Court.
- (b) Identifying parties, including those who may be affected by the result of this application, establishing a means of putting those potentially affected persons on notice of this application and giving them an opportunity to participate as a party.
- (c) Scheduling production of documentation by the parties and examinations for discovery.
- (d) Scheduling pre-hearing production and exchange of documents, including affidavits or witness statements for expert witnesses and affidavits or evidence summaries for other witnesses.
- (e) Identifying the number and nature of witnesses to be called by each party.
- (f) Estimating the amount of time required for the hearing.

- (g) Setting the commencement date for the hearing.
- (h) Making provisions about access to and login credentials for participants in the hearing.
- (i) Providing for service by personal service, registered mail or electronically (unless a statute or the Referee requires another method of service).
- (j) Dealing with such other matters or things as may arise and which the presiding Referee may determine is expedient to permit.

and after hearing the submissions of counsel, for the reasons that follow:

THIS COURT ORDERS that

1. The presiding Referee may vary or add to these rules at any time, either on request or as he sees fit. The presiding Referee may alter this Order by an oral ruling, or by another written Order.
2. This Order is supplementary to the November 22, 2023 (issued the same date), which remains in effect, as augmented by this Order, except as specifically amended by this Order, and the reasons for that previous decision remain extant. In the event of a conflict between Orders, the more recent Order shall prevail.
3. Anything that is required by this Order to be delivered by a party to another or to be filed with the Court shall be delivered directly to the presiding Referee concurrently with delivery to the other party or its filing with the Court.
4. For the purposes of this Order and the reasons therefor, unless the context requires a different meaning:
 - (a) the “**Act**”, sometimes referred to as the “***Drainage Act***”, means the *Drainage Act*, R.S.O. 1990 Chapter D.17, as amended.
 - (b) the “**Authorizing By-law**” means the Municipality’s By-law Number 93-2021 given first and second reading and provisionally passed on March 22, 2021 and finally passed on May 31, 2021, adopting the Engineer’s Report and authorizing the completion of the Shaw Branch Drain in accordance with the Act.
 - (c) the “***Constitution Act***” means the *Canada Act 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, as amended,
 - (d) “**CPR**” means the Canadian Pacific Railway Company, a “class I rail carrier” for the purposes of the *Transportation Act*.
 - (e) the “**Drain**” or “**Shaw Branch Drain**” means the *Drainage Act* project administered by the Municipality beginning with the *Drainage Act* process leading up to the completion and adoption of the Engineer’s Report, including rights of appeal to the Tribunal, then the construction of the Drainage Works and

thereafter the maintenance and repair of the Drainage Works all of the cost of which to be assessed to and paid for by the owners of lands that use the Drainage Works in accordance with the assessment schedules in the Engineer's Report.

- (f) the “**Drainage Works**” means the physical infrastructure components of the drainage works to be constructed under the authority of the *Drainage Act* in accordance with the Engineer's Report, including a 250mm (10 inch) diameter smooth wall steel pipe across the CPR railway right of way.
- (g) the “**Engineer's Report**” means the Engineer's Report on the Shaw Branch of the Facey East Drain issued by Spriet Associates, dated February 19, 2021, and signed by John M. Spriet, P.Eng., including plan and profile.
- (h) the “**Municipal Act**” means the *Municipal Act, 2001*, S.O. 2001, Chapter 25, as amended.
- (i) the “**Municipality**” means The Corporation of the Municipality of Chatham-Kent, the applicant, for itself and as the administrator of the *Drainage Act* within its territorial limits.
- (j) “**OMAFRA**” means the Ontario Ministry of Agriculture, Food and Rural Affairs.
- (k) the “**Railway Safety Act**” means the *Railway Safety Act*, R.S.C., 1985, c. 32 (4th Supp.), as amended.
- (l) the “**Rules**” means Regulation 232/15, being the Rules of Practice and Procedure in Proceedings Before The Referee.
- (m) the “**Transportation Act**” means the *Canada Transportation Act*, S.C. 1996, c.10, as amended.
- (n) the “**Transportation Agency**” means the Canadian Transportation Agency as continued by subsection 7(1) of the *Transportation Act*.
- (o) the “**Transportation Agency Rules**” means Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings) (SOR/2014-104).
- (p) the “**Tribunal**” means the Agriculture, Food and Rural Affairs Appeal Tribunal.

Parties and Representation

5. The applicant Municipality is represented by Emily Crawford, a Solicitor in the applicant's Municipal Solicitor's office and David Taylor, the Municipality's Director of Legal Services.
6. The CPR was initially represented by Kimberley Potter, and Lily MacLeod, lawyers with the law firm of Fasken Martineau DuMoulin ^{LLP}, Barristers and Solicitors, and since

January 10, 2024, is now represented by Christopher DiMatteo and Anne Drost, lawyers with the law firm of Blake, Cassels & Graydon ^{LLP}, Barristers & Solicitors.

7. The Attorney General of Ontario as intervenor is represented by Josh Hunter and Maia Stevenson, both Counsel in the Constitutional Law Branch of the Ministry of the Attorney General of Ontario
8. Others may be added as parties following the circulation of notice of this proceeding in accordance with directions to be given in the future, and if they are added as parties, they and their representative will be added.

Preliminary Issues

9. A case management video conference will be convened to address the following preliminary constitutional question and supplementary questions arising:
 - (a) Is CPR constitutionally exempt from paying assessments of railway right-of-way land it owns when such assessments have been determined in accordance with and are authorized under the *Drainage Act*?
 - (b) If the answer to question (a) is no, then (i) are the Municipality's expenses of an application to the Transportation Agency to authorize the construction of the Drainage Works across the CPR right-of-way to be charged to the Shaw Branch Drain and assessed to and paid for in accordance with the assessment schedules in the Engineer's Report, and (ii) do those expenses represent an increase in the cost of the Drainage Works caused by the existence of the works of the CPR railway right-of-way, to paraphrase section 26 of Act, and as such are they to be added to the Special Assessment against the CPR owned railway right-of-way lands?
 - (c) If the answer to question (a) is no, then (i) are the costs of any works in addition to the Drainage Works required by the Transportation Agency as a condition of an Order authorizing the construction of the Drainage Works across the CPR right-of-way to be charged to the Shaw Branch Drain and assessed to and paid for in accordance with the assessment schedules in the Engineer's Report and, (ii) do those expenses represent an increase in the cost of the Drainage Works caused by the existence of the works of the CPR railway right-of-way, to paraphrase section 26 of Act, and as such are they to be added to the Special Assessment against the CPR owned railway right-of-way lands?
 - (d) If the answer to question (a) is no, and the Municipality enters into an agreement with CPR, either of its own volition or as a requirement or condition of an Order authorizing the construction of the Drainage Works across the CPR right-of-way, which agreement requires works in addition to the Drainage Works, (i) are the Municipality's costs of such additional works to be charged to the Shaw Branch Drain and assessed to and paid for in accordance with the assessment schedules in the Engineer's Report and, (ii) do those expenses represent an increase in the cost of the Drainage Works caused by the existence of the works of the CPR railway right-of-way, to paraphrase section 26 of Act, and as such are they to be added to the Special Assessment against the CPR owned railway right-of-way lands?

