

**ONTARIO
SUPERIOR COURT OF JUSTICE**

IN THE MATTER OF the *Drainage Act*, R.S.O. 1990, Chapter D. 17

AND IN THE MATTER OF an application by the Corporation of the Municipality of Chatham-Kent for certain orders of the Drainage Referee with respect to construction of the Shaw Branch of the Facey East Drain and By-law No.

B E T W E E N:

CORPORATION OF THE MUNICIPALITY OF CHATHAM-KENT

Applicant

- and -

CANADIAN PACIFIC RAILWAY COMPANY

Respondent

APPLICATION pursuant to Section 106 of the *Drainage Act*, R.S.O. 1990, c. D.17

NOTICE OF APPLICATION

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED BY the applicant. The claim made by the applicant appears on the following page.

THIS APPLICATION will come for a hearing on ' **TO BE DETERMINED** a.m. at 425 Grand Avenue West, Chatham, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application, or to be served with any documents in the application, you or your Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the *Rules of Civil Procedure*, serve it on the applicant, and file with it, proof of service in the court office and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to

serving your notice of appearance, serve a copy of the evidence on the applicants' lawyer or, where the applicants do not have a lawyer, serve it on the applicants and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least four days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: July 6 2023

Issued by:

Local Registrar
Address of Court Office:
425 Grand Ave West,
Chatham ON N7M 6M8

TO: **Canadian Pacific Railway Company**
7550 Ogden Dale Road S.E.
Calgary, Alberta T2C 4X9

APPLICATION

1. The Applicant, the Corporation of the Municipality of Chatham-Kent (the “Applicant”) makes this Application for:

- a. An order, pursuant to Section 106(1)(d) of the *Drainage Act*, that construction of the Shaw Branch of the Facey East Drain (the “drainage works”) proceed forthwith in accordance with the recommendations of the Engineer’s Report of February 19, 2021 prepared by Spriet Associates pursuant to a petition under Section 4 of the *Drainage Act*, as finally adopted under By-law No. 93-2021 (the “Engineer’s Report”);
- b. An order, pursuant to Sections 63 and 106(1)(b) and (d) of the *Drainage Act*, authorizing the Applicant and its agents to complete the drainage works as specified in the Engineer’s Report, and, for that purpose, to enter upon those lands owned by the Respondent as specified in the Engineer’s Report for the purposes of carrying out recommended drainage works thereon, provided such entry shall be carried out in a manner that respects the rights of each party, including in respect of rail safety and operational concerns, and in accordance with the *Drainage Act and Engineer’s Report* thereunder;
- c. An order, pursuant to Sections 63 and 106(1)(b) and (d) of the *Drainage Act* that the Applicant is authorized, by virtue of and in accordance with the working easement designated in the Engineer’s Report and the provisions of the *Drainage*

Act, to enter upon those specified lands owned by the Respondent for the purposes of carrying out the drainage works recommended therein, provided such entry shall be carried out in a manner that respects the rights of each party, including in respect of rail safety and operational concerns;

- d. An order, pursuant to Section 106 of the *Drainage Act*, requiring, upon completion of the drainage works and certification thereof by the Drainage Engineer, the Respondent to pay to the Applicant those amounts assessed to it in respect of the drainage works, pursuant to *Drainage Act*, the Engineer's Report as finally adopted under By-law No. 93-2021, and final certification by the Engineer;
- e. An order abridging the time for service and filing, if necessary; and
- f. Such further and other relief as the Applicant may request and the Drainage Referee may deem just.

2. The grounds for the Application are:

- a. On February 11, 2020, a petition under Section 4 of the *Drainage Act* was filed with the Applicant by property owner Alex Miller, for those lands owned by Alex Frank Miller and Darlene Miller, being the petitioning owners of those lands located Part Lot 3 and 4, Concession 3, Zone Township in the Municipality of Chatham-Kent, Property Identifier Number 00627-0016, associated with Roll No.

1-093 (the “Miller Lands”), requesting the provision of “Legal and Functional outlet” to the East Branch Facey Drain;

- b. On March 2, 2020, by resolution of the Applicant’s Municipal Council, the Applicant appointed Spriet Associates London Limited (the “Engineer”) to prepare the Engineer’s Report under Section 4 of the *Drainage Act* on the Facey Drain East Branch in the Community of Zone Township;
- c. On October 27, 2020, and in accordance with Section 9 of the *Drainage Act*, an on-site meeting occurred in respect of the petition to examine the project area;
- d. On February 3, 2021, an additional on-site meeting occurred as between the Applicant, Respondent, and the Engineer to examine the project area;
- e. On February 21, 2021, the Engineer filed the Engineer’s Report proposing the construction of the Shaw Branch of the Facey East Drain, in the Community of Zone, Municipality of Chatham-Kent;
- f. The Engineer’s Report commented, regarding the existing drainage conditions within the drainage area, that:
 - i. The petitioning landowner was requesting a deeper outlet to allow from systematic tiling of approximately 6.0 hectares of land, and that the lands were subject to frequent ponding along the south limit of his property;

