

**ONTARIO
SUPERIOR COURT OF JUSTICE**

IN THE COURT OF THE DRAINAGE REFEREE

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 East Branch Facey Drain and By-law No. 93-2021;

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

AFFIDAVIT OF BLAISE CHEVALIER

I, *Blaise Chevalier*, of the County of Essex, MAKE OATH AND SAY:

1. I am a Drainage Superintendent employed by the Corporation of the Municipality of Chatham-Kent (the “Municipality”), responsible for the geographic area of the Community of Zone, Municipality of Chatham-Kent, including the area of the East Branch of the Facey Drain and the proposed Shaw Branch of the Facey Drain. As such, I have knowledge of the matters to which I hereinafter depose, save and except where I have indicated that I have obtained facts from other sources, in which case, I state the source of the information and I verily believe those facts to be true.

Background

2. The Municipality of Chatham-Kent was created on January 1, 1998 through amalgamation of several smaller municipalities and is approximately 2,500 square kilometres (or 617,763 acres) in size.
3. According to the Municipality's Official Plan, approximately 550,000 acres, or close to ninety percent, of the Municipality's lands are under cultivation, with almost all of this acreage considered to be prime agricultural land. Attached hereto as **Exhibit "A"** to this my Affidavit is Section 3.10 of the Municipality's Official Plan concerning agricultural policies in the Municipality.
4. The Ontario *Drainage Act*, R.S.O. 1990, c. D.17 ("*Drainage Act*") requires the Municipality to maintain and repair municipal drains and to respond to petitions for new municipal drains. The Municipality's Drainage Department is responsible to manage all *Drainage Act* works and associated costs, involving approximately 4,100 drains with an estimated total length of 4,000 kilometres that have *Drainage Act* status across the Municipality.
5. The vast majority of *Drainage Act* drains in Chatham-Kent serve agricultural lands and are important to safeguard agricultural operations, but many also serve urban and residential areas and are important to prevent flooding in those areas. *Drainage Act* projects form an integral part of the Municipality's stormwater management for both rural and urban areas. For example, in the Community of Bothwell, there is an assessment under the *Drainage Act* that applies to the entire urban area with the Community of Bothwell for drainage benefits, as the urban area water is entirely

outletted into *Drainage Act* drains. The benefit of this outlet results in an “urban assessment” to the Municipality, given the benefit it derives from the outlet as in delivering stormwater management to the urban area of the Community of Bothwell.

6. Through its former townships and villages, the Municipality’s documented history of drainage work under the *Drainage Act* dates back to the 1800s, with drainage by-laws passed under the current *Drainage Act* and its predecessors to accomplish various drainage works.

History of Facey Drain

7. I have reviewed the Municipality’s records concerning the history of the Facey Drain, including any records that could be found in the Municipality’s archives.
8. Based on my review of the Municipality’s records, the Facey Drainage system, in its earlier forms, was in existence as early as 1892. A handwritten report to Municipal Council for the former Township of Zone dated May 9, 1892 provides recommendations for the repairing and cleaning of the “Facey Creek Drain”. Attached hereto as **Exhibit “B”** to this my Affidavit is a copy of this 1892 report.
9. The East Branch of the Facey Drain appears to have been existence since at least 1909. A September 21, 1909 Engineer’s Report for the Facey Drain was prepared by A.S. Code, Ontario Land Surveyor and Certified Engineer, providing specifications for repairs to the Facey Drain. The Report’s corresponding plan clearly depicts the East Branch with a defined channel and watershed. Attached hereto as **Exhibit “C”** to this my Affidavit is a copy of this 1909 report.