- (e) If the answer to question (a) is no, then (i) is any payment required to be made by the Municipality as ordered by the Transportation Agency in connection with an application to the Transportation Agency to authorize the construction of the Drainage Works across the CPR right-of-way or imposed by the Transportation Agency as a condition of the Transportation Agency's Order authorizing the construction of the Drainage Works across the CPR right-of-way to be charged to the Shaw Branch Drain to be assessed to and paid for in accordance with the assessment schedules in the Engineer's Report and, (ii) do any such payments represent an increase in the cost of the Drainage Works caused by the existence of the works of the CPR railway right-of-way, to paraphrase section 26 of Act, and as such are they to be added to the Special Assessment against the CPR owned railway right-of-way lands?
- (f) If the answer to question (a) is no, and the Municipality enters into an agreement with CPR, either of its own volition or as a requirement or condition of an Order authorizing the construction of the Drainage Works across the CPR right-of-way, which agreement requires any payment to be made by the Municipality, (i) is the amount of such payment to be charged to the Shaw Branch Drain and assessed to and paid for in accordance with the assessment schedules in the Engineer's Report and, (ii) does such payment represent an increase in the cost of the Drainage Works caused by the existence of the works of the CPR railway right-of-way, to paraphrase section 26 of Act, and as such are they to be added to the Special Assessment against the CPR owned railway right-of-way lands?
- (g) If the answer to question (a) is no, then (i) are the Municipality's expenses of this application to be charged to the Shaw Branch Drain and assessed to and paid for in accordance with the assessment schedules in the Engineer's Report and, (ii) do those expenses represent an increase in the cost of the Drainage Works caused by the existence of the CPR railway right-of-way, to paraphrase section 26 of Act, and as such are they to be added to the Special Assessment against the CPR owned railway right-of-way lands?
- (h) If the answer to question (a) is no, then is the Municipality prohibited by sections 106 and 107 of the *Municipal Act, 2001* from paying or reimbursing, directly or indirectly, CPR for the amount of any *Drainage Act* assessments that CPR is required to pay or from exempting CPR from paying such *Drainage Act* assessments?

Case Management Conference to Identify Parties

10. Before scheduling a video conference to address the preliminary constitutional question and the supplementary questions, a case management pre-hearing conference will be held via video conference on Thursday, November 14, 2024 commencing 10:00 in the morning for the purpose of identifying parties to this application and for the purpose of establishing a schedule for any added party to file position papers, and to produce any documentation upon which they intend to rely, including any supporting affidavits. A second day, November 15th, will be set aside for this video conference.

11. At the time of the Thursday, November 14, 2024 video conference, or as soon thereafter as is possible, a date will be fixed for the argument of the preliminary constitutional question and the supplementary questions, and a schedule will be established for the exchange of evidence and facta in advance of such argument.
12. The Municipality shall give notice of the Thursday, November 14, 2024 video conference hearing and the following provisions shall apply to the giving of notice:
 - (a) The notice shall be given by the Municipality in the form attached to this Order.
 - (b) The notice shall be given by ordinary mail to:
 - (i) The current owners of lands identified in the Engineer's Report and, for this purpose, the lands identified in the Engineer's Report are those lands assessed or awarded allowances at their respective addresses as shown on the last revised assessment roll; as well as the petitioner(s) for the Shaw Branch Drain if they are not amongst the current owners of lands identified in the Engineer's Report.
 - (ii) All municipalities in the province of Ontario, including all upper-tier, lower-tier and single-tier municipalities.
 - (iii) The Association of Municipalities of Ontario (AMO) and the Rural Ontario Municipal Association (ROMA).
 - (iv) The following Class 1 railroads operating in Ontario:
 - Amtrak,
 - BNSF Railway,
 - Canadian National Railway,
 - Canadian Pacific Kansas City,
 - CSX Transportation,
 - Norfolk Southern Railway,
 - Via Rail Canada, and
 - Union Pacific Railroad.
 - (v) The Railway Association of Canada (RAC).
 - (vi) The following Shortline railways operating in Ontario
 - 2427811 Ontario Inc.
 - Agawa Canyon Railroad ULC
 - Cando Rail & Terminals Ltd.
 - Gio Railways Corporation
 - Guelph Junction Railway Ltd.
 - Huron Central Railway
 - Nylene Canada Inc.

- Ontario Southland Railway Inc.
 - Trillium Railway Co. Ltd.
 - Port Stanley Terminal Rail Inc.
 - Southern Ontario Locomotive Restoration Society operating as Waterloo Central Railway
 - South Simcoe Railway Heritage Corporation
 - York-Durham Heritage Railway Association
- (c) The notice will also be given to the Transportation Agency and to the Attorneys General of Canada and of Ontario.
- (d) Notice shall be mailed on or before the Friday, September 27, 2024.
- (e) The Municipality shall make available for review at its offices at 315 King Street, West, Chatham, (N7M 5K8) during normal business hours a copy of all of the documentation listed in paragraph 16 below of this Order together with a copy of this Order.
- (f) The Municipality shall make available on its website at,
<https://www.chatham-kent.ca/services/Drainage/Pages/Chatham-Kent-v.-Canadian-Pacific-Railway-Notice-of-Constitutional-Question.aspx>
all that is mentioned in clause 12(e) above.
- (g) The Municipality shall prepare an affidavit proving service in compliance with this Order.
- (h) The Municipality shall deliver the affidavit of service referred to in item 12(g) above to CPR by electronic e-mail transmission before the close of business on Friday, October 11, 2024; and the Municipality shall forthwith file with the Superior Court of Justice Civil Registrar, a copy of the affidavit of service electronically addressed to:
Chatham.Courthouse@ontario.ca
and when doing so, reference:
Chatham-Kent (Municipality) v CPR - Court of the Drainage Referee
Court File CV-23-00001165-0000 (Chatham)

Future Case Management Conferences

13. After the Court of the Drainage Referee has decided the preliminary constitutional question and supplemental questions arising and has ordered the Municipality to make an application to the Transportation Agency for authorization for the Shaw Branch Drain to cross the CPR railway right-of-way as contemplated by the Engineer's Report, the

hearing of this application in the Court of the Drainage Referee will then be adjourned *sine die*, but the presiding Referee will remain seized and, if necessary, future case management video conferences may be scheduled to address:

- (a) Scheduling pre-hearing production and exchange of documents, including affidavits or witness statements for expert witnesses and affidavits or evidence summaries for other witnesses.
- (b) Identifying the number and nature of witnesses to be called by each party at a hearing of the merits.
- (c) Estimating the amount of time required for the hearing of the merits.
- (d) Setting the commencement date for the hearing of the merits.
- (e) Making provisions about access to and login credentials for participants in the hearing.
- (f) Providing for service by personal service, registered mail or electronically (unless a statute or the Referee requires another method of service).
- (g) Dealing with such other matters or things as may arise and which the presiding Referee may determine is expedient to permit.

Video Conference Protocols

14. For case management video conferences and the hearing on the merits to be conducted by video conference, the following provisions shall apply:
- (a) The parties shall provide the presiding Referee the names and e-mail addresses of those who will be on hand at the video conference hearing; that includes counsel, any witnesses, and those giving instructions to counsel.
 - (b) Parties and those with a recognized interest in the proceeding, including news media, will be provided by the presiding Referee with access credentials, including a password, to log into the video conference at the appointed time.
 - (c) Parties are responsible for arranging to have their witnesses join the Zoom meeting to give their evidence at the time directed by the presiding Referee.
 - (d) Once logged on, the person will be held in a waiting area pending authorization by the presiding Referee to join the hearing.
 - (e) Parties intending to call a witness will ensure that the witness has a holy book (Bible or Koran) or an oath-taking article (such as an eagle feather) at hand if they are to be sworn to give evidence; a holy book is not required for a witness who affirms.
 - (f) Before giving testimony, each witness shall affirm to the presiding Referee orally that they are alone in the room and that they are not relying on any undisclosed

document, such as speaking notes. Witnesses are not permitted to testify with others present in the room or to use undisclosed documents without the approval of the presiding Referee.

- (g) For those joining the hearing to simply observe without participation, their microphone will be muted during the hearing conference.
- (h) Those joining the hearing will need a device equipped with a webcam and a microphone and access to a reliable internet connection with adequate bandwidth; the device should always be plugged in to ensure that the battery does not run low.
- (i) A smartphone may only be used at the discretion of the presiding Referee; the use of a smartphone is discouraged due to potential disruptions, such as incoming calls and messages, and the risk of running out of battery.
- (j) Those joining the hearing will normally be alone in their location; if they are not, the presiding Referee may require such other persons to leave the room during the proceeding. There is an ongoing obligation to inform the presiding Referee if they are joined by someone else during the proceeding.

