

The logo for the Rural Ontario Municipal Association (ROMA) features the word "ROMA" in a bold, green, sans-serif font. The letter "O" is replaced by a white stylized leaf or tree icon. The logo is set against a background of a large, light blue and green circular arc that frames the left side of the slide.

ROMA

Rural Ontario
Municipal Association

Trains and Drains

Protecting our collective
interests – together

Why are we here?

Proper land drainage is essential:

- to ensuring **public safety** and safeguarding property by preventing flooding;
- to maintaining land **productivity** for agricultural production and forestry activities.

Railway beds often **contribute** to a host of drainage challenges or they must be **integrated** into comprehensive municipal drainage works.



Why are we here?

In Ontario, the **Drainage Act** allows affected property owners and municipalities to ensure proper land drainage:

- drainage works can be **initiated** by an affected property owner or the municipality;
- the act provides for a broad **cost-sharing** mechanism for both construction and maintenance, keeping taxpayers **whole**;
- works under the Drainage Act are designed and overseen by an objective and independent **engineer**.

The Act also provides a right of **appeal** for anyone affected by the decision to undertake drainage works.



Railways are undermining the Drainage Act

After abiding by the Drainage Act provisions for essentially a century, ROMA has begun receiving regular reports from members that the major railways have started **pushing back** by:

- refusing to **pay** their share of capital and maintenance costs under the Act;
- refusing **access** to their land to construct or maintain municipal drainage works;
- refusing to acknowledge **municipal jurisdiction** or the **applicability** of the Drainage Act to railways in general;
- turning to the federal **Canadian Transportation Agency** to resolve drainage disputes with municipalities instead of pursuing Drainage Act appeals.



What the railways are claiming

The railways' position is simple: they claim that, because they are federally-regulated businesses, they enjoy **constitutional immunity** from any municipal bylaws or provincial statutes.

ROMA's view is that this legal argument is completely unfounded. That is simply not how the Canadian Constitution works. Federally-regulated businesses have to abide by municipal and provincial rules unless they can prove to a Court that a specific aspect of those rules is in conflict with federal authority.

There is a wide consensus among lawyers consulted that the railways do not have a constitutional leg to stand on – a position shared by the Government of Ontario.



David v. Goliath – Strength in numbers

In response to the railways' bullying, ROMA has been playing a proactive role:

- as a clearinghouse by gathering clear data on the issue,
- by applying political pressure at the provincial and federal levels to get the railways to play by the rules – as they have always done,
- by coordinating the development of a concerted, legal strategy in response to the railways' unfounded constitutional claims, and
- by approving a rare intervention by ROMA in the case opposing Chatham-Kent and CPR in which the railway is expected to make its constitutional claim for the first time.

Unless the railways **yield** to political pressure and go back to abiding by the Drainage Act once again, the only way to resolve the issue will be to obtain a **Court ruling** declaring that the Act applies to railways.

David v. Goliath – Strength in numbers

Setting the legal strategy

After a number of strategy meetings, and consultations with the Province (Ministry of the Attorney General) who supports ROMA's legal position, it was decided that **Chatham-Kent** would be the municipality to open the legal front in our collective battle.

Chatham-Kent was chosen because:

- it is a relatively large ROMA member, with its own in-house legal team who are well-versed in Drainage Act issues and sufficient resources to take this on;
- it had Drainage Act files ready to proceed to Court adjudication;
- these files were deemed to be good candidates for the constitutional arguments that will have to be made;
- Chatham-Kent was coming up against limitation periods and had to move forward to safeguard its rights.

The Chatham-Kent Experience



4100 municipal drains with an estimated total length of 4,000 kilometres.

Annually: 550 maintenance and 45 capital construction projects.

Historically, rail companies:

- have taken part in the Drainage Act processes,
- have allowed access to their property, and
- have paid costs towards drainage projects.

Rail companies typically require an “encroachment agreement” before granting access. Chatham-Kent enters into these agreements to address rail safety but insists on the rail companies paying their drainage costs.

Recently rail companies (CP, CN, CSX and VIA):

- are refusing to pay costs assessed to them, and
- are refusing, in some cases, to grant access through their properties.