10. A number of maintenance and capital projects have been carried out on the East Branch of the Facey Drain over time, including projects involving the lands owned by the Canadian Pacific Railway Company ("CP").
11. In 1963, a comprehensive cleanout was performed on the entirety of the open portion of the East Branch of the Facey Drain under the *Drainage Act*. The tile branch was not cleaned out as there was no ability at that time to clean out tiles. From my review of the January 15, 1963 Engineer's Report prepared by E.C. Brisco Jr., it appears that the work included removal of about 8" of earth from a culvert under CP's property. According to the Engineer's Report, CP was to be assessed for benefit in the amount of \$50.00. I am unaware of any municipal records indicating that CP appealed this work or challenged its assessment. Attached hereto as **Exhibit "D"** to this my affidavit is a copy of the report of Engineer E.C. Brisco Jr. dated Jan 15, 1963 and corresponding provisional bylaw #455-1963.
12. On September 23, 1969, Todgham and Case Limited delivered an Engineer's Report for the East Branch of the Facey Drain. The report recommended the deepening and widening of the existing drain, with road, railway and farm culverts to be cleaned or replaced, as required. The Report assessed benefit and outlet costs to CP in the amount of \$75.00 and \$55.00 respectively. I am unaware of any municipal records indicating that CP appealed this work or challenged its assessment. Attached hereto as **Exhibit "E"** to this my Affidavit is a copy of the September 23, 1969 Engineer's Report, Plan and Profile and corresponding By-law 597-69.

13. It appears from my review of municipal records, that at the time of construction of works recommended in September 1969, it was discovered that the railway crossings, both for the Main Branch and East Branch of the Facey Drain were too high. Each crossing had a concrete floor that prevented the deepening of the open drains in this area. Consequently, on September 2 and September 3, 1970, Todgham and Case delivered further Engineer's Reports concerning both the Main and East Branches of the Facey Drain. Attached hereto as **Exhibit "F"** to this my Affidavit is a copy of the September 2 and September 3, 1970 Engineer's Report and Provisionally Adopted By-laws 59-70 and 60-70.
14. The work for both crossings involved installation of a pipe beneath the embankment with its invert at the grade line of the deepened drain. A pipe was installed through jacking and boring beneath the railway embankment. Both reports determined that all of the work was made necessary by the fact that the floor of the concrete Railway culvert was too high to permit the drain to be dug to the specified depth across the Railway right-of-way. The Engineer determined, in both cases, the total cost of the work should be assessed to CP. I am unaware of any municipal records indicating that CP appealed this work or challenged its assessment.
15. Consistent with this point, a letter from August 17, 1970 from Todgham and Case to CP enclosed copies of the sketch and specification for the proposed work and asked that CP provide any comments on the proposed work. In response, on August 26, 1970, CP wrote to Todgham and Case to advise that it found the preliminary specifications and plans for the work to be satisfactory and to ask that the Former Township of Zone proceed with arranging a contract for the work on the railway property. Attached hereto as **Exhibit "G"** to this my Affidavit are copies of that correspondence.

16. On January 27, 1971, the Canadian Transport Commission Railway Transport Committee approved the technical specifications of the work over CP's property. This would have been done under the former *Railway Act*. Attached hereto as **Exhibit "H"** to this my Affidavit is a copy of the Committee's Order No. R-10835.
17. It appears that further work was carried out on CP lands within the East Branch of the Facey Drain in 1979 and early 1980s.
18. On October 1, 1979, Todgham and Case delivered an Engineer's Report for work including the deepening of the open portion of the East Branch, installation of tile on the tile portion of the East Branch, installation of two catch basins, and cleaning of the concrete culvert and steel pipe culvert on the East Branch of the CP crossing. Attached hereto as **Exhibit "I"** to this my Affidavit is a copy of the Engineer's Report, Plan and Profile, and Final By-law 28-79.
19. On October 22, 1979, CP wrote to the former Township of Zone to advise that it had received the Drainage Engineer's Report and Plan dated October 1, 1979 and that if the work were to proceed, work on CP's property should be included in the Township's contract. Attached hereto as **Exhibit "J"** to this my Affidavit is a copy of this correspondence.
20. I am unaware of any municipal records indicating that CP appealed any aspect of the work or assessment arising from the October 1, 1979 Report or resulting by-law.
21. On July 12, 1995, Drainage Engineer Dennis McCready produced an Engineer's Report to provide a new schedule of assessment for lands within the watershed of the East

Branch of the Facey Drain. That report provided a new assessment schedule which included assessments to CP for both outlet and benefit. Again, I am unaware of any municipal records indicating that CP appealed this work or challenged its assessment. Attached hereto as **Exhibit “K”** to this my Affidavit is a copy of the July 12, 1995 Engineer’s Report and Bylaw 30-1995.

