



## SO, WHAT'S A MUNICIPAL DRAIN?

S. Vander Veen

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Perhaps you've just purchased property, and been told by your municipality that you are assessed into a municipal drain. Perhaps you have owned a property for a couple of years and have recently discovered that you are located in the watershed of a municipal drain. You're probably wondering, what does this mean? How does it affect me? What will it cost?

### PHYSICALLY, WHAT IS A MUNICIPAL DRAIN?

Physically, a municipal drain is simply a drainage system. Most municipal drains are either ditches or closed systems such as pipes or tiles buried in the ground. They can also include structures such as dykes or berms, pumping stations, buffer strips, grassed waterways, storm water detention ponds, culverts and bridges. Even some creeks and small rivers are now considered to be municipal drains. Municipal drains are primarily located in rural agricultural areas of the province.

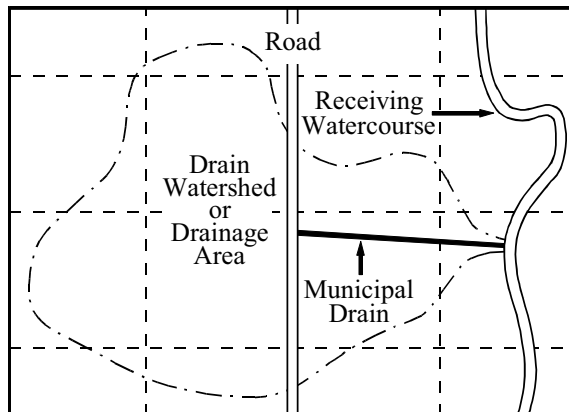


FIGURE 1. Plan of a Municipal Drain

### THE PURPOSE OF MUNICIPAL DRAINS

Municipal drains have been a fixture of rural Ontario's infrastructure since the 1800's. Most municipal drains were constructed to improve the drainage of agricultural land by serving as the discharge point for private agricultural tile drainage systems. However, they also remove excess water collected by roadside ditches, residential lots, churches, schools, industrial lands, commercial lands and any other properties in rural areas.

They are a vital component of the local infrastructure. Without them, many areas of the province would be subjected to regular flooding, reduced production from agricultural land and increased public health risks.

### WHY IS IT CALLED A "MUNICIPAL DRAIN"?

There are many, many drainage ditches and buried pipes in the province, but not all of them are "municipal drains". So what distinguishes a municipal drain?

Municipal drains are created under the authority of the *Drainage Act*. There are 3 key elements of a municipal drain:

**1) Community project** — Landowners who need to solve a drainage problem may submit a prescribed petition under the *Drainage Act* to their local municipality, requesting the establishment of a municipal drain. If certain criteria are met, the municipality appoints an engineer who prepares a report, identifying the proposed solution to the problem and how the costs will be shared. There are various meetings where landowners in the watershed of the municipal drain can voice their desires and concerns. There are also several appeal stages where they can voice their objections. So, the end result of the process is a "communally accepted" project.

**2) Legal Existence** — After all appeals have been heard and dealt with, the municipality passes a by-law, adopting the engineer's report. The municipality then has the authority and the responsibility to construct the project. The cost of the work is assessed to the lands in the watershed in the same ratios as contained within the engineer's report. So for a ditch or a pipe to be a municipal drain, there must be a by-law adopting an engineer's report.

**3) Municipal Infrastructure** — Once a municipal drain has been constructed under the authority of a by-law, it becomes part of that municipality's infrastructure. The local municipality, through its drainage superintendent, is responsible for repairing and maintaining the municipal drain. In certain circumstances, the municipality can be held liable for damages for not maintaining these drains.

#### DO'S AND DON'TS FOR PROPERTY OWNERS

##### You should:

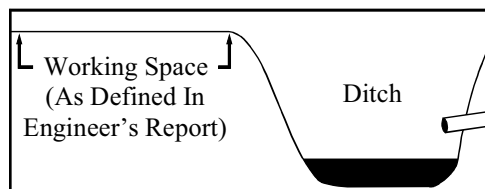
- Find out the name of your local municipality's drainage superintendent.
- If you don't have any information on the municipal drains that affect your property, make arrangements with your municipality to get copies. Please note you may have to pay for the photocopies.
- Find out how the municipal drain affects your property. How much is your property assessed? Are there any buried municipal drains that cross beneath your land? Is there a municipal working space along or above a municipal drain on your property?
- Remove debris from any catchbasins that may be located on your property or the adjoining road. This type of ongoing preventative work can reduce the possibility of property damage during storm events
- As an involved landowner, you have a responsibility for the drains located on your property, so observe them. If you notice any problems, immediately notify the drainage superintendent or the local municipality.
- Before purchasing a property, investigate how municipal drains may affect the property.

##### You can expect:

- Municipalities must maintain their municipal drains. Therefore, if you have a municipal drain located on your property, you can expect that your municipality will periodically arrange to enter onto your property and perform the necessary work. After it is completed, you will be billed for your share of the cost.
- For a period of time while the work is being completed, you can expect the working space along the drain to be accessed by the maintenance equipment and the land to be disrupted to some degree. Because this working space is a form of an easement, you will not be paid for any damages that occur on this land.
- Municipalities have the right to accumulate the cost of maintaining a drain for up to five years or \$5,000. Therefore, it is possible that you may be billed for work that occurred before you owned a property.

##### You should NOT:

- Along every municipal drain is an unregistered working space that the municipality has the right to use to maintain or repair the drain. Keep this working space accessible and do not plant trees or build structures in this area. If you do, and it results in an obstruction to the maintenance equipment, you may have to pay the cost of removing that obstruction.
- Don't store materials such as brush, lumber or other floatable material near the drain, because during storm events, it could float away and block the drain.
- The local municipality is responsible for maintaining municipal drains on behalf of the community of landowners involved in a drain. If you want to install a culvert or bridge on an open ditch municipal drain, or if a municipal drain requires maintenance, don't perform the work yourself; instead notify your municipality. If you do unauthorized work on a drain and that work results in damages to the drain or to other landowners, you could be responsible for paying the cost of repairing the damages.
- Although they are "man-made", all municipal drains eventually connect with the many beautiful lakes, rivers and streams located in Ontario. Do not direct septic system waste, milkhouse wastes, barnyard and manure storage runoff or other pollutants directly to these drains.



**FIGURE 2. Cross-Section of an Open Ditch Municipal Drain**

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# Municipal Drains and the Landowner

(Reprinted February, 1993)

Ralph Clayton, Resources Management Branch

## Introduction

Do you feel that the procedures of the Drainage Act are beyond your control? Then read on! This Factsheet outlines the landowner's input to the proposed drainage works.

Your interest, comments and questions can help council and the engineer determine the value and need for a drainage project. This Factsheet summarizes the decisions of the landowner for each step of the procedures outlined in the Drainage Act. Remember, landowners are the "initiators" of new or improved drainage works. The municipality (council) is the "facilitator".

## Background

In Common Law, an owner is liable for damages when surface water is artificially collected and discharged on lower lands. Common Law does not permit outlet for non-riparian owners (those owners not abutting a natural watercourse). For more information see OMAF Factsheet *Common Law Aspects of Water*, Agdex 557. The Drainage Act accepts the liability but allows non-riparian owners to recompense the riparian owner through assessments for "outlet liability" and "injuring liability". The payment of an injuring liability assessment relieves a non-riparian property from future charges under common law for damages caused by water artificially collected. A discussion of assessments may be found in OMAF Factsheet *Understanding Drainage Assessment*, Agdex 557. The Drainage Act provides interested non-riparian landowners with a method of obtaining a "legal outlet".