Documents and Exhibits

15. Because case management video conferences and the hearing on the merits are to be conducted by video conference, protocols concerning the entering of exhibits are warranted and the following apply in that connection:
- (a) A document, including a plan or photograph, to be relied upon at a hearing must be identified as an exhibit.
 - (b) To be identified as an exhibit, the document must be provided to the presiding Referee and to all other parties at least 2 days in advance of the video conference hearing at which it is to be presented as an exhibit; the presiding Referee may abridge this time.
 - (c) The presiding Referee will decide whether to enter the document as an exhibit and, if it is allowed, the presiding Referee will assign an exhibit an alpha/numeric identifier.
 - (d) Once the document has been entered as an exhibit, the party that introduced the exhibit shall, within 3 business days following the conclusion of the video conference hearing, file an electronic copy of the exhibit with the court via the One-Key portal and, when doing so, shall identify Court File No.: CV-23-00001165-0000 (Chatham) and the exhibit identifier assigned by the presiding Referee; a copy of the e-mail of transmittal shall be provided to the presiding Referee.

- (e) Court Orders, the application, notices of motion, facta, case law, legislation and compendiums of authorities will not be marked as exhibits though Court Orders, the application, notices of motion and facta should be filed with the court and item 15(d) above applies *mutatis mutandis*.

16. At the time of this Order, the following documents are part of the record:

	Notice of Application issued July 6, 2023
No.: 1	The Engineer's Report on the Shaw Branch of the Facey East Drain issued by Spriet Associates, dated February 19, 2021, and signed by John M. Spriet, P.Eng., including plan and profile (the " Engineer's Report ").
No.: 2	Municipality of Chatham-Kent By-law No.: 93-2021 provisionally adopted on March 22, 2021, and finally passed on May 31, 2021, adopting the Engineer's Report
	Order issued by Acting Referee Andrew Wright on November 22, 2023 April 16, 2024 providing for the production of documents by the Municipality and the exchange of affidavits by the parties.
No. 3	Notice of Constitutional Question issued by CPR on January 31, 2024
No. 4	Affidavit of Alex Miller sworn March 20, 2024, together with two Exhibits A and B
No. 5	Affidavit of John M. Spriet, P.Eng., sworn March 27, 2024, together with 14 Exhibits A through M
No. 6	Affidavit of Blaise Chevalier sworn April 2, 2024, together with 36 Exhibits A through JJ
No. 7	Affidavit of Sid Vander Veen, P.Eng. sworn April 2, 2024, together with five Exhibits A through E
No. 8	Affidavit of Rheal Lemelin sworn June 27, 2024
No. 9	Affidavit of Jack Carello sworn July 4, 2024, together with 26 Exhibits A through Z
No. 10	Affidavit of Blaise Chevalier sworn September 6, 2024, together with 7 Exhibits A through G

17. The documents that have exhibit numbers will retain their exhibit numbers through the case management hearings and hearing(s) on the merits of this case. New exhibits will be identified by the next ensuing exhibit number and be added to the list as the hearing(s) progresses.
18. The documents listed are intended to reflect those things which would normally be filed in court or which would be used in the course of the hearing; it does not include but does not intend to dispense with routine items such as appearances, affidavits of service

required by the court staff for filings such as the application, appearances, any motions and routine affidavits of service for supporting affidavits.

19. If counsel or a witness intends to rely upon case law, other than the cases listed in paragraph 16 or legislation, other than the Act, copies must be provided to the presiding Referee and to all other parties at least 2 days in advance of the video conference hearing at which it is to be referred to; the presiding Referee may abridge this time.

General Matters

20. When any document is required or permitted to be served, it shall be served by personal service, registered mail or electronically (unless a statute or the Referee requires another method of service) and shall be sent to:
 - (a) the party's representative, if any;
 - (b) where the party is an individual and is not represented, to that party directly, where that party has provided an address for service and/or an e-mail address;
 - (c) where that party is a corporation and is not represented, to the corporation directly, to the attention of an individual with apparent authority to receive the document.
21. For the purposes of this Order, unless otherwise ordered, Andrew C. Wright, Acting Drainage Referee, shall be regarded as the presiding Referee.
22. No adjournments or delays will be granted before or during the hearing except for serious hardship or illness.
23. Costs of the day are reserved to the final disposition of this matter.

Dated at London this September 19, 2024.



Andrew C. Wright
Acting Drainage Referee

REASONS

1. The Order to which these reasons are attached is part of an evolving case management and procedural Order, which is a consolidation of previously issued Orders and includes currently operable provisions and eliminates those matters which have been completed or are no longer necessary.
2. Words and phrases defined in the Order have the same meaning when used in these reasons. When in these reasons reference is made to the “**Order**”, it is a reference to the Order to which these reasons are attached.
3. At this stage, the parties have exchanged documents and have provided affidavits in support of the application and in response. As yet, there has been no cross-examination on the affidavits.
4. From the evidence provided, it appears that the Engineer’s Report contemplates relatively minor, petition-based Drainage Works that involve lowering and increasing the capacity of the existing drain crossing of railway right-of-way lands owned by CPR. CPR was made aware of the proposed drainage works but elected not to participate in any of the proceedings under the *Drainage Act*; in particular, CPR exercised none of the appeal rights it had under the *Drainage Act*, and the time for doing so has long since passed.
5. CPR relies upon the *Constitution Act* as the basis of its position that only the Transportation Agency has authority to authorize the crossing of the railway right of way without CPR’s agreement. CPR has served a Notice of Constitutional Question, which has been entered as Exhibit No.: 3. The Notice of Constitutional Question calls into question the constitutional applicability and operability of numerous sections of the Act and the Authorizing By-law.

Drainage Act Background

6. At this point, it is worthwhile to reflect upon the scheme of the *Drainage Act*. It is akin to many local improvement legislative schemes in which local landowners may petition for the installation of servicing infrastructure, such as roads, sewers, street lighting and sidewalks. If there is a prerequisite number of petitioners, the municipality proceeds with the project and then recovers the cost of doing so through an assessment of those landowners who use the installation. Usually, the legislation authorizes assessments to be recoverable as municipal property taxes. This is the general scheme of the *Drainage Act* as it applies to drainage works. The municipality is the administrator of the *Drainage Act* and is not the ultimate payor for the costs of construction, maintenance and repair of municipal drainage works; those whose lands use or contribute water to the drainage works pay the costs of constructing, maintaining and repairing drains. The Municipality brings this application not for itself *per se* but as the administrator of the Shaw Branch Drain as proposed by the Engineer’s Report.
7. While the Drainage Works are a relatively small project, it is part of the municipal drainage system that is important in Ontario. To put the Municipality’s role in that

context, for a century Ontario farmers and governments have and continue to invest heavily in drainage. An OMAFA Fact Sheet (Order No. 01-059) issued in August 2001 summarizes what a “municipal drain” is and the purpose of the as follows:

THE PURPOSE OF MUNICIPAL DRAINS

Municipal drains have been a fixture of rural Ontario’s infrastructure since the 1800’s. Most municipal drains were constructed to improve the drainage of agricultural land by serving as the discharge point for private agricultural tile drainage systems. However, they also remove excess water collected by roadside ditches, residential lots, churches, schools, industrial lands, commercial lands and other properties in rural areas. They are a vital component of the local infrastructure. Without them, many areas of the province would be subjected to regular flooding, reduced production from agricultural land and increased public health risks.

WHY IS IT CALLED A “MUNICIPAL DRAIN”

There are many, many drainage ditches and buried pipes in the province, but not all of them are “municipal drains”. So, what distinguishes a municipal drain?

Municipal drains are created under the authority of the *Drainage Act*. There are 3 key elements of the municipal drain:

1 Community project - Landowners who need to solve a drainage problem may submit a prescribed petition under the Drainage Act to their local municipality, requesting the establishment of a municipal drain. If certain criteria are met, the municipality appoints an engineer who prepares a report, identifying the proposed solution to the problem and how the costs will be shared. There are various meetings where the landowners in the watershed of the municipal drain can voice their desires and concerns. There are also several appeal stages where they can voice their objections. So, the end result of the process is a “community-accepted” project.

