



## DRAINAGE LEGISLATION

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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*