Three methods of outlet are set out in the Drainage Act and are commonly known as:

- (a) Mutual Agreement      (b) Requisition      (c) Petition.

Factsheets entitled *Mutual Agreement Drains*, Agdex 555 and *Drainage Legislation*, Agdex 752 explain outlet procedures.

## The Drainage Report

A new municipal drain is initiated by petition. A municipal drain on which landowners wish improvements is frequently initiated by council. A new drain or an improvement to a drain requires the preparation of a drainage report by a registered engineer. Interested landowners are financially responsible for a portion of costs incurred when the proposal is accepted by council and an engineer is appointed.

The drainage engineer has the obligation to prepare an unbiased drainage report based on information presented in written form, orally, and from visual inspection; in accordance with currently accepted design criteria. Council and/or the drainage superintendent should have a copy of *Performance Guidelines for Services of the Engineer Acting Under the Drainage Act*, published by the Association of Professional Engineers of Ontario.

An "on-site" meeting will be held by the engineer to gather information, view the site and hear landowner concerns. A survey crew will collect the necessary field information for the drainage system.

Taking all the available information into consideration, a drainage report is then prepared by the engineer and presented to council for review, prior to the "meeting to consider".

When the drainage report is received by a landowner, there will be a meeting notice attached, requesting the ratepayers to meet and discuss the proposed work. Providing the proposed work is accepted, council will proceed to set a date for the Court of Revision where ratepayers may appeal assessments. The Factsheet entitled "Drainage Act Appeals", Agdex 557, provides more information.

If you do not understand the report, assistance can be obtained from the drainage superintendent, the municipal clerk, or other knowledgeable persons.

It is the landowner's responsibility to review and understand the report and to attend or be represented at all the meetings for which notification is received. Non-attendance implies acceptance of the report as received. Similarly, if a "time frame" for an appeal is missed, the opportunity to appeal is forfeited unless a special situation exists. Appeals may add costs and time delays to the project. Thus it is very important that the landowner review the report and carefully consider the value of appeals relative to the overall cost of the drainage works.

The tabular information identifies "activities" taking place and "decisions" which can be made by the landowners and others. Reference to the applicable sections of the Drainage Act is given in numerals. This table is not "all encompassing" as circumstances may present alternatives not covered. This information follows the procedures as if a new drain was being undertaken. When a new drainage report is prepared for an existing municipal drain, the petitioning procedure may not be necessary. In this case, enter the tabular information at "the On-Site Meeting" under the sub-title "(b) Petition is Valid". Where the action is not noted, reference should be made to knowledgeable persons for advice.

Also note that as you move down through the procedures, decisions move from the owners involved, to other groups such as the Court of Revision and the Drainage Tribunal.

## Maintenance of Drains According to Current By-Law

The municipality is responsible for the maintenance of any drainage works constructed under the Drainage Act RSO 1980 or its predecessors to the extent of the work and structures specified in the current by-law. All upstream landowners, from the commencement of the maintenance work, are assessed for the cost of the maintenance work "pro-rata" as per the maintenance assessment schedule. 74

Landowners can reduce maintenance costs by undertaking management practices which reduce or eliminate degradation of the drain. Some practices to consider are:

1. Limiting cattle access by fencing and providing adequate cattle crossings.
2. Providing erosion control structures for surface water entry to open drains and for subsurface drain outfalls.
3. Maintaining a grass buffer strip along the top of the bank on open drains to aid bank stability and to provide a sediment filter.
4. Inspecting the drainage works for bank failure, obstructions, recent damage, structural failures, and surface water chutes or subsurface outfall durability.
5. Alerting the municipality (drainage superintendent) of concerns found from the inspection.
6. Discussing changes such as severances and land use with the municipality to ensure that the current drainage report reflects changes that influence expected flows. 65, 66
7. Encouraging frequent inspection and minor maintenance by the municipality to reduce long-term maintenance costs.

## Abandonment of the Drain

If a notice proposing abandonment of all or a portion of a drain in which property has been assessed is received, the landowner should review present and future drainage needs relative to the current and future use of the property. 84 Be aware that "abandonment" returns the watershed to Common Law Status, subject to riparian rights and obligations. Also, landowners not abutting the watercourse lose access to an outlet. Appeals against "abandoning" are possible. See OMAF Factsheets *Common Law Aspects of Water*, and *Drainage Act Appeals*, Agdex 557.

Activity	Owners Decisions	Interested Parties	Obligations of Owner	Appeal Body
<b>Informal Discussion</b>				
Discussion prior to petition.	Can we use improved outlet drainage?	Owner & Neighbours		
	Will I have benefit from improved drainage?	Owner		
<b>Names on Petition</b>				
Signing of Petition. 4 (1)	Am I in "area requiring drainage"?	Owner		
	Am I ready to assume financial responsibility?	Owner	When owner signs petition, will incur financial obligation. Cannot withdraw from petition until meeting to consider either preliminary or final report. Petitioners are responsible for costs incurred if petition fails.	
	Will my business benefit from the project?	Owner		
<b>Petition Considered by Council</b>				
Council considers petition. 5 (1)	If rejected, do I want to appeal council's decision?	Petitioner(s)	Petitioner(s) may appeal council's rejection to the tribunal by notifying municipal clerk. May be future financial obligations if Tribunal orders council to proceed.	Drainage Tribunal
	If council accepts - no decision to make.	Petitioner(s)	If name on petition, will have financial obligation if council proceeds.	
	If council does not inform of decision within 30 days of filing petition, 5 (2) (b), do I want further action on petition?	Petitioner(s)	If wish to appeal, owner(s) must request appeal through municipal clerk; may be future financial obligations if Tribunal orders council to proceed.	Drainage Tribunal
When petition accepted, council may appoint engineer, after 30 days notice to Conservation Authority. 6 (1), 8 (1)	Did council appoint?	Petitioner(s)	If engineer not appointed within 60 days of council's decision to proceed, may appeal through municipal clerk. 8 (3)  Once engineer has been appointed, petitioners have financial obligations.	Drainage Tribunal
Council decides on "preliminary" or "final" report. 10 (1)	Do I want to encourage council to request a preliminary report?	Petitioner(s) & Council	Request a preliminary report if mainly interested in estimated cost or unsure of project costs.	
<b>The On-Site Meeting</b>				
On-Site Meeting. 9 (1)	Do I attend the on-site meeting?	Petitioner(s)	Attend meeting and participate in discussion as owner of lands in "area requiring drainage".	
(a) If engineer decides petition not valid. 9 (2) (b)	If your name is on petition, and you are in the "area requiring drainage" - no decision to make.	Engineer & Petitioner(s)	Procedure stops and petitioners will share costs unless a valid petition is filed within 60 days. 9(4)	