22. Subsequent to the amalgamation of the Municipality of Chatham-Kent, the Municipality has continued to carry out maintenance projects on the Facey Drain under the *Drainage Act* involving lands owned by CP within the watershed. Attached hereto as **Exhibit “L”** to this my Affidavit are 8 spreadsheets prepared by the Municipality for the years in which associated maintenance costs were added to the municipal tax roll. Each spreadsheet specifies the type of work performed, total cost of the work, parties assessed for the work, and assessment amounts. Three of the spreadsheets concern the East Branch, and five concern the Main Branch. The spreadsheets have been redacted to remove the personal information of property owners.

Current Status of Facey Drain

23. Currently, the East Branch of the Facey Drain serves Lots 4 to 8 of Concession 3 and Lot 8 in Concession 4, including the lands and utilities in that area, covering approximately 377 acres which include approximately 14 acres of railway lands.
24. The East Branch serves private farm drainage including surface and subsurface drainage, roadway and railway road ditching, acting as outlet impacting drainage in the local area, allowing for agricultural farming, safe and reliable access along roads and rail, and drainage for residential dwellings located within the watershed.

25. The Main Branch finds its outlet in the Cruickshank Drain. The Main Branch has multiple branches in its upper watershed including the Middle Branch, West Branch, and East Branch. The proposed Shaw Branch will ultimately find its outlet into the East Branch of the Facey Drain.
26. Attached hereto as **Exhibit “M”** to this my Affidavit is a map I prepared on March 26, 2024 with the assistance of Spriet Associates showing the proposed Shaw Branch of the Facey East Drain, the approximate watershed, area of proposed work, CP corridor and existing crossing.

Proposed Shaw Branch

27. On February 11, 2020, the Municipality received a petition under Section 4 of the *Drainage Act* from Alex Miller, being one of the registered owners of the lands described as PT LT 3-4 CON 3 ZONE AS IN 656262; S/T 656195; CHATHAM-KENT, being PIN 00627-0016, associated with Roll No. 3650 310 001 09300 (the “Miller Lands”). Attached hereto as **Exhibit “N”** to this my Affidavit is a parcel identifier map prepared the Municipality depicting the location of the Miller Lands.
28. The petition requested the provision of legal and functional outlet to the East Branch of the Facey Drain, involving an outlet through property owned by CP. Attached hereto as **Exhibit “O”** to this my Affidavit is a copy of the petition.
29. The Miller Lands within the watershed of the Facey East Drain are agricultural lands and I am advised by Mr. Miller that the primary crops grown on that property are corn and soybean.

30. Mr. Miller has advised the Municipality that in his experience, the current drainage capacity on the Miller Lands is not sufficient to drain the gravitational water on his property, and the wet conditions are resulting in a loss of growing crop and reduced yields.
31. Based on my site visits to the Miller Lands arising from Mr. Miller's petition, and my review of the drainage engineering data, it is my assessment that the Miller Lands have both insufficient surface and subsurface drainage due to lack of adequate outlet.
32. On March 2, 2020, the Municipality appointed Spriet Associates London Limited (the "Engineer") to prepare a report under Section 4 of the *Drainage Act* on the Facey Drain East Branch in the Community of Zone Township. Attached hereto as **Exhibit "P"** to this my Affidavit is a copy of the minutes of the Municipal Council meeting occurring on March 2, 2020, approving the appointment of the Engineer for the purposes of preparing the required report.
33. On October 1, 2020, the Municipality sent notice of an on-site meeting concerning the petitioned drainage works, including to CP. Attached hereto as **Exhibit "Q"** to this my Affidavit is a copy of that notice and associated mailing labels.
34. The on-site meeting was held at 9:30 a.m. on October 27, 2020, north of the CP Property on Zone Road 2, Chatham-Kent. I attended the meeting in person. Ann Ford, Drainage Analyst for the Municipality and Mr. Miller were also present. John Spriet, P.Eng., for the Engineer, participated by teleconference.

35. As is my typical practice for onsite meetings, I started the meeting by introducing myself, Ms. Ford, and Mr. Spriet. I explained that the purpose of the meeting was to address the petition received by Mr. Miller. Mr. Spriet explained that a survey had been completed across the CP lands and that, in his opinion, a bore would be needed to cross the railway property and that a soils report would likely be needed to satisfy CP's requirements.