- ii. The Applicant's Drainage Superintendent indicated that this would require a crossing under Canadian Pacific Railway lands and that the new drain would be a tributary to the Facey East Drain;
 - iii. A site meeting occurred with the Respondent's officials to discuss the potential crossing and that the Respondent indicated that any borings under 300 mm in diameter did not require a geotechnical report;
- g. The Engineer's Report determined that "the lands within the area requiring drainage are currently serviced by a 900 mm diameter surface culvert that does not contain sufficient outlet to allow for subsurface drainage";
- h. The Engineer's Report determined that "construction of a new crossing under Canadian Pacific Railway lines would necessitate maintenance work on the Facey East Drain downstream of the proposed work";
- i. The Engineer's Report recommended as follows:
 - i. A new branch drain, to be known as the Shaw Branch, be constructed commencing at the East Branch of the Facey Drain and travelling north-westerly under the Canadian Pacific Railway allowance to just within the limits of the Miller Lands for a total length of 43 lineal meters;

- ii. The crossing under the railway be done by jack and bore to minimize disruption to rail traffic;
 - iii. That a swale be constructed from the Miller Lands east to the existing 900mm diameter surface culvert to ensure that the lands receive adequate surface drainage;
 - iv. That a catch basin be installed on the upstream end of the branch to alleviate surface ponding and provide a visible connection point to the drain;
 - v. That the Facey East Drain be cleaned out under maintenance to provide a sufficient outlet for the Shaw Branch;
- j. The Engineer's Report made Assessments for Benefit Costs against Property Identifier Number 00627-0015, legally described as Part Lots 3 and 4, Concession 3, Zone Township, owned by the Huston Farms Inc. (the "Huston Lands"), the Miller Lands, and the Respondent's lands, being Property Identified Number 00627-0055, legally described as Part Lots 3-5, Concession 3, Zone Township (the "Railway Lands");

- k. The Engineer's Report made a Special Assessment under Section 26 of the *Drainage Act* against the Respondent for the increased cost to the drainage work for boring a 250mm diameter smooth wall steep pipe across their right of way on the Shaw Branch;
- l. The Engineer's Report made Assessments for Outlet Costs against the Miller Lands and the Railway Lands;
- m. On February 22, 2021, the Applicant served the Notice of Consideration of the Engineer's Report in accordance with the requirements of the *Drainage Act*, including upon the Respondent;
- n. On March 16, 2021, the Drainage Board approved a recommendation that the Engineer's Report be provisionally adopted as presented and that the Applicant's Municipal Council give 1st and 2nd reading to the By-law with respect to the Shaw Branch of the Facey East Drain;
- o. On March 22, 2021, the Applicant's Municipal Council gave 1st and 2nd reading to the By-law for provisional approval;
- p. On April 12, 2021, the Applicant served a copy of the provisionally adopted By-law in accordance with the requirements of the *Drainage Act*, including upon the Respondent;

- q. On May 4, 2021, the Drainage Board approved a recommendation that the Applicant's Municipal Council give 3rd and final reading with respect to the By-law;
- r. On May 31, 2021, the Applicant's Municipal Council gave 3rd and final reading to the By-law, being finally adopted as By-law No. 93-2021 (the "By-law"), including the enactment that the Engineer's Report be adopted and completed in accordance with the By-law;
- s. At no time did the Respondent initiate any appeal under the *Drainage Act* or make application to quash the By-law;
- t. All rights of appeal available to the Respondent have expired;
- u. The Applicant has advised the Respondent that it is prepared to enter an encroachment agreement with the Respondent to carry out the requisite drainage work, with reasonable terms to reflect rail safety and operational requirements, provided such an agreement is also consistent with the provisions of the *Drainage Act*;
- v. The Respondent refuses to permit the Applicant access to its lands to carry out the requisite drainage works pursuant to the *Drainage Act*, By-law and Engineer's

Report adopted thereunder and further refuses to grant the Applicant an encroachment agreement to carry out the requisite drainage work under the *Drainage Act*;

- w. The Respondent denies all liability for costs assessed to it pursuant to *Drainage Act*, By-law and Engineer's Report adopted thereunder;
- x. The Respondent denies the Railway Lands derive any drainage benefit whatsoever from the proposed drainage work;
- y. The Ontario *Drainage Act*, R.S.O. 1990, c. D. 17, as amended, including Sections 4, 63, 26, and 106 thereof;
- z. *Rules of Practice and Procedure in Proceedings before the Referee*, Ontario Regulation 232/15, as amended;
- aa. Rules 1.04, 10.5, 2.01, 3.02, 14.05, 38, 39, 53 and 57 of the *Rules of Civil Procedure*, as amended;
- bb. Rule 131 of the *Courts of Justice Act*, RSO 1990 c. 43; and
- cc. Such other and further grounds as counsel may advise and the Referee may permit.

3. The following documentary evidence will be used at the hearing of the Application:

- a. The Affidavit of Blaise Chevalier, Drainage Superintendent, to be sworn, and Exhibits attached thereto;

- b. Such further and other evidence as counsel may advise and the Drainage Referee permits.

Date: July 5, 2023

**Corporation of the Municipality of
Chatham-Kent**

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CORPORATION OF MUNICIPALITY OF CHATHAM-KENT

Applicant

COURT FILE NO.

-and- **CANADIAN PACIFIC RAILWAY
COMPANY**
Respondent

ONTARIO
SUPERIOR COURT OF JUSTICE
COURT OF DRAINAGE REFEREE

PROCEEDING COMMENCED AT
CHATHAM, ONTARIO

NOTICE OF APPLICATION

**Corporation of the Municipality of
Chatham-Kent**

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