Activity	Owners Decisions	Interested Parties	Obligations of Owner	Appeal Body
(i) Engineer will establish requirements for petition to comply. 9 (2) (c)	If your name is not on petition, but you are in the "area requiring drainage" - decide if wish to add name. 9 (4)	Owner(s)	Realize that drainage project may "fail" or proceed, depending on one or more signatures.  Jointly owned property requires all signatures to count as one vote on the petition.	
(ii) Engineer will inform council of petition deficiency and set fee for meeting.	If your name is not on petition but you are in the "area requiring drainage" - decide if you wish to add name. 9 (4)	Owner(s)	May add name to petition. Realize that there may be a financial obligation.  Owner(s) in "area requiring drainage" have up to 60 days after engineer sends statement to council to add name.	
(b) Petition is valid. 9 (3)	What are my needs and concerns for the drainage proposal?	Petitioner(s) & Engineer	Participate in discussion regarding your drainage needs and concerns; e.g. crossing, fencing, sub-surface outlets, spreading of spoil, land area involved, bank stability, surface water entry, etc.  If after on-site meeting, have more comments, should relay through Drainage Superintendent to engineer before engineer completes preliminary or final report.	
<b>The Engineer's Report and Council Consideration</b>				
Engineer prepares preliminary or final report. 8 (1) or 10 (1)		Engineer	Council may extend time for filing report beyond 6 months. 39 (1)	
Engineer files with council:				
(a) A statement that the work cannot be constructed under Section 4.	Should I appeal?	Petitioner(s)	Review reason for engineer's statement. Is the additional cost of legal counsel warranted? Appeal is served upon council within 40 days.	Drainage Referee 47 (1)
(b) A statement that work is not required or is impractical. 40	Should I appeal?	Petitioner(s)	Review reasons for engineer's decision. Can I justify appeal to the Drainage Tribunal?	Drainage Tribunal 48 (1) (a)
(c) A preliminary report.	Does the report cover anticipated drainage needs?	Petitioner(s)	Petitioners attend meeting to consider and participate in discussion.	
A "meeting to consider" is called by council. 10 (2)	Is the estimated cost acceptable?		Note that "validity" of petition may be in jeopardy if delete name.	
	Do I add or delete my name from petition?		If delete name, still financially responsible. If petition validity fails, petitioners responsible in equal portions for costs to date.	
	Do I want to move to a full report?		Present your concerns to council and other petitioners, whether report should proceed or stop.	
If council does not proceed to final report.	Do I want council to proceed?	Petitioner(s)	May appeal if council does not proceed to final report.	Drainage Tribunal
(d) A final report.				
(i) If council decides not to proceed. 41 (1)	Should the drainage report proceed to the "meeting to consider"?	Petitioner(s)	Must file appeal with municipal clerk.  If report is not considered by council, the costs to date will have to be paid.	Drainage Tribunal 45 (2)

Activity	Owners Decisions	Interested Parties	Obligations of Owner	Appeal Body
(ii) Council decides to proceed and call a "meeting to consider". 41 (1)	Does the report cover anticipated drainage needs?	Council	Council should decide if the report is of value to the drainage area.	
Report is mailed to landowners with a notice of the date for "meeting to consider". 41 (1)	On receipt of report, landowner(s) decide if requests for drainage have been met.	All owners assessed	If want to object to procedures, owner(s) apply to Drainage Referee within 40 days of mailing of notice to ratepayers. 47 (1)	Drainage Referee
<p>Before attending the "meeting to consider", review the report for location drain length, depth, crossing size, pipe or drain dimensions, and environmental features such as rock chutes for surface flow, berms, bank protection, seeding, fencing, disposal or spreading of excavated material, etc.</p> <p>Owners should review allowances, estimated costs, and determine if proposal is "cost effective" for current or anticipated land use.</p>				
<p><b>Consideration of Report by Landowners</b> At "meeting to consider":</p>				
(a) Council will provide opportunity for owners to discuss report.	Question details and review specifications of report.	Petitioners & affected Owners	If owners desire changes and council is in agreement, report may be referred to engineer for further consideration. 57	
(b) Council will provide opportunity for owners in "area requiring drainage" to add or delete name from petition. 43	As petitioner or owner in "area requiring drainage", must decide if report is acceptable.  Add name?  Delete name?	Petitioners & Owners in "area requiring drainage".	<p>For a report prepared under Section 4, owners in the "area requiring drainage" may decide if:</p> <p>a) allow name to remain on petition; b) withdraw name from petition; c) add name to petition.</p> <p>Note that with a "final report", under Section 4, all petitioners are financially responsible on pro-rated basis according to assessment schedule regardless if petition remains valid.</p> <p>Where work is proposed under Section 78 and is stopped by landowners, the costs to date would likely be borne by the owners assessed in the last by-law.</p>	
(c) Council decides if it will give two readings to by-law - containing report, thus creating a provisional by-law. 44, 45	Landowners can discuss, with engineer and council, if location, design, and structures are adequate and suitable.	Owner(s)	<p>If petition remains valid, council may proceed to adopt a provisional by-law.</p> <p>Acceptance of report without comment at "meeting to consider," implies that owner is satisfied with engineer's design.</p> <p>If not satisfied with engineer's design, and council does not refer report back to engineer, owner should decide if have grounds for appeal as set out in 48 (1) (a) (b) (c) (d).</p>	Drainage Tribunal

Activity	Owners Decisions	Interested Parties	Obligations of Owner	Appeal Body
(d) Council does NOT adopt provisional by-law because:				
(i) Petition is not valid.	Who pays?	Petitioners	Original petitioners pro-rata according to assessment in report. 43	
(ii) Council uncertain if should proceed.	Petitioners decide if want report to proceed:			
	(a) Yes	Any Petitioner	File formal request for appeal with township clerk if council does not adopt by-law.	Drainage Tribunal
	(b) No		If report prepared under Section 4, council will likely be responsible for costs since no by-law exists for collection.	
			If report prepared under Section 78, council will likely pro-rate costs to date as per current by-law.	
Council, after adopting provisional by-law, sets date for "Court of Revision", 46 (1), and mails notices to land-owners.	Owner decides if proportion of estimated costs for construction and maintenance relative to the total estimated costs are acceptable:			
	(a) Yes	Owner(s)	Acceptance of proposed costs need no further action but realize that no appeal to the Court of Revision implies acceptance of the proposed proportion of cost.	
	(b) No	Owner(s)	File formal notice of appeal with municipal clerk at least 10 days before hearing. 52 (2)	Court of Revision
			<p>Grounds for appeal are: 52 (1)</p> <p>(a) Lands of appellant or other owner or road are assessed too low.</p> <p>(b) Lands of appellant or other owner or road are assessed too high.</p> <p>(c) Lands or roads not assessed that should have been assessed.</p> <p>(d) Type of land or use of land not considered.</p>	
			Verbal appeals may be heard if the court passes a resolution at the first sitting.	
<b>Court of Revision</b> Court of Revision decides if assessment appeals are worthy of consideration.	Owner(s) present appeals on grounds stated. 52 (1)  NOTE: Allowances may only be appealed to Drainage Tribunal. 48 (1) (c)	Owner(s) & members of Court of Revision (Legal counsel not required)	Appellant should identify lands or roads which should receive transferred assessments. 53	Court of Revision
(a) If appeal is accepted by Court of Revision.	Owner who receives transferred assessments decides if acceptable. 53			

Activity	Owners Decisions	Interested Parties	Obligations of Owner	Appeal Body
	(a) Yes	Owner	No further action; amended proportion of cost of works acceptable.	
	(b) No	Owner(s) to whom assessment transferred	Owner receiving transferred assessment has opportunity to consider change at meeting, or at reconvened Court of Revision, if not present. 53	Court of Revision
(b) If appeal is NOT accepted by Court of Revision.	Owner decides if want to appeal to Tribunal.			
	(a) Yes	Owner	Owner files formal appeal notice with municipal clerk within 21 days of Court of Revision decision.	Drainage Tribunal 54 (1)
	(b) No	Owner	No further action required; proportion of cost in report accepted.	
<b>Appeals to Drainage Tribunal or Drainage Referee</b>				
Drainage Tribunal Hearing	What is appeal? See sections 48 (1), 52, 53 and 54.	Owner (Legal Counsel may be utilized if owner desires)	Hearing of Tribunal is semi-formal.  Decisions have moved from local level to Drainage Tribunal.  Appeals are to be made within prescribed time periods.  Have presentation organized on prescribed grounds. See 48 (1) or 52, 53, 54 (1)  Fee for any legal assistance is owner's responsibility.  Recognize that Tribunal decisions are final for many appeals. See Appeal factsheet.  Tribunal can award costs 98 (7) (10) (11), to owner or drainage works. 73 (1)	Drainage Tribunal
Drainage Referee	Should I appeal to the Referee on legal or procedural matters? 47 (1) 58 (1)  NOTE: Competent legal counsel is suggested.	Legal Counsel & Owner	Appeals are to be made within prescribed time period.  Decisions have moved to Drainage Referee. Legal counsel, owner, and witnesses prepare pertinent testimony.  Costs are awarded by the Court. Owner may appeal Drainage Referee decision. 121	Divisional Court of Ontario
<b>Contract over Estimate</b>				
A review of the contract price when exceeds 133% of the estimated construction price. (Meeting is called by council) 59 (1) (2)	Does the additional cost exceed the benefits to be gained?  If an original petitioner - should I withdraw name?	All Owners & Council  Petitioner	(1) State interest in project. (2) If owner is one of original petitioners, can leave on or withdraw name from petition.  NOTE: If sufficient names are withdrawn, petition may not be valid and original petitioners would pay costs to date on a pro-rata basis.  If petition remains valid, then procedure towards construction continues.	