2 Legal Existence – After all appeals have been heard and dealt with, the municipality passes a by-law adopting the engineer’s report. The municipality then has the authority and the responsibility to construct the project. So, for a ditch or a pipe to be a municipal drain, there must be a by-law adopting an engineer’s report.

3 Municipal Infrastructure – Once a municipal drain has been constructed under the authority of a by-law, it becomes part of that municipality’s infrastructure. The local municipality, through its drainage superintendent, is responsible for repairing and maintaining the municipal drain. In certain circumstances, the municipality can be held liable for damages for not maintaining these drains.

8. For the Ontario fiscal year ending March 31, 2023, as reported by OMAFRA to the Drainage Practitioners Meeting in October 2023, municipal expenditures for drainage

works authorized by the *Drainage Act*, including improvements thereof, totalled \$40.8 million across the province.

9. The farming community benefits from drainage through improved crop yields, the ability to adopt higher-value crops, timeliness of planting and harvesting, land improvement and reduced production costs.

Jurisdiction to Authorize the Crossing of Railway Right-of-Way by a Municipal Drain

10. CPR's Notice of Constitutional Question calls into question the constitutional applicability and operability of numerous sections of the Act and the Authorizing By-law. It does not pose a question, *per se*, but the submission is that a crossing of the CPR right-of-way by the Drainage Works cannot be authorized by the *Drainage Act* and that, therefore, any Order of the Court of the Drainage Referee to that effect would be constitutionally invalid.
11. Whether or not the Court of the Drainage Referee has the constitutional authority, the court does not need to, nor does it intend at this time to make an Order to authorize the crossing of the CPR right-of-way by the Drainage Works. I have reviewed the authority of the Transportation Agency as found in sections 100 and 101 of the *Transportation Act*, the Objectives set out in Section 3 of the *Railway Safety Act* and Section 16 of the *Railway Safety Act*. It is not for the Court of the Drainage Referee to determine the Transportation Agency's jurisdiction and authority, but at first glance, it is conceivable that the Transportation Agency may have the authority to sanction the crossing by a municipal drain of a railway right-of-way. CPR says the Transportation Agency has that authority; the Municipality does not concede that it does. The Attorney General for Ontario shares the Municipality's reservations about the Transportation Agency's jurisdiction and authority. This Court of the Drainage Referee is not to be taken as giving any opinion on the matter. That said, the Transportation Agency has expertise borne of knowledge and experience with railways and administrative resources that the Court of the Drainage Referee does not. The Transportation Agency is in a much-preferred position to ensure that any municipal drain crossing of a railway will not compromise the railway right-of-way or rail traffic using the right-of-way or put at risk the safety and security of the public and personnel, or the protection of property and the environment.
12. Assuming the Transportation Agency has prerequisite jurisdiction and authority, I imagine that, when dealing with applications relating to railways under the *Transportation Act*, decisions of the Transportation Agency are informed by the Objectives enunciated in Section 3 of the *Railway Safety Act*, which are all about the safety and security of the public and the protection of property and the environment. Whether or not to approve a utility crossing, and on what terms and conditions, would perhaps focus on the risk of compromising the railway right-of-way and rail traffic using the right-of-way or putting at risk the safety and security of the public and personnel or the protection of property and the environment. It is for the Transportation Agency to determine, but instinctively CPR's refusal of a municipal drain crossing of one of its railway rights-of-way seems inconsistent with these Objectives and at odds with the public interest.

13. While it is entirely in the discretion of the Transportation Agency to decide how the liability for the expense of the Shaw Branch Drain crossing of the CPR railway right-of-way is to be allocated, under subsection 16(4) of the *Railway Safety Act*, the Transportation Agency is to consider “the relative benefits that each person who has, or who might have, referred the matter stands to gain from the work, and to any other factor that it considers relevant.” Some portion of the benefit from the municipal drain crossing of the CPR railway right-of-way will accrue to the Drain. Unless the answer is “yes” to the preliminary question set out in clause 9(a) of the Order, whatever portion of the liability for the expenses of the crossing is allocated to the Drain by the Transportation Agency will then be assessed and paid in accordance with the Engineer’s Report as authorized by the *Drainage Act*. There is no inconsistency or conflict between the federal *Transportation Act*, the federal *Rail Safety Act*, and the Ontario *Drainage Act*.
14. While CPR, in its Notice of Constitutional Question, challenges the authority of the *Drainage Act* to authorize a crossing of the CPR right-of-way by the Drainage Works and, therefore, challenges the constitutional validity of any Order of the Court of the Drainage Referee to that effect. The Notice of Constitutional Question asserts that the Transportation Agency has the jurisdiction to authorize the crossing of the railway right-of-way without CPR’s agreement, but CPR has carefully avoided putting the essential constitutional question:

Is CPR constitutionally exempt from paying assessments of railway right-of-way land it owns when such assessments have been determined in accordance with and are authorized under the *Drainage Act*?
15. The answer to this constitutional question is important to the drainage engineering community in Ontario and to municipalities that are charged by the Province with administering and maintaining drainage works under the Act. It is equally important to companies that own and operate federally regulated railways in Ontario and perhaps beyond.
16. Before directing the Municipality to make an application to the Transportation Agency, I wish first to address the constitutional question of an exemption from paying *Drainage Act* assessments as a preliminary matter, as well as the following supplementary questions, which arise if the answer is that CPR is not exempt from paying *Drainage Act* assessments.
 - (a) Are the Municipality’s expenses of an application to the Transportation Agency to authorize the construction of the Drainage Works across the CPR right-of-way to be charged to the Shaw Branch Drain and assessed to and paid for in accordance with the assessment schedules in the Engineer’s Report, and do those expenses represent an increase in the cost of the Drainage Works caused by the existence of the works of the CPR railway right-of-way, to paraphrase section 26 of Act, and as such are they to be added to the Special Assessment against the CPR owned railway right-of-way lands?
 - (b) Are the costs of any works in addition to the Drainage Works required by the Transportation Agency as a condition of an Order authorizing the construction of the Drainage Works across the CPR right-of-way to be charged to the Shaw

Branch Drain and assessed to and paid for in accordance with the assessment schedules in the Engineer's Report and do those expenses represent an increase in the cost of the Drainage Works caused by the existence of the works of the CPR railway right-of-way, to paraphrase section 26 of Act, and as such are they to be added to the Special Assessment against the CPR owned railway right-of-way lands?

- (c) If the Municipality enters into an agreement with CPR, either of its own volition or as a requirement or condition of an Order authorizing the construction of the Drainage Works across the CPR right-of-way, which agreement requires works in addition to the Drainage Works, are the Municipality's costs of such additional works to be charged to the Shaw Branch Drain and assessed to and paid for in accordance with the assessment schedules in the Engineer's Report and do those expenses represent an increase in the cost of the Drainage Works caused by the existence of the works of the CPR railway right-of-way, to paraphrase section 26 of Act, and as such are they to be added to the Special Assessment against the CPR owned railway right-of-way lands?
- (d) Is any payment required to be made by the Municipality as ordered by the Transportation Agency in connection with an application to the Transportation Agency to authorize the construction of the Drainage Works across the CPR right-of-way or imposed by the Transportation Agency as a condition of the Transportation Agency's Order authorizing the construction of the Drainage Works across the CPR right-of-way to be charged to the Shaw Branch Drain to be assessed to and paid for in accordance with the assessment schedules in the Engineer's Report and do any such payments represent an increase in the cost of the Drainage Works caused by the existence of the works of the CPR railway right-of-way, to paraphrase section 26 of Act, and as such are they to be added to the Special Assessment against the CPR owned railway right-of-way lands?
- (e) If the Municipality enters into an agreement with CPR, either of its own volition or as a requirement or condition of an Order authorizing the construction of the Drainage Works across the CPR right-of-way, which agreement requires any payment to be made by the Municipality is the amount of such payment to be charged to the Shaw Branch Drain and assessed to and paid for in accordance with the assessment schedules in the Engineer's Report and, does such payment represent an increase in the cost of the Drainage Works caused by the existence of the works of the CPR railway right-of-way, to paraphrase section 26 of Act, and as such are they to be added to the Special Assessment against the CPR owned railway right-of-way lands?
- (f) If the Municipality's expenses of this application to be charged to the Shaw Branch Drain and assessed to and paid for in accordance with the assessment schedules in the Engineer's Report and do those expenses represent an increase in the cost of the Drainage Works caused by the existence of the CPR railway right-of-way, to paraphrase section 26 of Act, and as such are they to be added to the Special Assessment against the CPR owned railway right-of-way lands?

