

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

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

IN THE MATTER of the *Drainage Act*, RSO 1990, c 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. 93-2021;

BETWEEN:

CORPORATION OF THE MUNICIPALITY OF CHATHAM-KENT

Applicant

and

CANADIAN PACIFIC RAILWAY COMPANY

Respondent

and

MINISTRY OF THE ATTORNEY GENERAL OF ONTARIO
CANADIAN NATIONAL RAILWAY
ONTARIO FEDERATION OF AGRICULTURE
RURAL ONTARIO MUNICIPAL ASSOCIATION

Intervenors

APPLICATION pursuant to s.106 of the *Drainage Act*, RSO 1990, c D.17

APPLICATION RECORD
RURAL ONTARIO MUNICIPAL ASSOCIATION

February 21, 2025

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AFFIDAVIT OF LINDSAY JONES
(Affirmed February 21, 2025)

I, Lindsay Jones, of the City of Toronto, in the Province of Ontario, SOLEMNLY AFFIRM AS FOLLOWS:

1. I am the Director of Policy and Government Relations of the Association of Municipalities of Ontario (“AMO”) and have occupied this position since 2022. As such, I have knowledge of the matters deposed herein and, where facts are based on information obtained from others, I believe that information to be true.

2. I make this Affidavit in support of the intervention of the Rural Ontario Municipal Association (“ROMA”) in these proceedings under the *Drainage Act*, RSO 1990, c D.17, and for no other reason.

A. The Rural Ontario Municipal Association

3. AMO is the collective voice of Ontario municipalities at the provincial level on matters of common interest to AMO members. AMO represents the interests of Ontario’s 444 municipal governments through advocacy, policy development, and research work. Although, by and large, this work involves interacting with the Government of Ontario, AMO’s interactions also include working with non-governmental stakeholders. AMO also provides various educational opportunities to support municipal elected officials in their roles.

4. To accomplish this work, AMO is guided by an elected Board of Directors comprised of 43 Directors elected from various regions in Ontario. To support the Board of Directors, AMO counts on a complement of approximately 60 full-time staff members.

5. For its part, ROMA is the rural section of AMO, providing a focus on the interests of those approximately 270 municipalities with populations of less than 10,000. ROMA relies on a separately-elected Board of Directors, comprised of 15 elected Directors, to establish priorities specifically tailored to the interests of rural municipalities and their elected officials. A number of ROMA officers also sit on the AMO Board. For their part, AMO staff also support the ROMA Board to carry out these policy development and advocacy activities.

6. AMO is the only province-wide organization of its kind in Ontario and is explicitly recognized in the *Municipal Act, 2001*, SO 2001, c 25 as representing the interest of Ontario's municipal sector.

B. The crucial role played by the *Drainage Act* regime

7. The construction, maintenance, and repair of rural land drainage systems provide economically vital and environmentally impactful flood-control measures. Proper drainage is crucial to optimize food production on agricultural lands. Many farmers in rural communities rely on good drainage systems constructed under the Act as poor drainage can cause significant reductions in crop yields.

8. In many cases, proper drainage is also key to maintaining the health of woodlots for the forestry industry.

9. Lastly, proper drainage can also help protect villages and rural subdivisions from overland flooding events that have become more common with the effects of climate change.

10. In addition to the direct advantages to the land owners who benefit from drainage works constructed and maintained under the Act, the cost-sharing components of the statute are key to the fiscal health and the very sustainability of rural municipalities. As described in greater detail below, the near-systematic refusal of national railways, particularly CP and CN to continue abiding by the financial obligations set out in bylaws adopted under the Act, sometimes decades ago, has the potential to wreak havoc on the finances of smaller rural municipalities.

11. If railway companies do not comply with the Act, rural municipalities will either no longer be able to pay for the construction and maintenance of adequate and vital drainage works, or they will be forced to pass these costs onto rural taxpayers. It is worth repeating that most of ROMA's members have fewer than 10,000 residents. By contrast, Chatham-Kent's population is over 100,000. As a result, it is not surprising that ROMA's research shows that the relative impact on individual tax bills in small municipalities would be significant if railways were permitted to disregard their obligations under the Act.

C. Assessing the railways' unexpected about-face

12. In late 2020 and into early 2021, as CP and CN gradually began informing municipalities that they would not cover their share of municipal drainage costs, ROMA was approached by affected municipalities for support. What was clear from these initial reports was that the change in the railways' stance was sudden, unexpected, and in marked departure from longstanding compliance with the *Drainage Act*.