36. Mr. Spriet explained that his recommendation would be for the proposed pipe to be 400 mm diameter installed by pipe ramming and that the bore could be located beside the existing concrete crossing with the old crossing grouted or removed, whichever CP preferred. Mr. Miller explained that, in his view, the existing concrete crossing on CP's lands was not in good shape and suggested that perhaps it could be lined with a steel pipe. Mr. Miller explained that water coming off of CP's property farther to the northeast was entering his property and travelling back around through his farm.

Attached hereto as **Exhibit "R"** to this my Affidavit is a copy of Ms. Ford's notes taken on behalf of the Municipality which, based on my recollection, accurately summarize the on-site meeting.

37. On November 18, 2020, as no representative from CP had attended the statutory on-site meeting, I contacted Glenna Hall of CP via email, using contact information provided to me by the John Spriet's office which Mr. Spriet's office had previously used to engage with CP on other drainage projects.

38. I wrote to Ms. Hall explaining that the Municipality had received a petition under Section 4 of the *Drainage Act* for outlet to a property located at the north-east corner of

the intersection of Zone Rd 2 and the CP rail line. I also explained that based on preliminary site reviews and survey, the proposed project scope generally included the installation of a new rail crossing consisting of a 400mm diameter pipe (there being an existing 900mm diameter concrete in the same vicinity) and some drainage swale improvements. I attached a site map to my email and requested direction from CP regarding the best contact for the Municipality to obtain CP's review of the proposed work. Ms. Hall responded to copy Jack Carello, Manager Utilities & Flagging for CP, advising me that Mr. Carello was the appropriate contact to assist the Municipality. Attached hereto as **Exhibit "S"** to this my Affidavit is a copy of that email correspondence with CP, together with the site map attachment.

39. On November 27, 2020, I followed up directly with Mr. Carello and forwarded another copy of the site map to his attention, together with preliminary drawings for the petitioned drainage project received from the Engineer. Attached hereto as **Exhibit "T"** to this my Affidavit is a copy of that email correspondence, together with the enclosures.
40. On December 1, 2020, Mr. Carello responded to request a teleconference. Attached hereto as **Exhibit "U"** to this my Affidavit is a copy of that email correspondence.
41. On December 14, 2020, I held a teleconference with Mr. Carello, Brandon Widner, P.Eng. from Spriet's office, and Ms. Ford. I explained that the purpose of the call was to identify CP's requirements for the proposed project. Mr. Widner explained the proposed specifications and installation method. Mr. Carello explained that CP may require a utility protocol, geotechnical reporting and track monitoring. Mr. Widner responded to

advise that the Municipality would be happy to go through CP's process and that CP would be responsible for costs under Section 26 of the *Drainage Act*.

42. During that same meeting, Mr. Carello asked if CP could do the work on its lands itself and both Mr. Widner and I explained that CP could conduct the work itself, at its cost. Mr. Carello requested an on-site meeting and me and Mr. Widner agreed that an on-site meeting would be arranged. We concluded by confirming with Mr. Carello that survey shots of the proposed drainage project location would be done prior to the site visit to have more information in hand. Attached hereto as **Exhibit "V"** to this my Affidavit is a copy of Ms. Ford's notes taken on behalf of the Municipality summarizing the teleconference, which to my recollection accurately describe this meeting.
43. Following the teleconference, and at the request of CP, on December 18, 2020, I wrote to CP to organize a further on-site meeting to discuss the petitioned drainage works. Attached hereto as **Exhibit "W"** to this my Affidavit is a copy of the email correspondence with CP setting the on-site meeting.
44. On February 3, 2021, I attended the on-site meeting with Ms. Ford, Mr. Rheal Lemelin, Manager Bridge Maintenance Toronto for CP, and Mr. Widner for the Engineer. The meeting occurred at the proposed drainage project location. I showed Mr. Lemelin the location of the proposed culvert and explained the proposed dimensions. After Mr. Lemelin had the opportunity to examine the site, we discussed if CP may wish to carry out the work itself. Mr. Lemelin responded that CP did not need to be involved in executing the work given the minor nature of the work in question, nor did he typically become involved in minor work of this nature. Mr. Lemelin confirmed that the proposed

project was acceptable to CP, provided there would be no interruption to the track. With this confirmation, I advised everyone that the Engineer would be proceeding to prepare a final Engineer's Report. Attached hereto as **Exhibit "X"** to this my Affidavit is a copy of Ms. Ford's notes taken on behalf of the Municipality summarizing the meeting, which to my recollection accurately describes the meeting.