- (g) If the Municipality is prohibited by sections 106 and 107 of the *Municipal Act, 2001* from paying or reimbursing, directly or indirectly, CPR for the amount of any *Drainage Act* assessments that CPR is required to pay or from exempting CPR from paying such *Drainage Act* assessments?
17. These supplemental preliminary questions are within the jurisdiction of the Court of the Drainage Referee and not within the jurisdiction and authority of the federal Transportation Agency.
18. At the risk of stating the obvious, the Transportation Agency has no authority to amend section 26 of the *Drainage Act* or the Engineer's Report. It also has no authority to amend sections 106 and 107 of the *Municipal Act* or to compel the Municipality to do that which is prohibited by those sections. More will be said below about sections 106 and 107 of the *Municipal Act*.
19. To put the supplemental preliminary questions set out in paragraph 16 above in context, it is necessary to bring into focus CPR's essential substantive issue, which is that CPR is dissatisfied with section 26 of the *Drainage Act*. That section is as follows:
- 26 In addition to all other sums lawfully assessed against the property of a public utility or road authority under this Act, and despite the fact that the public utility or road authority is not otherwise assessable under this Act, the public utility or road authority shall be assessed for and shall pay all the increase of cost of such drainage works caused by the existence of the works of the public utility or road authority.
20. Public Utility is defined in the Act to mean: "a person having jurisdiction over any water works, gas works, electric heat, light and power works, telegraph and telephone lines, railways however operated, street railways and works for the transmission of gas, oil, water or electrical power or energy, or any similar works supplying the general public with necessities or conveniences."

21. The Engineer’s Report reflects section 26 as follows:

Special Assessment

In accordance with Section 26 of the Drainage Act, a Special Assessment has been made against CP Railway Inc. being the increased cost to the drainage work for boring a 250mm diameter smooth wall steel pipe across their right-of-way on the Shaw Branch due to the construction and operation of the rail line. The Special Assessment shall be made up to the actual cost of this work and both the final and estimated values of the Special Assessment are to be calculated as follows:

Drain	Cost of Work	Less Equivalent Drain Cost (Fixed)	Plus Administration Cost	Plus Interest & Net H.S.T.	Special Assessment
250mm pipe	\$14,000.00	\$1,280.00	\$6,900.00	\$490.00	\$20,110.00

The above special assessments shall not apply for future maintenance purposes.

If any additional work is required to the drainage works due to the existence of buried utilities such as gas pipelines, communications cables, etc. or if any of the utilities require relocation or repair, then, the extra costs incurred shall be borne by the utility involved in accordance with the provisions of Section 26 of the Drainage Act.

- 22. The Engineer’s Report estimates the cost of the proposed Drainage Works is \$36,500.00, so a significant portion of that amount is being assessed to CPR as Special Assessment in accordance with section 26 of the Act. CPR is also assessed \$5,860.00 for Benefit and \$2,629.00 for Outlet for a total of \$8,489.00 in addition to the Special Assessment. As mentioned, CPR did not appeal these assessments to the Tribunal as it was entitled to do under the *Drainage Act*.
- 23. The first preliminary question asks, is CPR constitutionally exempt from paying assessments for the Shaw Branch Drain as authorized by the *Drainage Act* for the construction, maintenance and repair of the Shaw Branch Drain?
- 24. If the answer is: yes, then the Engineer’s Report special assessment under section 26 of the *Drainage Act* and the assessment of CPR lands for outlet and benefit are constitutionally invalid, and the entire Engineer’s Report should be set aside because the fundamental assessment premise of the Engineer’s Report is in error as a matter of law. The whole project needs to be reconsidered, taking into account that the CPR lands are constitutionally exempt from assessment under the *Drainage Act*.
- 25. If, however, the answer is: no, then the supplemental preliminary questions set out in paragraph 16 above arise and need to be answered because those answers will reflect the

practical effect of assessments in accordance with the Engineer's Report as authorized by the *Drainage Act*. The answers to those preliminary questions have to do with the *Drainage Act*, not the *Transportation Act*, but the answers to those questions will perhaps inform the decisions upon the Municipality's application for authority to construct the Drainage Works across the CPR right-of-way land.

**Has the Municipality Authority to Pay *Drainage Act* Assessments
Otherwise Payable by CPR or Exempt CPR from Paying such Assessments?**

26. Again, if the answer is "no" to the preliminary constitutional issue question set out in clause 9(a) of the Order, then the question is whether the Municipality has the statutory authority to reimburse CPR for any *Drainage Act* assessment CPR is required to pay or to exempt CPR from the *Drainage Act* assessment, hence the preliminary question set out in clause 9(a) of the Order.
27. The Municipality has the authority to enter into an agreement with CPR concerning many aspects of the Shaw Branch Drain crossing of its railway right-of-way to ensure that the Shaw Branch Drain crossing will not compromise CPR's railway right-of-way or rail traffic using the right-of-way or put at risk the safety and security of the public and personnel, or the protection of property and the environment. The concern is, however, for reasons discussed below, there may be statutory constraints on what the Municipality is permitted to do about altering assessments established after due process under the *Drainage Act*.
28. Insofar as the Municipality paying out of its general funds what CPR is otherwise required to pay under the *Drainage Act*, section 106 of the *Municipal Act* appears at first glance to prohibit it. Section 106 provides as follows:
- Assistance Prohibited
106(1) Despite any Act, a municipality shall not assist directly or indirectly any manufacturing business or other industrial or commercial enterprise through the granting of bonuses for that purpose.
- Same
106(2) Without limiting subsection (1), the municipality shall not grant assistance by,
- (a) giving or lending any property of the municipality, including money;
 - (b) guaranteeing borrowing;
 - (c) leasing or selling any property of the municipality at below fair market value; or
 - (d) giving a total or partial exemption from any levy, charge or fee.
- Exception
106(3) Subsection (1) does not apply to a council exercising its authority under subsection 28 (6), (7) or (7.2) of the *Planning Act* or under section 365.1 of this Act..

General Power to make Grants

107(1) Despite any provision of this or any other Act relating to the giving of grants or aid by a municipality, subject to section 106, a municipality may make grants, on such terms as to security and otherwise as the council considers appropriate, to any person, group or body, including a fund, within or outside the boundaries of the municipality for any purpose that council considers to be in the interests of the municipality.

Loans, Guarantees, etc.

107(2) The power to make a grant includes the power,

- (a) to guarantee a loan and to make a grant by way of loan and to charge interest on the loan;
- (b) to sell or lease land for nominal consideration or to make a grant of land;
- (c) to provide for the use by any person of land owned or occupied by the municipality upon such terms as may be fixed by council;
- (c.1) to provide for the use by any person of officers, employees or agents of the municipality upon such terms as may be fixed by council;
- (d) to sell, lease or otherwise dispose of at a nominal price, or make a grant of, any personal property of the municipality or to provide for the use of the personal property on such terms as may be fixed by council; and
- (e) to make donations of foodstuffs and merchandise purchased by the municipality for that purpose.

29. While I have no doubt I will receive submissions from the parties in connection with this last preliminary question, it would seem that the Municipality may be prohibited from paying out of general municipal funds any of CPR's share of the cost of the Drainage Works either by making a grant as prohibited by subsection 106(1) of the *Municipal Act* or by giving an exemption from any levy, charge or fee as prohibited by clause 106(2)(d) of the *Municipal Act*. If that is so, then I am concerned about whether the Municipality has the authority to do so or to enter into a contract with CPR for the same purpose and may, in fact, be prohibited from doing so. In addition to all of that, I observe that there is no provision in the *Drainage Act* which authorizes the Municipality to enter into agreements which would deviate from the assessment rules, procedures and requirements of the *Drainage Act*.

