

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  
- and -  
CANADIAN PACIFIC RAILWAY COMPANY  
- and -  
OTHERS WHO MAY BE GRANTED PARTY STATUS UPON APPLICATION

Applicant  
Respondent  
Respondents

ACTING DRAINAGE REFEREE ) HEARD ON WEDNESDAY,  
ANDREW C. WRIGHT ) THE 22<sup>ND</sup> DAY OF NOVEMBER, 2023  
)  
)

ORDER

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

- (a) Phasing of the hearing to deal with preliminary constitutional and/or jurisdictional issues before getting to a hearing of the application's merits.
- (b) Identifying parties, including potential intervenors.
- (c) Identifying preliminary constitutional and/or jurisdictional issues and issues for the hearing of the merits.
- (d) Fixing a time for the applicant to deliver supporting evidence.
- (e) Fixing a time for the respondent to deliver responding materials.
- (f) Scheduling pre-hearing production and exchange of documents, including affidavits and witness statements for expert witnesses and affidavits and evidence summaries for other witnesses.

- (g) Fixing a time for the delivery of other documentation, having regard for subsection 11(1) of Regulation 232/15, being the Rules of Practice and Procedure in Proceedings Before The Referee (the “**Rules**”).
- (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) Identifying the number and nature of witnesses to be called by each party.
- (k) Estimating the amount of time required for the hearing hearing.
- (l) Setting the commencement date for the hearing hearing.
- (m) 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 it sees fit. The presiding Referee may alter this Order by an oral ruling, or by another written Order.

### **Parties and Representation**

2. The applicant (sometimes referred to as the “**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.
3. The respondent (sometimes referred to as “**CPR**”) is represented by Kimberley Potter, and Lily MacLeod, lawyers with the law firm of Fasken Martineau DuMoulin <sup>LLP</sup>, Barristers and Solicitors.
4. 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.

### **Exchange of Documentation**

5. On or before January 31, 2024, CPR will deliver to the Municipality and the presiding Referee a Notice of Constitutional Question. The Notice of Constitutional Question will also be given to the Attorneys General of Canada and of Ontario in accordance with the *Courts of Justice Act*.

6. On or before March 31, 2024, the Municipality shall deliver to CPR and to the presiding Referee the applicant's affidavit or affidavits supporting its application. One of the affidavits will be sworn by John M. Spriet, P.Eng., the author of 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, all of which are referred to as the "**Engineer's Report**". Mr. Spriet's affidavit will provide his *curriculum vitae*, prove the Engineer's Report and provide background to and an explanation of the Engineer's Report, including reference to the Facey East Drain into which it is proposed the Shaw Branch will outlet.
7. On or before March 31, 2024, the Municipality shall deliver to CPR and to the presiding Referee the documentation referred to in subsection 11(1) of the Rules, which relates both to the Engineer's Report as well as to the Facey East Drain into which it is proposed that the Shaw Branch will outlet.
8. On or before June 30, 2024, CPR shall deliver to the Municipality and to the presiding Referee CPR's responding affidavit or affidavits.
9. The Municipality may deliver to CPR and to the presiding Referee any reply affidavit or affidavits on or before August 31, 2024
10. Documents to be delivered as contemplated by paragraphs 5, 7, 8 and 9 above shall be in machine-readable electronic format. Hard copy may also be delivered in addition to the electronic versions.

#### **Future Case Management Conferences**

11. Future case management video conferences will be scheduled to address:
  - (a) Phasing of the hearing to deal with preliminary constitutional and/or jurisdictional issues before getting to a hearing of the application's merits.
  - (b) Identifying parties, including potential intervenors, and establishing a procedure for giving notice to any potential intervenors and a process by which they may seek intervenor party status.
  - (c) Identifying preliminary constitutional and/or jurisdictional issues and issues for the hearing of the merits.
  - (d) Fixing a time for any added intervenor parties to deliver supporting affidavit evidence.
  - (e) Fixing a time for the delivery by the applicant and by the respondent CPR to deliver materials in response to affidavit evidence delivered by intervenor parties.
  - (f) Scheduling pre-hearing production and exchange of documents, including affidavits and witness statements for expert witnesses and affidavits and evidence summaries for other witnesses.