Activity	Owners Decisions	Interested Parties	Obligations of Owner	Appeal Body
<b>Adoption of Report</b>				
Council may give third reading to provisional by-law after all appeals have been decided. 58 (1)	Will I accept the report as amended or updated?			
	Yes	Owner	No further action required.	
	No	Owner	Owner gives notice of "intention" to make application to "Quash" the by-law, to the clerk, within 10 days of third reading. 58 (1) (2)	Drainage Referee
Where appeals have been decided and council does not give third reading to by-law. 58 (5)	Do I want the drainage works to proceed?	Petitioner	If Yes - and council not willing to give third reading, petitioner may file appeal with clerk. 58 (5)	Tribunal
			If No - and council does not proceed, provisional by-law may be dropped. Costs of report to date may be the responsibility of council. 58 (3)	
Where notice of "intention" to quash is filed with clerk, 58 (1) or "application to quash" is made to Drainage Referee. 58 (2)	Is the report flawed such that legal counsel can make case before Drainage Referee?	Legal Counsel & Owner	Owner, after giving notice of intention, has three months to make formal application. Legal Counsel should make application.	Drainage Referee
			Legal counsel and owner prepare necessary testimony for hearing. Costs are at the discretion of the Drainage Referee. 108, 109	
			Realize that interest costs for outstanding account for drainage report continue until construction completed or by-law quashed.	
<b>Construction</b>				
After by-law has been given third reading and all appeals have been decided, construction of drain may proceed. 58 (1)	Is construction as per plans and specifications in report?	Owner(s) & Construction Supervisor & Contractor	If not constructed according to plan, bring concern to attention of municipality.	
After construction	Is quality of construction adequate? 64	Owner(s) & Municipality	Bring concern to attention of municipality. Tribunal may order work to be done and charged to the appropriate party.	To Drainage Tribunal within one year of certified completion.
<b>Drain Maintenance</b>				
Council is responsible for maintenance of the drain. 74	Is the drain out of repair and requiring brushing, sediment removal, etc.?	Owner(s)	Maintenance work is encouraged to keep drain functioning properly. Landowners should keep municipality (drainage superintendent) informed of necessary maintenance work. Maintenance costs are assessed pro-rata upstream. 74	
	Is the list of owners in the assessment schedule up to date? 65, 66	Council & Owner(s)	Drainage reports must reflect current ownership and land use to be acceptable for maintenance.	

## Other Legislation

Any works under the Drainage Act should take into consideration other statutes such as the Lakes and Rivers Improvement Act, the Environmental Protection Act, the Ontario Water Resources Act and federal statutes such as the Fisheries Act and the Navigable Waterways Protection Act. Federal statutes take precedence over provincial statutes.

## Concerns

Environmental issues and capital costs are of the greatest concern when dealing with drainage matters. The agricultural industry recognizes that drains may have an impact on water quality. A design which mitigates the impact should be considered. There are provisions in the Drainage Act for interested agencies to comment on the drainage proposal. Agriculture and the environment can and must co-exist!

## Summary

The Drainage Act provides a procedure whereby the municipality may provide a legal outlet for surface and subsurface waters not attainable under Common Law. In return, the landowners within the defined drainage watershed pay pro-rata for their share of the drainage outlet.

The engineer provides the drainage report containing cost estimates, specifications and maintenance schedules from design criteria, information obtained in the field, and from conversations with landowners. The engineer's experience with other similar projects is valuable in preparing the design, determining necessary structures, specifying materials, writing a comprehensive description of work requirements, estimating costs, determining a cost share based on traditional drainage engineering concepts, and preparing necessary tender documents. The drainage report forms the basis for further discussion of a drainage proposal. If the proposal is accepted, it is adopted by by-law and the work is constructed.

Under the Drainage Act, the municipality is responsible for maintaining the drainage works after construction. The municipality may appoint a drainage superintendent to supervise maintenance work on all municipal drains within the municipality. When the drainage by-

law is "current", maintenance work can be undertaken without preparing a new drainage report. The drainage superintendent is responsible to the municipality and the landowners for inspecting the drain, discussing necessary maintenance with landowners, and supervising the maintenance work. The costs for maintenance are distributed upstream amongst the landowners in the watershed according to the maintenance clauses contained in the current by-law.

Landowners involved in a drainage works proposal are urged to participate in the procedures of The Drainage Act so the end result will be an outlet drainage system which is adequate, of reasonable cost and easy to maintain. You, as the landowner, can help this occur!

## Other Information Sources

Factsheets:

Title	Agdex
<i>Drainage Benefits</i>	333
<i>Drainage Legislation</i>	752
<i>Understanding Drainage Assessment</i>	557
<i>Mutual Agreement Drains</i>	555
<i>Drainage Act Appeals</i>	557
<i>Common Law Aspects of Water</i>	557

1. *The Drainage Act, RSO, 1980.*
2. *The local municipality (administration office).*
3. *County office of the Ontario Ministry of Agriculture and Food.*
4. *Performance Guidelines for Service of the Engineer Acting Under the Drainage Act, 1975*
5. *Design and Construction Guidelines, 1986*
6. *Ministry of Natural Resources, Ministry of the Environment and other interested agencies.*





# COMMON LAW ASPECTS OF WATER

(Reprinted October 1975)

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This summary is only a general guide. It is not possible to make a definite assertion as to the legal truth of any point covered here since the application of the law usually depends upon the particular circumstances of each case. **Competent legal counsel should be procured for any water right or drainage problem that may arise.**

## HISTORICAL BACKGROUND

The aim of Law is to ensure justice and to promote the welfare of people. Justice is not fickle and does not change with the changes in our social and economic life. Law is a heritage from the past and can be expected to remain stable in the future.

The basis for Canadian Law is derived from two sources: (1) **English Common Law** and, (2) **Roman Civil Law** which was the predecessor to the French Civil Code. There are some similarities between them since the Roman Civil Law was the source of some English Common Law. The Common Law is basic. It always applies and governs except insofar as it may be varied or added to by Statute Law. Statutory authority must always be sought for any variations from Common Law.

Law may be classified according to origin or according to nature and purpose. According to origin, it may be either (1) Statute Law or (2) Common Law. Statute Law comprises Acts of the Legislature or Parliament to meet the need of the people. Common Law consists of rules, principles and customs established in England and once used as a basis for decision. While it is frequently called Unwritten Law, much of this law is now in written form. Common Law also changes as customs change and as new practices arise. Common Law may be classified as follows:

- (a) Case Law, formerly unwritten and now to be found in the published official law reports.
- (b) Precedent, a recognized custom or new interpretation of existing law. Once established it becomes law until changed by a higher court.
- (c) Equity may be based on no precedent and was formerly a ruling based on an appeal to the King. Presently these are given in the Court of Chancery.