Parties' Submissions Concerning Preliminary Questions

30. The Municipality submits that the preliminary constitutional question enunciated in paragraph 14 above of these reasons should be qualified or limited to submissions focused on the principles of Interjurisdictional Immunity and Federal Jurisdiction. With respect, I am not prepared to limit the scope of the debate about that preliminary constitutional question. Potential additional parties and intervenors may have varied and

different approaches to the constitutional question and I do not wish to preclude any arguments which may not be encompassed within the principles which the Municipality believes are pertinent.

31. CPR takes the position that the preliminary constitutional question enunciated in paragraph 14 above of these reasons and the supplementary questions set out in paragraph 16 above are hypothetical and premature until a decision has been made to authorize a crossing of the CPR right-of-way by the Drainage Works. CPR says the application to the Court of the Drainage Referee by the Municipality is for an Order authorizing such a crossing and that the matter of the crossing is the limit of what is before the Court. CPR says that the *Drainage Act*, in its entirety, is constitutionally inoperative and inapplicable vis-à-vis CPR and proposes the following preliminary constitutional questions for the Court:
 - (a) Is Ontario's *Drainage Act* and Municipality's By-Law No. 93-2021 enacted pursuant to the *Drainage Act*, in whole or in part, constitutionally inapplicable to CPR by reason of the doctrine of inter-jurisdictional immunity?
 - (b) Is Ontario's *Drainage Act* and the Municipality's By-Law No. 93-2021 enacted pursuant to the *Drainage Act*, in whole or in part, constitutionally inoperative in relation to CPR by reason of the doctrine of federal paramountcy?
32. With respect, the preliminary constitutional question enunciated in paragraph 14 above and the supplemental preliminary questions set out in paragraph 16 above are embedded in the questions proposed by CPR. When addressing the more focused preliminary constitutional question enunciated in paragraph 14 above and the supplemental preliminary questions set out in paragraph 16 above, CPR will be able to make all the same submissions it would have made in response to the questions as proposed by CPR.
33. But the answers to the more focused questions will inform any decision about authorizing a crossing of the CPR right-of-way by the Drainage Works, whether by the Transportation Agency, this Court of the Drainage Referee, or any other permitting authority. This Court of the Drainage Referee has the jurisdiction and authority to decide the preliminary constitutional question enunciated in paragraph 14 above and the jurisdiction, perhaps exclusive jurisdiction and authority to decide the supplemental preliminary questions set out in paragraph 16 above of these reasons. It is important that any decision-maker considering authorizing a crossing of the CPR right-of-way by the Drainage Works be alive to and informed by the answers to these questions. It is also important for the parties to have answers to these questions, as their respective future courses of action about this case will be influenced by the answers to these questions.
34. As previously said, answers to these questions will also be important to the drainage engineering community in Ontario and to municipalities that are charged by the Province with administering and maintaining drainage works under the Act. They will be equally important to companies that own and operate federally regulated railways in Ontario and perhaps beyond.
35. Putting and answering the questions at this time is neither premature nor hypothetical.

Notice to be Given to Potential Intervenors

36. I now turn to the matter of giving notice to others who may wish to have a voice in this application and, in particular, input to the preliminary questions articulated in the Order. In doing so, I reflect upon what was said in my reasons attached to the Procedural Order issued on November 22, 2023, in paragraphs 3, 4 and 5 as follows:
3. The Engineer's Report contemplates relatively minor, petition-based drainage works that involve increasing the capacity of the existing crossing of railway right-of-way lands owned by CPR. This raises jurisdictional questions, the answers to which are important to the drainage engineering community in Ontario and to municipalities that are charged by the Province with providing and maintaining drainage works under the Act. The same jurisdictional questions are equally important to companies that own and operate federally regulated railways in Ontario and perhaps beyond.
 4. It is my aspiration to provide, with the assistance of the parties, a forum in which to establish a template process and some ground rules for the co-existence of drainage works that are essential under the provincial jurisdiction of the Act and equally crucial rights-of-way of railways operating within the constitutional jurisdiction of the federal government of Canada.
 5. At this stage, the parties have agreed on the dates for the delivery of supporting, responding, and reply affidavits. Those dates are set out in the Order to which these reasons are attached. Thereafter, there will be a further case management conference to consider providing notice to municipalities, railways, and others, such as Attorneys General, and an opportunity and process to be involved as intervening parties. The parties are asked to consider and, in due course, give counsel as to the persons to be given such notice.
37. I contemplated that the Court of the Drainage Referee could be a forum in which to establish a template process and some ground rules for the co-existence of drainage works and railway rights-of-way. Many Ontario municipalities are encountering railway unyieldingness about municipal drains, and this application provides an opportunity to establish a way forward for drainage works and railways.
38. As previously indicated, assuming, without deciding, that the Transportation Agency has the jurisdiction and authority to do so, I have concluded that the Transportation Agency has expertise borne of knowledge and experience with railways and administrative resources that the Court of the Drainage Referee does not and that, therefore, the Transportation Agency is in a much-preferred position to ensure that any municipal drain crossing of a railway will not compromise the railway right-of-way or rail traffic using the right-of-way or put at risk the safety and security of the public and personnel, or the protection of property and the environment. So, notwithstanding its reservations about the Transportation Agency's jurisdiction, I will direct the Municipality to make an application to the Transportation Agency for such authorization. While it is for the Transportation Agency to determine its own process and procedures, I commend to their consideration the giving of notice of the Municipality's application to Ontario municipalities and the operators of railways and the giving of an opportunity to intervene

as I am doing with respect to the application and the preliminary issue questions. With the benefit of input from a representative cross-section of the stakeholders, the Transportation Agency also has an opportunity to establish a template form of application for municipalities and a decision which will provide future guidance to municipalities and railway owners and operators.

39. For municipalities, an appearance before the Transportation Agency is foreign territory, so it would be beneficial if Transportation Agency members and staff were to educate and inform municipal participants about the protocols and procedures of the Transportation Agency. It may well be that, after the disposition of the Municipality's application, there will be many more municipal applications for municipal drain interference with or by railway rights-of-way, and it will be advantageous for all participant stakeholders if there is an understanding of a straightforward process to follow. The crossing by the Drainage Works of the CPR railway right-of-way, in this case, does not appear to be technically challenging, but that may be different in other locations in other municipalities, and it would be advantageous for the Transportation Agency to have a well-defined path to get to a resolution for the benefit of both the railways and the drainage authorities.
40. In order that the owners of railways and drainage authorities will be aware of this application and the preliminary questions, in paragraph 9 of the Order, I have given directions that notice be given in the form attached to those identified in clauses 12(b) and 12(c) of the Order. That notice will be mailed by the Municipality on or before Friday, September 27, 2024. It will give notice of a case management video conference to be held on Thursday, November 14, 2024 for the purpose of identifying parties and intervenors to this application and for the purpose of establishing a schedule for any added party to file position papers and to produce any documentation upon which they intend to rely, including any supporting affidavits. At or soon after the time of that case management video conference, a date will be fixed for the argument of the preliminary questions, and a schedule will be established for the exchange of evidence and facta in advance of such argument.
41. Once the preliminary constitutional question and the supplementary questions arising have been decided by the Court of the Drainage Referee, as mentioned previously, notwithstanding its reservations about the Transportation Agency's jurisdiction, the Municipality will be ordered to make an application to the Transportation Agency for authorization for the Shaw Branch Drain to cross the CPR railway right-of-way as contemplated by the Engineer's Report. The hearing of this application in the Court of the Drainage Referee will then be adjourned *sine die*, but I will remain seized.
42. The hearing may resume at the request of any party
 - (a) If it is determined by the Transportation Agency or a court of competent jurisdiction that the Transportation Agency lacks jurisdiction and authority to sanction the crossing by a municipal drain of a railway right-of-way or