13. In order to gauge, in a more comprehensive manner, the extent of the issue being reported by individual members, AMO staff conducted four surveys of its members:

- a) Survey 1 – September 20, 2022 to October 7, 2022
- b) Survey 2 – December 12, 2022 to January 11, 2023
- c) Survey 3 – May 8 to 23, 2023
- d) Survey 4 – December 15, 2023 to January 16, 2024

14. The first survey was circulated to the entire AMO membership, regardless of the size of municipalities – not just the 270 smaller municipalities that comprise most of the ROMA membership. This approach was chosen to ensure that the data collected would cover all of Ontario, and to provide as robust a data set as possible. In my experience, most ROMA members, because of their size, typically have access to limited internal resources and tend to participate in fewer numbers in research projects such as this one. The survey was conducted in conjunction with the Drainage Superintendents Association of Ontario (“DSAO”).

15. The second survey targeted the approximately 60 municipalities who indicated that they had national railway infrastructure within their municipalities. The third survey and fourth surveys targeted a sub-group of municipalities who indicated that they had experienced *Drainage Act* challenges with national railways and were in a position to provide detailed case studies regarding the nature and extent of their experiences.

D. Key takeaways from the Surveys administered by AMO

16. Of the total AMO membership, 119 individual municipalities (27% of AMO members) responded. The key findings from this survey can be summarized as follows:

a) Half of the responding municipalities (60 of the 119) indicated that they maintained municipal drains under the Act that were located within railway rights-of-way.

b) The table below indicates the number of drains within railway rights-of-way for each of the 60 responding municipalities:

Number of drains located within railway rights-of-way	Number of Municipalities	Percentage
1-10	31	52% of respondents
11-30	18	30% of respondents
31-49	4	6% of respondents
50+	7	12% of respondents
Total	60	100%

c) By way of illustration of the scope of the interaction between drainage works and railway lands, Thames Centre reports that the municipality has over 50 municipal drains crossing railway tracks, with hundreds of reports where railways are assessed for maintenance purposes. Removing contributions from federally-regulated railways would require hundreds of reports to be reassessed by an engineer. Every single report will have to be presented to Council, with thousands of affected landowners invited to the meetings, and benefiting from their rights of appeal under the Act.

d) The table below indicates the number of active projects (construction and maintenance) under the *Drainage Act* involving railway rights-of-way:

Number of active drainage projects located within railway rights-of-way	Number of Municipalities	Percentage
0 or N/A	24	40% of respondents

1-5	27	45% of respondents
6-10	3	5% of respondents
11-19	3	5% of respondents
20+	3	5% of respondents
Total	60	100%

- e) Of the 36 responding municipalities that had active projects under way under the Act, 19 had already costed these projects. The cost of individual projects varied greatly, from as low as a few thousand dollars to the million dollar mark in some cases, with the greatest number of projects in the \$150,000 to \$250,000 range.
- f) With two exceptions, the responding municipalities that engaged with national railways reported that their interactions were unsatisfactory. There were generalized comments with respect to the railways recently taking the position that because they are “federally regulated”, they do not have to comply with the provisions of the *Drainage Act*, confirming the anecdotal information received by ROMA. In all cases, this position expressed by the railways was recent and not in keeping with long-established practices of complying with the *Drainage Act*.
- g) By contrast, the three respondents who only interacted with local, provincially-regulated railways reported a high degree of cooperation, as well as full compliance with the Act.
- h) Of the responding municipalities, 12 reported that they had outstanding amounts due by the railways, some dating back to 2013. In total, these municipalities were waiting on past due payments of \$870,676.10, on capital construction costs, with individual amounts ranging from less than \$1,000 to \$187,000. With respect to maintenance costs, the overdue amounts were \$327,722.40, ranging from amounts of less than \$100 to \$250,000.
- i) In terms of impacts on municipal finances, the data provided by the most affected municipalities is telling:
- i. In Plympton-Wyoming, a municipality of less than 8,000 residents, the amounts overdue by railways under the Act totalled slightly more than \$80,000. By comparison, the total property tax revenue for this municipality is \$946,000. The

amount due by the delinquent railway therefore represents 8.5% of the property taxes collected by the municipality. Looking to future maintenance work required, the municipality reports that there are 18 drains that cross railway lands. Many of these drain crossings are aged and nearing the end of their life cycle. They will require replacement in the near future due to pipe failure or inadequate capacity. Climate change and erratic weather patterns are placing additional strain on these ageing drainage systems. The most recent crossing cost \$60,000.00. Current estimates for crossing replacements are about \$100,000 per crossing. To replace all 18 crossings would cost over \$1.8 million. This is a crippling amount for the municipality or landowners to bear.