Law is also classified according to nature and purpose. The chief divisions on this basis are: (1) Criminal, (2) Civil, (3) Military, (4) Martial and (5) International Law. The Criminal Law is contained in the Canadian Criminal Code and a crime is punished by the State. To constitute a crime there must be both a criminal act and a guilty mind. That is, there must be criminal intention, criminal negligence or malice aforethought.

Civil Law is private law and deals with private rights and obligations. These include: (1) Contractual Rights; (2) Property Rights and (3) Torts.

A Tort is a wrong against an individual and includes acts or omissions of acts which cause actual loss or injury and infringement of the legal rights of others but do not cause actual damage. Since a Tort is a civil wrong against an individual, it is the person who suffers loss or injury who must initiate legal action. Examples of Torts may be defamatory statements, breach of contract, injury caused by dangerous animals, trespass, private nuisances and negligence. A private nuisance is committed when a person uses his own property in such a way that he causes damage to the property of some other person, or interferes with another's legal rights and personal comfort. Where a nuisance arises out of an act authorized by Law, there is no right of action.

An easement is a right annexed to land to utilize other land of different ownership in a particular manner, or to prevent the owner of such other land from utilizing his land in some manner; but does not involve the taking of any part of the natural produce of that land or of any part of its soil. Easements can be created only by Grant or Statute. Creation of an easement by Grant may be either by: (1) express consent, (2) implied grant, or (3) prescription. A prescriptive right may be established by a court on the ground of long and open use which was uninterrupted and undisputed and not by any implied or express permission of the other owner.

The Statute of Limitations places a minimum of 20 years on the above use for water rights without interruption or formal protest by the party concerned.

## Remedies for Torts

All infringements of the rights of water, natural or acquired, come under trespass or nuisance. A private nuisance may be removed or abated by the party aggrieved if it can be done peacefully. The remedy by act of law for infringement of water rights is by injunction or mandamus.

There is no distinction in the Common Law between the rights of a corporation and the rights of a private landowner. A Municipal Corporation at Common Law has no greater rights or obligations than other landowners.

## NATURAL WATERCOURSES

Almost the whole law of watercourses is founded on the maxim of the Common Law, "Aqua currit et debet currere," water flows naturally and should be permitted thus to flow.

A natural watercourse is defined generally as a stream of water which flows along a defined channel, with beds and banks, for a sufficient time to give it substantial existence. This may include streams that dry up periodically.

A natural watercourse does not cease to be such if at a certain point it spreads out over a level area and flows for a distance without defined banks before flowing again in a defining channel.

A riparian owner is one whose land is in actual contact with the stream of water. The Riparian Doctrine of water rights is apparently in effect in Ontario with respect to natural watercourses.

A riparian owner is not only entitled to have the water of a stream passing through his land flow to him in its natural state, so far as it is a benefit to him, but he is also bound to submit to receive it so far as it is a nuisance to him by its tendency to flood his land. Unless, therefore, the flow of the stream is increased or diverted to his prejudice by some unauthorized act, by the proprietors above or below him, he has no remedy but must submit to what is the result of natural causes. Thus, where a stream becomes by natural causes silted up or choked by weeds, and in consequence overflows adjoining lands, there is no common law liability on the owner to clear the channel or to compensate the adjoining owners who may be damaged thereby. The utmost extent of the obligation imposed upon the owner of lower land is not to alter the condition of it, so as to interfere with the enjoyment of the easement by the high land. This obligation, however, applies only to the water which flows naturally without the art of man. If any person above or below makes any change in the natural flow of a stream to the material injury of the owner situated upon it, or by any interference shall prevent the stream from flowing as it was wont to flow, to such injury, he is liable for the damage he may occasion.

Any landowner whose lands abut upon a natural watercourse has the right to drain those lands into the natural stream, except the riparian land owner may not bring waters into a natural watercourse which have not fallen upon the lands located in the watershed. He may not sell or assign the right to drain into a natural watercourse. He may collect the water, whether it be in ditches or in proper drains and he may discharge it into the watercourse. This is so even though the result is to increase the volume of the stream and to accelerate its rate of flow.

If a riparian owner raises the level of his land by filling or structures in order to protect it from flooding, he may be deemed to have interfered with the natural channel of the stream and if it can be shown that his protective works have diverted the stream or caused flooding of the lands of another, then he has interfered with the channel and will be liable for the resulting damage.

The principle of the Common Law is that it is the duty of anyone who interferes with the course of a natural stream to see that the works which he substitutes for the channel provided by nature are adequate to carry the water which may be brought around even by extraordinary rainfall.

Where a natural watercourse becomes part of an artificial drainage system it is no longer immune under the law, so the entire system must have a safe and proper outlet. Riparian owners may make reasonable use of a stream as it flows past as an outlet for drainage of their own land for agricultural purposes.

Generally a riparian owner has a proprietary right to have the water flow to him in its natural state neither increased nor diminished in quantity or quality. He is also entitled to use it for domestic or natural uses. He may use it for extraordinary purposes if he does not interfere with the rights of others. He may use it for irrigation purposes or divert it on his own land, if he returns it opposite his own land, less what has naturally been absorbed; but the quantity he may take depends on the condition that he must not injure lower owners.

A riparian owner has the right to waterpower from flowing water. In Ontario no dam may be constructed until the plans have been approved by the Lieutenant Governor in Council. The Minister may also authorize the removal of obstructions in the public interest.

The pollution of water is an indictable nuisance. The injured owner need not show damage but merely breach of his rights. The right to pollute may be gained by prescription.

### **WATER HAVING NO DEFINED COURSE**

The principles of law which regulate the rights of owners of land in respect of water flowing in known and defined channels, whether upon or below the surface of the ground, do not apply to water which runs in no defined channel, or merely percolates through the strata and no action will, therefore, lie for the abstraction or diversion of such water.

No right of drainage of mere surface water exists as long as the flow is not in a defined channel. An owner of lower land may, at his own choice, either allow water from higher land to flow over it or keep such water off his property by dams or banks.

### **SUMMARY OF NATURAL DRAINAGE RULES**

1. A natural watercourse must not be obstructed or diverted.
2. Surface water must not be collected and diverted to land that would not naturally receive it.
3. The point of entry of surface water on lower land must not be changed.
4. Water must not be brought in from another watershed.
5. Cannot accelerate the flow of water to the material damage of lower land.
6. Low land may be filled and the water forced out into natural channels.
7. Municipalities must not drain into private drains.

Drainage Acts are statutory and have enlarged on owner's right to improve his drainage beyond the point permitted by the Court's interpretation of the Common Law but has not curtailed the Common Law rights of riparian owners.

### **UNDERGROUND WATERS**

The concept of underground waters is often referred to as the English Rule and is based on the concept of absolute ownership. The rights to use this water for irrigation are more secure than is a surface source. The owner of land containing underground water which percolates by undefined channels and flows to the land of a neighbor has the right to use for any purpose, divert, appropriate or sell the percolating water within his own land so as to deprive his neighbor of it. No action will lie where water which has actually percolated into, and is in the well, has been abstracted by operations in the adjoining land.



## DRAINAGE LEGISLATION

(Revision of Factsheet "Drainage Legislation," March 1986)

R.W. Irwin, School of Engineering, Ontario Agricultural College, University of Guelph

Profitable returns from farmland depend on effective drainage. A farmer may be convinced of the need for improved drainage but the complications that may arise when he considers undertaking such work often delay action.

The provincial government has from time to time, enacted laws to provide much needed assistance to meet the problems of obtaining a legal drainage outlet, engineering and financing. This Factsheet has been prepared to acquaint farmers with the assistance at their disposal.