- (b) if the Transportation Agency refuses to consider the Municipality's application or fails within a reasonable time to exercise its authority to decide on the Municipality's application or
 - (c) if there is some aspect of the Engineer's Report or the *Drainage Act* as it applies to the Shaw Branch Drain, which requires interpretation or clarification.
43. If it is necessary for the hearing to resume, the presiding Referee will pick up where it was left with a pre-hearing case management conference to address the following:
- (a) Scheduling production of documentation by the parties and examinations for discovery.
 - (b) Scheduling pre-hearing production and exchange of documents, including affidavits or witness statements for expert witnesses and affidavits or evidence summaries for other witnesses.
 - (c) Establishing an issues list.
 - (d) Identifying the number and nature of witnesses to be called by each party.
 - (e) Estimating the amount of time required for the hearing.
 - (f) Setting the commencement date for the hearing.
 - (g) Making provisions about access to and login credentials for participants in the hearing.
 - (h) Providing for service by personal service, registered mail or electronically (unless a statute or the Referee requires another method of service).
 - (i) Dealing with such other matters or things as may arise and which the presiding Referee may determine is expedient to permit.
44. If there is no request for the hearing to resume and the Municipality's application to the Transportation Agency is finally disposed of, this application may be settled as the parties may agree. If I have not heard from the parties about how this application is to be dealt with by the end of 2025, I will convene a video conference after that date to receive a status report from the parties.

at London this September 19, 2024.



Andrew C. Wright
Acting Drainage Referee

TO WHOM IT MAY CONCERN

NOTICE OF CASE MANAGEMENT VIDEO CONFERENCE HEARING
DATE: THURSDAY, NOVEMBER 14, 2024 AT 10:00 AM

Re: Chatham-Kent v CPR
Court File No.: CV-23-00001165-0000 (Chatham)

1. This Notice of a Case Management Video Conference hearing is being sent to you as directed by Acting Drainage Referee Andrew C. Wright. The video conference hearing will be convened on THURSDAY, NOVEMBER 14, 2024 at 10:00 am using the Zoom platform. The purpose of the hearing and how it may affect you is described below.
2. If you wish to seek party status in this proceeding, please follow the instructions set out in paragraphs 18 and 19 below, which require completion and return of a Memorandum of Appearance in substantially the form found at the end of this Notice.
3. If you wish to simply observe and not be a party to the proceeding, you are required to provide the Drainage Referee with your contact information as set out in paragraph 20 below.

Background and Purpose of This Notice

4. By Order issued on the 19th day of September 2024, the presiding Drainage Referee required the applicant, Chatham-Kent (the “**Municipality**”), to give this notice of the court proceeding and the procedure to be followed by those who may be affected by the result.
5. The Municipality has brought an application in the Court of the Drainage Referee for Orders authorizing the crossing by a municipal drain called the Shaw Branch Drain of the railway right-of-way owned by the Canadian Pacific Railway Company (“**CPR**”). The crossing involves a 250mm (10 inch) diameter smooth wall steel pipe across the CPR railway right-of-way as proposed in the Engineer’s Report on the Shaw Branch of the Facey East Drain issued by Spriet Associates, dated February 19, 2021, and signed by John M. Spriet, P.Eng., including plan and profile (the “**Engineer’s Report**”).
6. CPR takes the position that the Court of the Drainage Referee has no jurisdiction or authority to make such Orders because, constitutionally, railways are within the jurisdiction of the federal government over which the Court of the Drainage Referee has no authority. CPR has filed a formal Notice of Constitutional Question, which calls into question the constitutional applicability and operability of numerous sections of the *Drainage Act* (sometimes referred to as the “**Act**”) and the Municipality’s authorizing By-law.
7. The Municipality has served and filed its supporting affidavit material, and CPR has served and filed its responding affidavit material, all of which is available on the Municipality’s website and for review at the Municipality’s principal office in Chatham, as outlined below. There has been no cross-examination on these affidavits.

8. The Drainage Referee has decided that the federal Transportation Agency has expertise borne of knowledge and experience with railways and it has administrative resources that the Court of the Drainage Referee does not. The Transportation Agency is in a much-preferred position to ensure that any crossing of a railway will not compromise the railway right-of-way or rail traffic using the right-of-way or put at risk the safety and security of the public and personnel or the protection of property and the environment. The Drainage Referee does not need to, nor does the Court of the Drainage Referee intend at this time to make an Order authorizing the crossing. If it is determined by the Transportation Agency or a court of competent jurisdiction that the Transportation Agency lacks jurisdiction and authority to sanction the crossing by a municipal drain of a railway right-of-way or if the Transportation Agency refuses or fails within a reasonable time to exercise its authority to do so, then the Drainage Referee may address the constitutional question of whether the Court of the Drainage Referee has the authority to do so.

9. However, before Ordering the Municipality to make an application to the Transportation Agency, the Court of the Drainage Referee has decided that there a preliminary constitutional question and supplementary questions arising that should be addressed before the application moves forward. Those questions are set out in the September 19, 2024 Order and are as follows:
 - (a) Is CPR constitutionally exempt from paying assessments of railway right-of-way land it owns when such assessments have been determined in accordance with and are authorized under the *Drainage Act*?
 - (b) If the answer to question (a) is no, then (i) are the Municipality's expenses of an application to the Transportation Agency to authorize the construction of the Drainage Works across the CPR right-of-way to be charged to the Shaw Branch Drain and assessed to and paid for in accordance with the assessment schedules in the Engineer's Report, and (ii) do those expenses represent an increase in the cost of the Drainage Works caused by the existence of the works of the CPR railway right-of-way, to paraphrase section 26 of Act, and as such are they to be added to the Special Assessment against the CPR owned railway right-of-way lands?
 - (c) If the answer to question (a) is no, then (i) are the costs of any works in addition to the Drainage Works required by the Transportation Agency as a condition of an Order authorizing the construction of the Drainage Works across the CPR right-of-way to be charged to the Shaw Branch Drain and assessed to and paid for in accordance with the assessment schedules in the Engineer's Report and, (ii) do those expenses represent an increase in the cost of the Drainage Works caused by the existence of the works of the CPR railway right-of-way, to paraphrase section 26 of Act, and as such are they to be added to the Special Assessment against the CPR owned railway right-of-way lands?
 - (d) If the answer to question (a) is no, and the Municipality enters into an agreement with CPR, either of its own volition or as a requirement or condition of an Order authorizing the construction of the Drainage Works across the CPR right-of-way, which agreement requires works in addition to the Drainage Works, (i) are the Municipality's costs of such additional works to be charged to the Shaw Branch

Drain and assessed to and paid for in accordance with the assessment schedules in the Engineer's Report and, (ii) do those expenses represent an increase in the cost of the Drainage Works caused by the existence of the works of the CPR railway right-of-way, to paraphrase section 26 of Act, and as such are they to be added to the Special Assessment against the CPR owned railway right-of-way lands?