The Drainage Act



If a petition for new work is received or improvements are needed:

- An **engineer's Report** is prepared. This step includes site visits and opportunities for property owner input.
- The Report lays out the **work** to be done and assesses the **costs** of the work based on benefits to each property.
- Assessed owners have an ability to **appeal** the drainage Report.
- Public utilities (which includes *“railways however operated”*) must pay costs assessed to them, and *“pay all the increase of cost of such drainage works caused by the existence of the works of the public utility”*.
- The **Drainage Referee** is like a judge with specialized drainage knowledge.
- The Referee has the power to determine any claims and disputes arising under the Drainage Act, and to make orders directing anything required to be done under the Drainage Act.

Chatham-Kent v. Canadian Pacific Railway (CPR)



Starting in December 2020:

- **petition** for drainage received, which requires a pipe under the CPR rail bed;
- engineer's **report** is completed and served on CPR;
- CPR does **not** file an appeal.

June 2021:

- CPR writes a letter saying they will **not pay**, and that Chatham-Kent must enter into an encroachment agreement.
- CPR takes the position that the Drainage Act does not apply to their company, that they receive no benefit, and that they maintain their own drainage.

Chatham-Kent v. Canadian Pacific Railway (CPR)



July 2023:

- Chatham-Kent has started a claim in the **Court of the Drainage Referee** for an order:
 - 1) to allow the work to proceed, subject to entering into an agreement regarding railway safety and operational concerns,
 - 2) for CPR to pay the costs assessed to it.

For its part, ROMA:

- is coordinating next steps by convening meetings of affected municipalities as required;
- is providing some legal support to Chatham-Kent as requested;
- has been acting as liaison with the Ministry of the Attorney-General. The Ministry has stated its intent to defend the integrity of the Drainage Act. It may choose to step in, in coordination with Chatham-Kent and ROMA, when appropriate.

Why it matters... the impacts on your constituents

1. The financial and operational implications are significant, particularly for smaller municipalities:

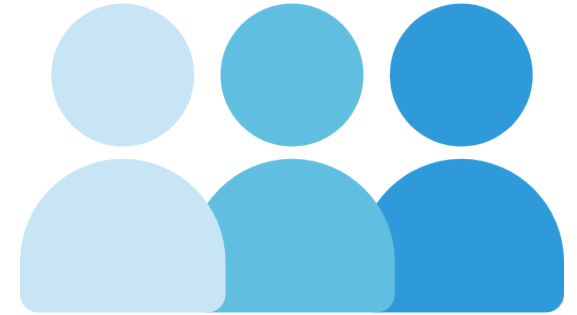
- If these large multinational companies refuse to pay their fair share, taxpayers and property owners will be left with covering their bills.
- The existence of railway lands can significantly increase costs of drainage projects, so the railways' position is patently unfair.
- If municipal drainage networks cannot cross their lands, drainage simply cannot work. This undermines the long-term functionality of agricultural and other lands.
- Clarifying railways' obligations to provide access and pay their costs for drainage works will provide certainty for all landowners and rural municipalities.

Why it matters... this is part of a much bigger issue

2. The bogus *immunity* position the railways are taking have ramifications on other core municipal responsibilities:

- The major railways appear to have concerted themselves: they are essentially all taking the same position on the Drainage At.
- In Halton, CN has refused to abide by any municipal bylaw or provincial statute in the construction of a massive rail-to-truck transfer hub – fill bylaws, road access bylaws, etc. – and the Railway Association of Canada is openly supporting CN in Court.
- FCM is now getting consistent reports from across the country that telecommunications carriers (Bell, Rogers, Telus, etc.) have starting taking the same position with respect to their work in municipal rights-of-way.
- Carriers and FCM have been involved in a major legal battle in which the carriers are seeking the right to install antennas anywhere they want.

What ROMA needs from you



Information

Share any similar experiences you have with the ROMA. This information will help us plan and carry out our strategy.

Keep on top of things

Make sure to proceed diligently with any Drainage Act files, keep an eye out for your limitation periods, and don't buy into the railways' immunity claims.

Coordination

If you are at the stage of contemplating or preparing legal action for unpaid drainage costs or a refusal to provide access, let us know.

Awareness and support

Raise awareness with your Councils and seek support for this issue (pass motions, support funding support requests if received etc.)