**Since the application of the law usually depends upon the circumstances of each case, and as laws may be changed by court decisions or legislation, this Factsheet should not be used by persons with drainage or water problems as a substitute for competent legal advice. It must also be understood that this Factsheet does not contain the entire law on the subject of drainage, and there are some portions of the law which may effect the individual which are not dealt with herein, or are only briefly touched upon.**

### COMMON LAW

Generally, no right of drainage of mere surface water exists. A lower owner does not have to receive such surface water unless a prescriptive right has been acquired.

There is a right of drainage for water flowing in a natural watercourse. It must have a bed, and visible, confining banks, and a flow for a sufficient time to give it substantial existence. This may include streams that dry up periodically. The Ontario Ministry of Agriculture and Food Factsheet, *Common Law Aspects of Water*. Agdex 557, enlarge on these general statements.

### THE DRAINAGE ACT

#### Mutual Agreement Drains

Two or more owners may enter into a written agreement to construct or improve a drain on their land. The agreement should describe the land affected, the location of the drainage works, and the proportion of the work each person is expected to pay for and maintain.

When the agreement is drawn up, it may be registered against the land for the protection of owners.

The Drainage Act gives Mutual Agreement Drains formal status, and registration makes the agreement binding on future owners of the land. Agreements should be made each time a main drain leaves an owner's property and should be registered in the appropriate registry office. Enforcement of the Agreement must be made through court action.

#### Petition Drains

The Drainage Act Provides a democratic procedure for the construction, improvement and maintenance of drainage works. The following abbreviated statements give the order of procedure for petition drains. Numbers following the abbreviated statements refer to the appropriate section of The Drainage Act. For complete and accurate reference, see the current Statutes of Ontario available at most local libraries.

#### Order of Procedure

1. Owner desiring drainage works circulates petition and obtains a majority of the names of other owners in the area requiring drainage, or the names of owners holding 60% of the acreage in the area requiring drainage. (To be a valid petition, the area described by lot and concession should be a true drainage basin.) 4(1)
2. Owner presents signed petition to council. 4(1)
3. Council considers the petition and within 30 days, sends copies of its decision to the petitioners. 5(1)
4. If the Council decides not to accept the petition, any petitioner can appeal the decision to the Tribunal. 5(2), 99  
*Note:* An appeal to the Tribunal concerning any section of this Act is implemented by notifying, in writing, the clerk of the initiating municipality. 99. Legal assistance is not required.
5. If Council decides to proceed, they must appoint an Engineer within 60 days of reaching the decision. 8(1), 8(3)
6. Council may instruct the Engineer to prepare a preliminary report. 10(1)
7. If an environmental appraisal is required, the Council must instruct the Engineer to prepare a preliminary report. 10(1)

8. Engineer calls on-site meeting. 9(1)
9. Engineer prepares a report and files with the Clerk within six months, or as extended. 39(1)
10. Council should pass a resolution that they intend to proceed. 41(1)
11. If Council decides not to proceed, any petitioner can appeal to the Tribunal. 45(2), 99
12. Council sends copies of report, and notice of meeting to consider report, to owners within the municipality who are subject to assessment or compensation, other clerks, conservation authority, railways, road authorities, public utilities, the Ministry of Natural Resources and the Director. 41(1)  
*Note:* For information regarding the basis for your assessment, see the Ontario Ministry of Agriculture and Food Factsheet, *Understanding your drainage assessment*, Agdex 557.
13. Other clerks send notice to assessed or compensated owners in their municipality. 41(2)
14. Council of the initiating municipality considers report at meeting held not less than 10 days after the notices have been sent. 42 and 41(3)
15. Owners in the area requiring drainage may add or strike their names from the petition. 42
16. Council may adopt report, by provisional by-law if petition still has sufficient signatures. 44
17. If Council does not adopt the report, any petitioner can appeal to the Tribunal. 45(2), 99
18. Council within 5 days of adopting the report, to send a copy of the provisional by-law and the date of the Court of Revision to local municipalities. 46(1)
19. All Councils, within 30 days of the adoption of the report, to send a copy of the provisional by-law and the date of the Court of Revision to assessed or compensated owners. 46(2)
20. The Court of Revision is held by the initiating municipality not sooner than 20, nor later than 30 days from the date of mailing the by-law. 46(3)
21. Owner wishing to appeal his assessment must serve notice on the Clerk of the initiating municipality at least 10 days before first sitting of the Court. 52
22. Owner may appeal to Tribunal against decision of Court of Revision by notifying clerk within 21 days of the pronouncement of the decision of the Court of Revision. 54(1)
23. Clerk to alter assessment on order of Court of Revision or Tribunal. 56
24. Owner or public utility may appeal from report of Engineer to Drainage Referee within 40 days of mailing the notices, or the adoption of the report. 47(1)  
*Note:* Owners are advised to obtain legal assistance in appealing to the Referee.
25. Owner or public utility may appeal from report of Engineer to Tribunal within 40 days of mailing the notices, or the adoption of the report. 48(1), 99
26. Council of any municipality to which notice has been sent by the initiating municipality may appeal from report of the Engineer to the Tribunal within 40 days of the date the provisional by-law was sent by the initiating municipality. 50(1)
27. Council obtains Ontario Municipal Board approval for project if required. (See sections 64 and 65 of the Ontario Municipal Board Act.)

28. Council obtains any necessary permits.
29. Council of the initiating municipality may pass provisional by-law authorizing the work after time for appeals elapsed, and no appeals or all appeals completed. 58(1)
30. Notice of intention to quash the by-law must be filed with the Clerk of the initiating municipality within 10 days of passing the by-law. 52(2)
31. If a notice of intention to quash the by-law is received, proceedings are delayed until a hearing is held, or 3 months have passed without an application being made to the Referee. 58(2)
32. If the tendered bid exceeds the Engineer's estimate of contract price by one-third, Council must hold a meeting to see if the petitioners want to proceed at the tendered cost. 59(1)
33. *Work may commence* if no appeals, or all appeals favorably resolved. 58(1)
34. If Council does not proceed with construction in a reasonable time, any petitioner can appeal to the Tribunal. 58(5), 99
35. Council must amend by-law if insufficient or surplus funds are provided. 62
36. Local municipalities by by-law to raise and pay cost within 60 days of completion of the drainage works. 60
37. Council sends application for grant to the Ministry after the work is completed and time for appealing assessments has expired and there are no appeals, or all appeals have been heard. 88
38. Any owner dissatisfied with the quality of the workmanship on the drain may, within 1 year of completion, appeal to the Tribunal. 64,99

#### **Maintenance**

1. Drainage works are maintained by the municipality at the expense of all the *upstream* lands and roads assessed by the Engineer's report. 74
2. Any person whose property is injured, may give the Clerk 45 days notice to repair the drainage works. 79
3. If an owner obstructs a drain, the obstruction may be removed at his expense. 80
4. A municipality with an approved drainage superintendent may receive a grant for maintenance work.

#### **Repair and Improvement**

1. Council can make minor improvements of deepening, widening or extending a drain to an outlet, providing the cost does not exceed \$4500. The cost must be assessed over all the lands and roads affected by the drain regardless of the location of the work. 77
2. Council can improve a drain on the report of an Engineer, without a petition. An owner can make a written request to Council for the improvements of a drain, or, Council can initiate the improvements. The procedure follows that for a petition drain as much as possible starting at step 3 in the Order of Procedure. 78

### **Abandonment of a Drain or part of a Drain**

1. A by-law for a drainage works may be repealed at any time before the work is commenced. 58(3).
2. A drain may be abandoned by petition of 3/4 of the owners of land assessed for benefit who own not less than 3/4 of the area assessed for benefit. 85(1)
3. Council may initiate abandonment of a drain. 84(2)
4. The Engineer may recommend abandonment of a drain which is no longer useful. 19

### **Grants**

A portion of the drainage cost assessed against agricultural land may be paid by the Province in the form of a grant if the work is done under an Engineers' report, or an approved drainage superintendent. The grant is 33 1/3 % in a county, 66 2/3% in a territorial district or a provisional county, and up to 80% in a territory without municipal organization. 87, 90.