Engineer's Report

45. Subsequent to the February 3, 2021 site visit, on February 8, 2021, I wrote to Mr. Lemelin and Mr. Carello to confirm my understanding, based on my discussion with Mr. Lemelin at the site visit, that a geotechnical report would not be required by CP. Mr. Carello responded to advise that if the proposed pipe stayed under 12" diameter, a geotechnical report and track settlement plan would not be required. I responded to clarify whether that was 12" inclusive, as the current sizing proposal was for a 12" diameter crossing. Mr. Lemelin responded to state, "if possible make 10". Attached hereto as **Exhibit "Y"** to this my Affidavit is a copy of this email correspondence.
46. On February 21, 2021, the Engineer filed its Engineer's Report proposing the construction of the Shaw Branch of the Facey East Drain, in the Community of Zone, Municipality of Chatham-Kent (the "Engineer's Report"). Attached hereto as **Exhibit "Z"** to this my Affidavit is a copy of the Engineer's Report, plan and profile.
47. The Engineer's Report commented, regarding the existing drainage conditions within the drainage area, that:

- a. 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;
 - b. The Drainage Superintendent for the Municipality indicated that this would require a crossing under the CP Rail Property and that the new drain would be a tributary to the Facey East Drain;
 - c. A site meeting occurred with officials from CP Rail to discuss the potential crossing and that CP Rail indicated that any borings under 300 mm in diameter did not require a geotechnical report.
48. 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".
49. The Engineer's Report determined that "construction of a new crossing under C.P. Rail lines would necessitate maintenance work on the Facey East Drain downstream of the proposed work."
50. The Engineer's Report recommended as follows:
- d. A new branch drain, to be known as the Shaw Branch, be constructed commencing at the East Branch of the Facey Drain and travelling northwesterly under the CP Rail allowance to just within the limits of the Miller Lands for a total length of 43 lineal meters;

- e. The crossing under the railway be done by jack and bore to minimize disruption to rail traffic;
 - f. 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;
 - g. 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;
 - h. That the Facey East Drain be cleaned out under maintenance to provide a sufficient outlet for the Shaw Branch.
51. With respect to the pipe to be installed under the CP crossing in particular, the Report proposed installation of 17 meters of 200mm diameter (approximately 8”), 7.9 mm thickness smooth wall steep pipe, to be installed by boring, consistent with what the Municipality had been advised would be acceptable to CP for this project.
52. The Engineer’s Report made a special assessment to CP under Section 26 of the *Drainage Act* 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. Costs are assessed under Section 26 for the increase in cost of the drainage works where a drain crosses or proposes to cross a road or public utility. The *Drainage Act* defines a public utility to include “railways however operated”.
53. The Engineer’s Report made Assessments for benefit to the Huston Lands, Miller Lands, and CP lands under Section 22 of the *Drainage Act*. The *Drainage Act* defines benefit to

mean the advantages to any lands, roads, buildings or other structures from the construction, improvement, repair or maintenance of a drainage works such as will result in a higher market value or increased crop production or improved appearance or better control of surface or subsurface water, or any other advantages relating to the betterment of lands, roads, buildings or other structures.

54. The Engineer's Report made Assessments for outlet liability against the Miller Lands and CP lands. Section 23 of the *Drainage Act* provides that lands and roads that use a drainage works as an outlet, or for which, when the drainage works is constructed or improved, an improved outlet is provided either directly or indirectly, may be assessed for outlet liability.