- ii. In Perth East, a municipality with a population of 12,000, the outstanding amount under the Act by a federal railway for a 2021 large maintenance project was \$175,000 (representing 24% of the total project cost). This does not include some \$150,000 for active construction projects. By comparison, the total tax revenue of Perth East is \$9,100,000. The amount due by the delinquent railway for maintenance alone therefore represents 1.9% of the property taxes collected by this municipality. If the railway's share of active construction projects is included, the amount increase to 3.6%.
 - iii. In Southwold, a municipality with a population of fewer than 5,000, the outstanding amount by railways for construction projects under the Act was \$187,598. By comparison, the total tax revenue of Southwold is \$6,700,000. The amount due by the delinquent railway therefore represents 2.8% of the property taxes collected by this municipality.
- j) Responding municipalities also reported increasing urgency with a number of construction and maintenance projects which were paused because of the lack of cooperation with the railways on cost-sharing pursuant to the Act. As the examples provided below indicate, concerns centered on flooding risks for agricultural operations and homes:

- i. Plympton-Wyoming proceeded with a drainage construction project despite the railway's refusal to pay its share of the cost under the Act. The completion of this project was essential to the creation of a 135-lot subdivision in the Village of Wyoming. It also improved drainage to a large portion of the Village that was experiencing surcharging and flooding during large storm events. The new and improved outlet will prevent significant flooding and property damage to roads and private properties within the Village of Wyoming. The project also provides improved outlet (drainage) to approximately 30 hectares of agricultural land.
- ii. In another Plympton-Wyoming project, some 230 hectares of agricultural land and two residential properties are affected by a malfunctioning drain. This affects agricultural yield as well as posing a flooding risk for the two homes affected. The national railway's land is also at risk of flooding and, in the municipality's opinion, rail safety could be compromised. The railway has nonetheless refused to participate in this project on the basis that it is not subject to the *Drainage Act*.
- iii. Perth South proceeded with upgrades to a 1957 municipal drain based on a 2020 Drain Improvement Report. The entire project was completed but, because of the lack of cooperation with the national railway, the new drain is temporarily connected to the 1957 culvert through the railway crossing. However this old drain is undersized and at the incorrect depth, affecting the effectiveness of the new drain that services farmland, township roadways as well as the railway's own property.
- iv. In Southwest Middlesex, the municipality reports that it has faced a systematic refusal by the national railway to engage in any new projects – construction or maintenance. There are approximately 50 drain crossings in the municipality. These drains serve as outlets for a variety of farmland and residential properties. As a result of the last drainage project that was almost about to begin in December 2020 for a drain bore, but that was later abandoned because of the railway's refusal to participate under the Act, there is continued flooding.
- v. Southwold responds that the national railway did not respond to any of its correspondence regarding two drainage projects. The municipality had to proceed,

and cover the railway's share under the Act, as these drains were related to a sanitary sewer project. The railway ultimately cooperated to facilitate the drains but has refused to contribute to their cost. These delays in construction cost landowners money because they do not enjoy adequate outlets to improve drainage on their farmland, hindering production. Upstream residential and commercial properties, as well as roads located upstream, have increased risks of flooding if an adequate drainage outlet cannot be obtained in a timely manner because of railways not participation in the process.

D. Conclusion

17. For the reasons stated above, preserving the integrity of the long-established and comprehensive process set out in the *Drainage Act* has become a top priority for ROMA and rural municipalities of all sizes.

18. In addition to the four surveys referred to in paragraph 13, ROMA organized two workshops on the issue of non-compliance with the act by national railways at provincial conferences. Both events were attended by over 80 participants.

19. ROMA has engaged in advocacy initiatives at the provincial and federal levels with a view to finding a resolution to the matter at the heart of these proceedings through political means, trying to avoid the need for judicial intervention in the matter.

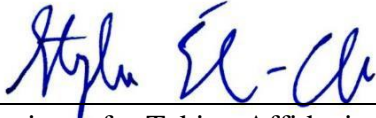
20. On the legal front, ROMA has coordinated a number of roundtable meetings with municipalities who were considering legal action against the national railways, similar to the proceedings initiated by Chatham-Kent. The purpose of these meetings was to coordinate the provincial municipal sector's reaction to the national railways novel position of rejecting the applicability of the *Drainage Act* to their lands with a view to limiting overlapping or duplication of proceedings. The fact that these proceedings have become the forum for the constitutional debate to take place demonstrates ROMA's success on this front.

21. As with any survey, the data summarized above is a snapshot in time. What is clear from the surveys and other feedback from ROMA members is that there is significant concern for the future. Drainage construction and maintenance projects involving the lands of federally-regulated

railways are regularly undertaken by Ontario municipalities each year. The possibility that national railways, contrary to all other property owners, can disregard their obligations under the *Drainage Act* will continue to be a significant concern for ROMA and AMO members until the matter is adjudicated.

22. I solemnly affirm this Affidavit conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath.

SOLEMNLY AFFIRMED by Lindsay Jones of)
the City of Toronto, in the Province of Ontario,)
before me at the City of Ottawa, in the Province)
of Ontario, on February 21, 2025, in accordance)
with O. Reg. 431/20, Administering Oath or)
Declaration Remotely.)



Commissioner for Taking Affidavits
Stéphane Émard-Chabot
LSO 33909



LINDSAY JONES

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