### **Requisition Drains**

Where an owner is unable to get sufficient signatures for a petition, he may file a requisition with the Clerk requesting that an Engineer be appointed for the work. A deposit of \$300 is required to be applied to expenses. The work must not cost over \$7500 and the land liable to assessment is limited. 3(1-5)

### **Order of Procedure**

1. Upon the filing of the requisition, the Council must appoint an Engineer to make a preliminary report. 3(6)
2. The Engineer must call an on-site meeting of affected parties. 3(7)
3. The Engineer must file both a benefit/cost statement and an environmental statement with his preliminary report. 3(8)
4. If drain cannot be constructed under The Drainage Act, Engineer files report indicating who must pay costs to date. 40
5. Engineer files preliminary report with Clerk. 3(10)
6. Council calls meeting of all affected owners. 3(10)
7. Owners have the opportunity to petition for the proposed drainage works. 3(13)
8. Requisition may be withdrawn. 3(12)
9. If no petition and requisition not withdrawn, Council must instruct Engineer to prepare report. 3(4)
10. Council must adopt and implement report after going through the same procedures as for a petition drain. 3(15)
11. Start at step 12 in Petition Drains in Order of Procedures.

### **Grants**

There are no grants available for the construction of Requisition Drains.

### **Appeals**

#### **Court of Revision**

The Court of Revision is comprised of councillors, or persons entitled to be councillors. The Court of Revision hears only appeals on the amount of assessment. 97

Any owner wishing to appeal an assessment should write to the clerk of the initiating municipality at least 10 days before the sitting. 52

### **Ontario Drainage Tribunal**

The Ontario Drainage Tribunal is a panel of three or more persons, one of whom is a lawyer. 98 The Tribunal hears appeals from the Court of Revision and all technical questions pertaining to a drain. 54

Any owner wishing to appeal to the Tribunal should write the Clerk of the initiating municipality within 40 days of the mailing of the notice of the adoption of the report, or within 21 days of the decision of the Court of Revision. 48

The Clerk must send a copy of the appeal to everyone assessed on the drain, and to the Tribunal. 99

The Tribunal will arrange for a hearing in the local municipality. 98

### **Drainage Referee**

The Drainage Referee is equivalent to a justice of the Supreme Court. The Referee hears appeals on all legal questions, and disputes regarding damages as well as decisions of the Tribunal which are not final.

Any owner wishing to appeal to the Referee should engage a lawyer to write to the Clerk of the initiating municipality, within 40 days of the mailing of the notice of the adoption of the report, stating the grounds for the appeal. The Regulation to the Drainage Act sets out a procedure for the lawyer to follow in order to obtain a hearing before the Referee. 47

The hearing will be held in the local county court house. 103

For information regarding detail on appeals, see OMAF Factsheet *Drainage Act Appeals*, Agdex 557

### **THE TILE DRAINAGE ACT**

The Tile Drainage Act makes loans available for the drainage work done on a farm. A loan is obtained from the provincial government through the township council.

After the township has passed the necessary borrowing by-law, an assessed owner may make application for a loan. The application is made prior to the work commencing. The loan cannot exceed 75% of the total cost of the drainage system.

The approval of a loan application lies within the discretion of Council. Council may request such information as they require to arrive at a decision. Written notice of the Council's decision is given to each applicant.

After Council's approval of the loan, the work may commence.

When the work has been completed, an inspector employed by the Council files an inspection and completion certificate with the township clerk which states that the work is either done, or not done, to his satisfaction.

His certificate includes verified costs of:

- (a) materials
- (b) trenching, laying and backfilling
- (c) sundry
- (d) inspection fee, and
- (e) license number(s) of the machine(s) used to install the drainage work.

The inspection fees paid out of the money loaned.

A plan of the completed drains is required. Such a plan is useful to Council for apportionment purposes, in the event of partial sale of land on which money has been lent. It is also useful to the owner when the system is being repaired or expanded.

The rate of interest fluctuates. At the date of printing, the rate on such loans is 8%.

Repayment of principal and interest is made over a 10-year period; the ten equal installments are \$14.90 for every \$100 borrowed (at 8%), and may be paid with the regular land taxes. The Council passes a by-law imposing an annual rate on the property concerned.

A loan can be discharged at any time by paying the balance of the loan together with the interest to the township treasurer. If Council decides that the land has gone out of agricultural production, the loan becomes immediately due.

Farmers in unorganized territory may be eligible for a tile loan directly from the Ministry. Farmers should contact their local agriculture representative. The terms and conditions of such a loan are similar to those in organized municipalities.

#### **THE AGRICULTURAL TILE DRAINAGE INSTALLATION ACT**

Provides for the licensing of contractors engaged in the business of installation of agricultural drainage systems. Each contractor, each of his drainage machines, and each of his operators must be licensed.

The Act does not apply to contractors working under the Drainage Act nor to individuals installing drains on their own property.

To qualify for a loan under the Tile Drainage Act, the drainage system must be installed in compliance with the Agriculture Tile Drainage Installation Act.

#### **AWARD DRAINS**

Award drains were created under the Ditches and Water Courses Act and were so named because the work of construction was "awarded" to persons along the ditch. Ditches were constructed for nearly a century under this Act. There are a great many in Ontario. The act was repealed June 1, 1963.

#### **Maintenance**

Maintenance was to be by the respective owners in such proportion as provided in the original or any subsequent agreement or award. If an owner who was to maintain a certain section failed to do so, he was notified, in writing, by another owner to put it in repair within 30 days. If he failed to do so, the affected owner then notified the Engineer to make an inspection of that portion. The Engineer could then tender the work and place the cost against the property. This was the only means of enforcing the award.

#### **Present Situation**

It is apparent that, (1) no new award drains can be constructed, (2) existing award drains are still legal and can be maintained by the owners in accordance with the original award, and (3) when an owner does not comply with the written notice that the drain is out of repair, there are no statutory provisions to enforce compliance.

An affected owner has the following alternatives:

1. Attempt to have the old award drain changed to come under The Drainage Act so that a grant may be allowed.
2. Suit under civil law for damages for non-compliance with an agreement.

#### **OTHER READING**

##### **OMAF Factsheet**

*Common Law Aspects of Water*  
*Understanding Drainage Assessment*  
*Drainage Act Appeals*



**Ontario**Ministry of Agriculture,  
Food and Rural Affairs**AGRICULTURAL  
ENGINEERING**

## UNDERSTANDING DRAINAGE ASSESSMENTS

Agriculture and Rural Division  
(Reprinted March 1997)

The *Drainage Act* provides a legal procedure by which an "area requiring drainage" may have an outlet drain constructed to dispose of excess water.

The drainage work is initiated by interested individuals within an "area requiring drainage" who will benefit from the construction of the drain. A petition form, obtained from the municipal clerk, is signed by interested landowners. In order to be valid or sufficient, the petition must be signed by the majority of the owners in the "area requiring drainage" or by owners that represent at least 60% of the lands in this area. The "area requiring drainage" is usually described by lot and concession, or other legal land description. By taking this action, it is presumed that the owners signing the petition have made a decision that the drain will be of benefit to them and that the probable cost will be lower than the anticipated benefits. The initial benefit-cost decision is made at this point by the landowners, not the engineer or Council.