- (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) Identifying the number and nature of witnesses to be called by each party.
- (j) Estimating the amount of time required for the hearing hearing.
- (k) Setting the commencement date for the hearing hearing.
- (l) Dealing with such matters or things as may arise and which the presiding Referee may determine is expedient to permit.

### **Video Conference Protocols**

12. 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**

13. 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 letter or 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 13(d) above applies *mutatis mutandis*.

14. 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 " <b>Engineer's Report</b> ").
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 under the <i>Drainage Act</i> , R.S.O. 1990 c.D.17, as amended (the " <b>Act</b> ")

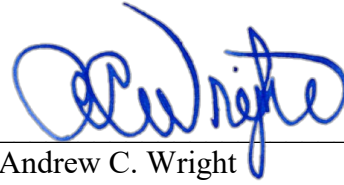
15. The documents that have exhibit numbers will retain their exhibit numbers through the case management hearings and hearing(s) on the merits of this case. New exhibits will be identified by the next ensuing exhibit number and be added to the list as the hearing(s) progresses.
16. The documents listed 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.
17. If counsel or a witness intends to rely upon case law, other than the cases listed in paragraph 14 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

18. 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.
19. For the purposes of this Order, unless otherwise ordered, Andrew C. Wright, Acting Drainage Referee, shall be regarded as the presiding Referee.
20. No adjournments or delays will be granted before or during the hearing except for serious hardship or illness.

21. Costs of the day are reserved to the final disposition of this matter.
22. Andrew C. Wright, Acting Drainage Referee, is not seized of the hearing of the merits of this application.

Dated at London this November 22, 202.



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Andrew C. Wright  
Acting Drainage Referee

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## REASONS

1. The Order to which these reasons are attached is the start of an evolving case management and procedural process intended to prepare for a hearing of the merits.
2. Words and phrases defined in the Order have the same meaning when used in these reasons.
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.
6. Those seeking 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.
7. The notice contemplated by paragraph 5 above would provide public access to all the documentation exchanged by the parties in this proceeding to the time of the giving of notice. That public access would be via the Municipality's website, so it is important that documents to be delivered as contemplated by the Order be in machine-readable electronic format as required by paragraph 10 of the Order.
8. If there are difficulties with document exchange or anything else arising from the Order and these reasons, at the request of either party, I will convene a video conference to deal with it.
9. In that connection, in paragraph 7 of the Order, the Municipality is required to produce documentation referred to in subsection 11(1) of Rules, which relates both to the

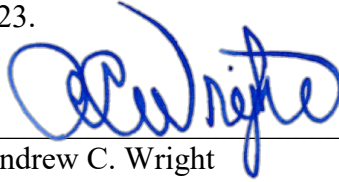


Engineer's Report, as well as to the Facey East Drain into which it is proposed that the Shaw Branch outlet. Subsection 11(1) of the Rules provides that:

Unless the referee orders otherwise, a municipality that is a party to a proceeding under the Act shall produce at the hearing all documents within its possession or control relating to the drainage works, including all reports, plans, specifications, assessments, by-laws, provisional by-laws, resolutions, correspondence and copies of notices sent to ratepayers entitled to notice.

10. I do not wish to burden the Municipality with the production of extensive documentation pertaining to the Facey East Drain if the documentation has little or no bearing on the issues relating to the proposed Shaw Branch. The Municipality is to make available to CPR all documentation pertaining to the Facey East Drain so that the parties can settle what is pertinent for production contemplated by paragraph 7 of the Order. If the parties cannot agree about what needs to be produced in relation to the Facey East Drain, I may be spoken to about an order under subsection 11(1) of the Rules limiting the extent of the production required by that Rule.

Dated at London this November 22, 2023.



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Andrew C. Wright  
Acting Drainage Referee