Consideration and Adoption of Engineer's Report

55. On February 22, 2021, the Municipality delivered Notice of Consideration of the Engineer's Report, together with a copy of the Engineer's Report itself, in accordance with the *Drainage Act* requirements for consideration of the Engineer's Report at the March 16, 2021 meeting of the Municipality's Drainage Board. Attached hereto as **Exhibit "AA"** to this my affidavit is a copy of the Notice of Consideration.
56. On March 16, 2021, the Drainage Board approved the recommendation that the Engineer's Report be adopted and presented, and that it be recommended that Council give first and second reading to the corresponding By-law. Attached hereto as **Exhibit "BB"** to this my affidavit is a copy of the Drainage Board meeting minutes of March 16, 2021.

57. On March 22, 2021, Council gave first and second reading to a by-law to adopt the Engineer's Report and proceed with the recommended drainage works. Attached hereto as **Exhibit "CC"** to this my affidavit is a copy of the Council meeting agenda, where the by-law was given first and second reading on March 22, 2021.
58. On April 12, 2021, the Municipality delivered Notice of the first sitting of the Court of Revision together with copies of the provisionally adopted by-law. Attached hereto as **Exhibit "DD"** to this my affidavit is a copy of the Notice and mailing labels.
59. On May 4, 2021, the Court of Revision hearing proceeded and a motion passed that "the Schedule of Assessment published in the report dated February 19, 2021 on the Shaw Branch of the Facey East Drain be adopted and the Court of Revision of the Shaw Branch of the Facey East Drain be closed." Attached hereto as **Exhibit "EE"** to this my Affidavit are the minutes of the Court of Revision and the Drainage Board for May 4, 2021.
60. On May 31, 2021, Municipal Council gave 3rd and final reading to the By-law No. 93-2021, including the enactment that the Engineer's Report be adopted and completed in accordance with the By-law. Attached hereto as **Exhibit "FF"** to this my Affidavit is a copy of By-law No. 93-2021.
61. On June 15, 2021, in the interest of getting pre-construction for the project organized, I contacted Mr. Carello to request an encroachment permit for CP's property. On July 6, 2021, Mr. Carello responded to me to advise that CP required an agreement be put in place to cover the pipe installation and any future maintenance, enclosing a "utility application form", and stating that all expenses for the proposed installation must be

borne by the Municipality. Attached hereto as **Exhibit “GG”** to this my Affidavit is a copy of that correspondence and enclosure.

62. On October 26, 2021, the Municipality wrote to CP requesting its confirmation that it would bear the legislated costs of the project, in accordance with the engineer’s finalized report. Attached hereto as **Exhibit “HH”** to this my Affidavit is a copy of that correspondence.
63. On November 26, 2021, CP responded to advise of its position that CP is not subject to Section 26 of the *Drainage Act* and that Section 101 of the Canada Transportation Act already synthesized the resolution of costs where federal rail lands are involved. CP advised it did not have any technical objections to the work, but that it should not be responsible for any associated costs. CP advised that by way of next steps, it would prepare its standard pipe crossing agreement. Attached hereto as **Exhibit “II”** to this my Affidavit is a copy of that correspondence.

Current State of Drainage Project

64. The technical aspects of the proposed drainage project were agreed to by CP.
65. CP has not advised the Municipality of any new concerns with the technical aspects of the proposed drainage project, including the means and methods set out in the Engineer’s Report as approved by By-law No. 93-2021.
66. The Municipality is prepared to mobilize to carry out the Drainage Project approved by By-law No. 93-2021.

67. In my experience, where a *Drainage Act* project involves installation of or improvements to *Drainage Act* infrastructure on active federally regulated railway lands, the process to facilitate the work on railway lands is as follows:

- a) As part of the *Drainage Act* process, a statutory site meeting is carried out and the railway is given notice of the meeting, and the opportunity to attend and provide its position concerning the proposed drainage work, including the means and methods of the work;
- b) The Municipality will meet and communicate separately with the railway to receive any technical requirements the railway has for the drainage project;
- c) Where requested by the railway, the Municipality will provide alternative work plans for the railway's review and consideration;
- d) The Drainage Engineer will receive the railway's comments and technical requirements;
- e) The Engineer's Report will be prepared to address the railway's comments and technical requirements, if any;
- f) The railway has the option to complete the work itself, at its cost, or can elect to have the Municipality undertake the work;
- g) If the work is to proceed on the railway lands, and where the railway requests the Municipality proceed with the work on its behalf, as in this case, the

Municipality obtains the appropriate encroachment and work permits from the railway;

- h) The Municipality coordinates the timing of the work with the railway to avoid operational disruptions to the railway;
- i) All work on the railway lands is carried out in accordance with the requirements of the Engineer's Report, including railway specifications, and any permit conditions; and
- j) Once the project has been completed and costs finalized, the railway is invoiced for assessed amounts arising out of the project.