The petition is presented to and considered by Council. If the petition represents a proper "area requiring drainage", that is a real drainage basin, and appears to be valid, the Council may decide to proceed. Council then notifies each of the petitioners of this decision as well as any other municipality affected and the local Conservation Authority and the Ministry of Natural Resources.

Council then appoints an engineer. The engineer is an employee of Council, hired to design this specific drain. Under *The Drainage Act*, Section 9(2), the engineer is required to hold an on-site meeting to determine (1) the area requiring drainage, (2) if the petition is valid, (3) the drainage needs of the area. The engineer is then required "to make an examination of the area requiring drainage as described in the petition and to prepare a report which shall include:

- (a) plans, profiles and specifications of the drainage works;
- (b) a description of the area requiring drainage;
- (c) an estimate of the total cost thereof;
- (d) an assessment of the amount or proportion of the cost of the works to be assessed against every parcel of land and road for benefit, outlet liability and injuring liability;

- (e) allowances, if any, to be paid to the owners of land affected by the drainage works and
- (f) such other matters as are provided for under this Act."

The engineer's report is presented to Council, who then notifies all persons assessed and calls a special meeting where the report is considered. General objections to the report may be raised at this time. At this meeting signatures may be added or removed from the petition and this determines if the project will continue. Unresolved problems, depending on the subject, may be appealed to the Court of Revision, the Ontario Drainage Tribunal or the Drainage Referee. Details on appeal procedures may be found in *The Drainage Act*\* or in Ontario Ministry of Agriculture, Food and Rural Affairs Factsheet, Drainage Legislation.

The engineer's report includes two important items:

1. The estimated cost of the work — No matter how individual assessments are arrived at, this total estimated cost must always be equal to the total amount assessed, otherwise the work cannot proceed.
2. The assessment liability — This may be spread over several pages if an owner owns several parcels of land and if there are branch drains. It may be summarized.

Let us examine the obligations regarding this assessment.

### RESPONSIBILITIES UNDER COMMON LAW

A natural watercourse is defined generally as a stream of water which flows along a defined channel, with bed and banks, for a sufficient time to give it substantial existence. This may include streams that dry up periodically.

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\**The Drainage Act may be found in the Revised Statutes of Ontario 1980, Chapter 126, available in most public libraries. Individual copies may be purchased from the Ontario Government Bookstore, 1-800-668-9938.*

A riparian landowner (owner of lands that abut upon a natural watercourse) has the right to drain his or her lands into the natural stream, but may not bring water in from another watershed. He or she can collect water in ditches and drains and discharge it into the watercourse even though it results in an increase in volume and rate of flow.

Where a natural watercourse becomes a part of a drain, it is no longer a natural watercourse. When this occurs, the riparian rights, as described earlier, are lost.

Surface water not flowing in a natural watercourse (i.e. not having discernible bed and banks) has no right of drainage. An owner of lower land may, at his or her own choice, either allow the water from higher land to flow over it or by dams or banks, keep such water off his or her property. No owner has the right to collect such surface water by ditches or drains and discharge it on lands of another. He or she has a responsibility to take this water to a sufficient outlet, i.e., a natural watercourse or a drain constructed under *The Drainage Act*.

Since there is no right to drain surface water, the owner of each parcel of land in the watershed is generally assessed for "outlet liability". In other words, his or her Common Law liability is removed by paying for the increased size or cost of the drain due to the volume of water which is discharged from his or her property, even though the drain may not provide a direct outlet for this water. The authority for this liability is set out in Section 23(1).

Since, through Common Law, a landowner is also liable for any damage he or she may cause from water which he or she collects in drains and discharges on other land without a sufficient outlet, he or she may be assessed for relief from such "injuring liability" if the new drain serves as an outlet for his or her drains and prevents this injury from occurring. The authority for this liability is set out in Section 23(2).

Injuring liability is frequently difficult to distinguish from outlet liability, consequently many engineers' reports do not contain such an item.

The assessment for outlet liability and injuring liability is based on the volume and rate of flow of the water artificially caused to flow from an owner's property. Generally, the assessment is based upon a unit value per hectare. Owners at higher elevations on a watershed may have a higher unit charge than those owners near the outlet since the water from their land makes use of a greater length of drain. A difference may be made in the unit outlet charge due to varying types of soil or land use, or the distance to the drain.

## **RESPONSIBILITY UNDER THE DRAINAGE ACT**

In addition to the Common Law responsibility, an owner may also be assessed for benefit.

Benefit will vary between different lands, according to their differences of elevation, quantity of water to be drained from each, distance of undrained land from the course of the proposed ditch, and the presence or absence of existing drains, and other like factors.

To consider whether a parcel of land will receive any benefit from the construction, it is proper to consider whether any enhanced financial value will accrue to it as a result of the drain construction. This may occur through the increased productive power of the land or by rendering it more salable and at a better price, or by preventing water from entering on to it.

If the proposed drainage works can be of no possible benefit to the owner, or is of no commercial or agricultural value, the Act does not authorize a contribution for benefit.

Sometimes, an owner has an undeveloped area that he or she intends to leave in this condition. The owner may feel that he or she should not be assessed since the drain will be of no benefit. However, the property could change hands and the new owner might want to drain and develop it. It is with this in mind that the engineer must make an assessment, regardless of the present owner's intentions.

It is the duty of the engineer to determine whether or not a parcel of land will benefit from the project. When appealing a benefit assessment, the landowner must prove that the land does not benefit from the drain.

An owner has no responsibility for work done upstream from his or her property unless the work provides a benefit by "cutting off" a harmful flow of water across the property.

In some instances, a "special benefit assessment" may be levied against the property. This value usually represents the difference in cost between that which was originally designed and the increased level of design requested by a landowner. Examples include a closed or tile drain where open ditches would ordinarily suffice, or the construction of ponds beside the drain, or other special requests by a landowner specifically for this benefit. The authority for this liability is set out in Section 24.

## **ENGINEER'S REPORT**

The Engineer's report should contain a plan and profile of the drain, as well as details on the drain design and the assessment schedule.

The plan shows the location of drains and the limits of the watershed. The profile shows ground elevations along the drain and the present and proposed drain bottom. The specifications give details on how the drain is to be constructed.

The Schedule of Assessment contains several columns. The first group contains the names of owners with a description of each parcel of land assessed.

The hectarage shown in the schedule for which an owner is assessed is only approximate. No survey is made to accurately establish the watershed boundary or farm areas. Any minor error in hectarage assessed is not a valid basis for appeal nor does it greatly affect the assessment. The other columns in the Schedule set forth the assessment liability for each drain and/or branch drain. These values are only estimates. The final value will not be known until the construction work is finished. The assessment will then be prorated to recover the actual cost.

Allowances to lands injured by the work are set out in a separate schedule by the engineer as authorized in Sections 29 to 33 of *The Drainage Act*.

Damage to crops during construction and disposal of waste material will vary depending on the time of year that the work is constructed. Crop damage due to spreading the spoil on the banks is based on a decreasing yearly loss of crop over several years. All or part of the cost of access bridges from a public road to the property may be assessed to the property owner.

Farm bridges are constructed as a part of the work. In certain circumstances a severance allowance may be paid instead of building the bridge. The allowance will depend upon the value of the land severed, or the cost of the bridge that would be required. The cost, or part of the cost of farm bridges or the severance allowance may be assessed across the property.

Where private drains are incorporated into the new drain, a nominal allowance may be paid based on any saving that may result from using the private drain. These allowances may not be included in the Summary of Assessments but are usually shown in a separate Schedule of Allowances.

## **RELEVANT OMAFRA FACTSHEETS**

*Drainage Legislation.*

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