

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 to davet@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 to davet@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
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Toronto ON M5L 1A9

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