68. The above process was followed in this case, up to the point that the Municipality requested an encroachment permit in order to mobilize.

69. It was anticipated, that after following the process set out in the *Drainage Act* and ensuring the plan, profile and specifications for the project were agreeable to CP, the Municipality would be able to proceed, with CP bearing its associated assessed costs.

70. CP now advises the Municipality that while it doesn't dispute the technical aspects of the project, it is not responsible for any assessed costs.

71. This response by CP is contrary to my experience with other federally regulated rail companies operating in Chatham-Kent, even in recent years.

72. For example, beginning in around 2017, I oversaw the construction of a large *Drainage Act* project partially on land owned and operated by CN Rail. That work, further to a

petition under Section 4 of the *Drainage Act*, involved the construction of a new drain known as Zsoldos Drain, also in Zone Township. Spriet was appointed as the Drainage Engineer for that project, like the proposed Shaw Branch project. The project included a new 762mm diameter crossing (much larger than the crossing proposed for the Shaw Branch) installed under the CN railway by pipe ramming.

73. In the course of that project, and at the request of CN, the Municipality provided alternative work plans and specifications for CN's review and consideration. The Engineer's Report, plan and profile were finalized to reflect the work plan and specifications approved by CN. Increased costs to the drainage project arising from the crossing work were assessed to and paid for by CN in accordance with Section 26 of the *Drainage Act*. Attached hereto as **Exhibit "JJ"** to this my affidavit are three email chains between the Drainage Engineer, John Spriet, and CN Rail, dated May 4, 2017, November 1, 2017, and November 8, 2019, documenting some of the cooperative communications between the Municipality and CN concerning that project.

74. In my experience, the Municipality has never had a dispute with a federally regulated rail operator about the technical aspects of a *Drainage Act* project. Rather, the railway's technical requirements are identified through consultation with the railway company and incorporated into the Engineer's Report.

75. To my knowledge, *Drainage Act* costs for projects in Chatham-Kent have never been decided by a federal tribunal, rather these costs have always been decided through the *Drainage Act* process.

76. After the Municipality learned of CP’s position that it is not required to pay costs assessed to it under the *Drainage Act*, I, together with other representatives of the Municipality of Chatham-Kent, have consulted with drainage personnel employed by other municipalities across Ontario. We have learned that other municipalities have likewise recently been advised by CP and other federally regulated rail companies that these rail operators are increasingly refusing to pay costs assessed to them under the *Drainage Act*. Based on these consultations, we have learned that in other municipalities, railway owners’ share of costs for *Drainage Act* work has gone unpaid, or necessary drainage work has been put on hold due to the fact that involved railway owners refuse to pay their share. The impacts of federal rail companies refusing to cooperate with the *Drainage Act* process therefore extends beyond the Municipality of Chatham-Kent.

77. I make this Affidavit for no improper purpose.

SWORN REMOTELY at the)
City of Chatham, in the)
Municipality of Chatham-Kent)
this the ^{2nd} day of April, 2024, in accordance)
with O. Reg. 431/20, Administering Oath or)
Declaration Remotely)
Commissioner for Taking Affidavits)

BLAISE CHEVALIER

Linda Marie Kalp, a Commissioner, etc.
Province of Ontario, for the Corporation
Of the Municipality of Chatham-Kent
Expires August 31, 2026

CORPORATION OF MUNICIPALITY OF CHATHAM-KENT
Applicant

COURT FILE NO. CV-23-00001165-0000 (Chatham)
-and- **CANADIAN PACIFIC RAILWAY COMPANY**
Respondent

ONTARIO
SUPERIOR COURT OF JUSTICE
COURT OF DRAINAGE REFEREE

PROCEEDING COMMENCED AT
CHATHAM, ONTARIO

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