- (e) If the answer to question (a) is no, then (i) is any payment required to be made by the Municipality as ordered by the Transportation Agency in connection with an application to the Transportation Agency to authorize the construction of the Drainage Works across the CPR right-of-way or imposed by the Transportation Agency as a condition of the Transportation Agency's Order authorizing the construction of the Drainage Works across the CPR right-of-way to be charged to the Shaw Branch Drain to be assessed to and paid for in accordance with the assessment schedules in the Engineer's Report and, (ii) do any such payments represent an increase in the cost of the Drainage Works caused by the existence of the works of the CPR railway right-of-way, to paraphrase section 26 of Act, and as such are they to be added to the Special Assessment against the CPR owned railway right-of-way lands?
 - (f) If the answer to question (a) is no, and the Municipality enters into an agreement with CPR, either of its own volition or as a requirement or condition of an Order authorizing the construction of the Drainage Works across the CPR right-of-way, which agreement requires any payment to be made by the Municipality, (i) is the amount of such payment to be charged to the Shaw Branch Drain and assessed to and paid for in accordance with the assessment schedules in the Engineer's Report and, (ii) does such payment represent an increase in the cost of the Drainage Works caused by the existence of the works of the CPR railway right-of-way, to paraphrase section 26 of Act, and as such are they to be added to the Special Assessment against the CPR owned railway right-of-way lands?
 - (g) If the answer to question (a) is no, then (i) are the Municipality's expenses of this application to be charged to the Shaw Branch Drain and assessed to and paid for in accordance with the assessment schedules in the Engineer's Report and, (ii) do those expenses represent an increase in the cost of the Drainage Works caused by the existence of the CPR railway right-of-way, to paraphrase section 26 of Act, and as such are they to be added to the Special Assessment against the CPR owned railway right-of-way lands?
 - (h) If the answer to question (a) is no, then is the Municipality prohibited by sections 106 and 107 of the *Municipal Act, 2001* from paying or reimbursing, directly or indirectly, CPR for the amount of any *Drainage Act* assessments that CPR is required to pay or from exempting CPR from paying such *Drainage Act* assessments?
10. The answers to these questions are important to the drainage engineering community in Ontario and to municipalities that are charged by the Province with providing and maintaining drainage works under the *Drainage Act*. The same constitutional jurisdictional questions are equally important to companies that own and operate federally regulated railways in Ontario and perhaps beyond.

11. This notice is being sent to those identified as assessed owners in the Engineer's Report and to all municipalities in Ontario and to all Class 1 and Shortline railway operators in Ontario as well as to the Transportation Agency and the Attorneys General of Canada and Ontario. The purpose of this notice is to make recipients aware of the Municipality's application and to give each recipient an opportunity to seek party status.
12. Assessed owners would be respondent parties; others would be intervenor parties in order to speak to the preliminary issues questions. Those seeking intervenor party status would be expected to show how their interests may be affected by the hearing or its result, that they have a genuine interest, whether public or private, in the subject matter of the proceeding, and that they are likely to make a relevant contribution to the court's understanding of the issues.
13. A party is entitled to call witnesses, cross-examine parties and witnesses opposite in interest, file material, make submissions, and may be subject to a decision regarding costs. The nature and extent of an intervenor's participation may be more limited; the level of its participation will be decided at the time of the determination of intervenor status.
14. You are, therefore, hereby given notice that the presiding Drainage Referee will convene a case management pre-hearing conference to give procedural directions. The pre-hearing conference will be held by video conference and will commence at 10:00 in the morning on Thursday, November 14, 2024. Details concerning access to the video conference appear later in this notice.
15. The purpose of the case management pre-hearing conference on Thursday, November 14, 2024, will be to identify parties and intervenors and to establish a schedule for any added party or intervenor to provide a position statement and to produce any documentation upon which they intend to rely, including any supporting affidavits. At the time of that case management video conference on Thursday, November 14, 2024, or as soon thereafter as is possible, a date will be fixed for the argument of the preliminary questions, and a schedule will be established for the exchange of evidence and facta in advance of such argument. At that time, the presiding Referee may also deal with such other matters or things as may arise and which the presiding Referee may determine is expedient to permit.
16. The pre-hearing conference will, as previously mentioned, be held by video conference. The parties and those seeking party status will be provided, via e-mail, with sign-in credentials, including a password, a few days before the scheduled pre-hearing conference. Similarly, for those with an interest in the matter who wish to hear and observe the proceedings, sign-in credentials, including a password, will be provided via e-mail a few days in advance of the pre-hearing conference.
17. Hard copies of the presiding Referee's September 19, 2024 Order requiring the giving of this notice and all the documentation which has been exchanged by the parties to date may be viewed during normal business at the office of the Municipal Clerk of the

Municipality located at 315 King Street, West, Chatham, (N7M 5K8). As well copies of all of that documentation is available from the Municipality's website at:

<https://www.chatham-kent.ca/services/Drainage/Pages/Chatham-Kent-v.-Canadian-Pacific-Railway-Notice-of-Constitutional-Question.aspx>

18. For those seeking party status, if you, or an Ontario lawyer acting on your behalf, wish to be involved as a party to the pre-hearing conference and to the subsequent hearing with respect to the preliminary issues questions, you or your lawyer should complete a Memorandum of Appearance in substantially the form attached to this Notice as Appendix "A".
19. On or before Friday, November 1, 2024, the completed Memorandum of Appearance must be sent by mail or e-mail to:

Counsel for the Municipality:	Emily Crawford, Solicitor, via e-mail to emilycr@chatham-kent.ca David Taylor, Director of Legal Services, via e-mail todayvet@chatham-kent.ca The Corporation of the Municipality of Chatham-Kent 315 King Street, West, Chatham, Ontario N7M 5K8
Counsel for CPR:	Christopher DiMatteo via e-mail to christopher.dimatteo@blakes.com Blake, Cassels & Graydon ^{LLP} Barristers & Solicitors 199 Bay Street Suite 4000, Commerce Court West, Toronto ON M5L 1A9 Anne Drost via e-mail to anne.drost@blakes.com Partner, Blake, Cassels & Graydon ^{LLP} 1 Place Ville Marie Suite 3000 Montréal, Quebec, H3B 4N8
Presiding Referee	Andrew C. Wright, via e-mail to andrewcwrightis@outlook.com 12 The Ridgeway London, Ontario. N6C 1A

20. For those wishing to simply observe the proceedings without any participation before Friday, November 1, 2024, they must provide to the presiding Referee and to counsel for the Municipality and for CPR their name, mailing address, e-mail address and telephone number together with an indication of their interest in the case; an assessed owner or a family member or other representative of such owner would have sufficient interest for

this purpose, as would being a representative of the news media. That information can be given by mail or by e-mail. To observe the proceedings, a computer and internet access will be required; audio access will also be available by telephone.

21. Parties should attend at the start of the pre-hearing conference at the time and date indicated. Hearing dates are firm; adjournments will not be granted except in the most serious circumstances.
22. If you do not attend or are not represented at this hearing, the presiding Referee may proceed in your absence, and you will not be entitled to any further notice of the proceedings.

Dated at London this 19th day of September 2024.



Andrew C. Wright
Acting Drainage Referee

ATTACHMENT "A"

Court File No.: CV-23-00001165-0000 (Chatham)

ONTARIO
SUPERIOR COURT OF JUSTICE
IN THE COURT OF THE DRAINAGE REFEREE

B E T W E E N:

THE CORPORATION OF THE MUNICIPALITY OF CHATHAM-KENT

Applicant

- and -

CANADIAN PACIFIC RAILWAY COMPANY

Respondent

- and -

OTHERS WHO MAY BE GRANTED PARTY STATUS UPON APPLICATION

Respondents

MEMORANDUM OF APPEARANCE

The undersigned intends to seek party status in this application and will appear for that purpose at the case management pre-hearing conference on Thursday, November 14, 2024.

Date:

Signature of Party or of Solicitor for Party

Print Name:

Address for service:

Telephone number:

E-mail address:

TO Andrew C. Wright, Acting Drainage Referee
12 The Ridgeway
London, Ontario. N6C 1A1
E: andrewcwrightis@outlook.com
Presiding Drainage Referee

AND TO Emily Crawford, Solicitor, via e-mail to emilycr@chatham-kent.ca
David Taylor, Director of Legal Services, via e-mail todayet@chatham-kent.ca
The Corporation of the Municipality of Chatham-Kent
315 King Street, West,
Chatham, Ontario N7M 5K8

Counsel for the applicant Municipality

AND TO: Christopher DiMatteo via e-mail to christopher.dimatteo@blakes.com
Blake, Cassels & Graydon ^{LLP}
Barristers & Solicitors
199 Bay Street
Suite 4000, Commerce Court West,
Toronto ON M5L 1A9

Anne Drost via e-mail to anne.drost@blakes.com
Partner,
Blake, Cassels & Graydon ^{LLP}
1 Place Ville Marie
Suite 3000
Montréal, Quebec, H3B 4N8
Counsel for the respondent CPR