Court File No.: CV 18-3

ONTARIO

SUPERIOR COURT OF JUSTICE

IN THE COURT OF THE DRAINAGE REFEREE

B E T W E E N:

TERESA BEISCHLAG and JAMES DOUGLAS WILSON

Applicants

- and –

THE CORPORATION OF THE COUNTY OF HALDIMAND

- and –

BLANCHE DOROTHY PHIBBS and DAVID ALLAN PHIBBS

Respondents

ACTING DRAINAGE REFEREE ANDREW C. WRIGHT	)))))	MONDAY, THE 5TH DAY OF NOVEMBER, 2018

ORDER

Having received submissions from the parties by their counsel and having heard evidence from Kristopher Franklin, the County Drainage Superintendent, and from Michael DeVos, P.Eng., for the reasons which follow:

THIS COURT ORDERS that:

1. Haldimand County By-law 1879/17 be and the same is hereby amended as follows:

   (a) The assessment in respect of the applicant, Teresa Beischlag (Roll #7-049) is reduced to zero;

   (b) The assessment in respect of the applicant, Douglas James Wilson (Roll # 7-120) is reduced to zero;

   (c) The assessment in respect of the individual respondents, Blanche Dorothy Phibbs and David Allan Phibbs (Roll # 7-047 and 7-047-50) is reduced to $109.96 and $1.42 respectively; and

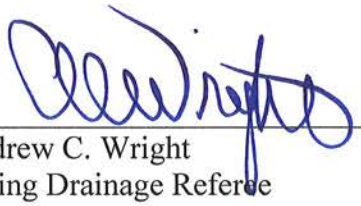
(d) The assessment to the roads of the respondent County is increased by $214.92.

2. The respondent County is hereby ordered to procure, in accordance with section 76 of the *Drainage Act*, the report of an engineer to vary the assessment schedule for the maintenance and repair of the Harrop Drain (sometimes hereafter referred to as the "Drain") having regard for changes in conditions and circumstances since the most recent report on the Drain prepared by R. Blake Erwin, P. Eng., O.L.S. dated December 5, 1957.

3. The parties will bear their own costs of this application.

4. Pursuant subsection 118(1) of the *Drainage Act*, the County's costs and expenses of this application shall be assessed to the Drain in the same manner as for maintenance under the *Drainage Act* and shall be assessed in accordance with the updated assessment schedule resulting from the process ordered to occur under section 76 of the *Drainage Act*.

Dated at London this 5th day of November, 2018



Andrew C. Wright
Acting Drainage Referee

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REASONS

1. The first part of this decision is on consent of the parties. The second order requiring an engineer's report under section 76 of the *Drainage Act* ("*Drainage Act*") is a reflection of the changes in conditions and circumstances since the most recent report on the Harrop Drain.

2. The application deals with assessments by the County for maintenance and repair work done by the County on the Harrop Drain in 2015 and completed in 2016. The essence of the application is that a County Court Judge exercising appellate jurisdiction under *The Ontario Drainage Act*, R.S.O, 1950 ("*The Ontario Drainage Act*") exempted several properties from assessment for the work done on the Harrop Drain under the report of R. Blake Erwin, P. Eng., O.L.S. dated December 5, 1957. The submission in this application is that the County Court decisions in 1958 continued to apply to assessments for maintenance and repair of the Harrop Dain done in 2015. More will be said about the County Court decisions below; suffice it to say here that Mr. DeVos agreed that the reasons for those decisions are not consistent with current drainage assessment practises.

3. In April, 2018 the Court of the Drainage Referee scheduled a procedural pre-hearing conference to be held in the courthouse in Cayuga on October 10, 2018. In September 2018 the County brought a motion on consent to dispose of the application on the basis set out in the first part of this decision. Having reviewed the material provided in support of the proposed disposition prior to October 10th, the presiding Acting Drainage Referee asked that a witness be called to answer questions and provide clarification. The supporting

material was in the form of an affidavit sworn by Kristopher Franklin, the County Drainage Superintendent and he was available to give evidence. As well, the County had available Michael DeVos, P.Eng., who is a seasoned, well qualified engineer with particular expertise in matters under the *Drainage Act*. Mr. Franklin and Mr. DeVos were called to give evidence together as a panel.

4. It should also be mentioned that Mr. McCarthy, counsel for the applicants, advised the Court that he also represented Blanche Dorothy Phibbs and David Allan Phibbs whose assessments are also affected by the consent disposition proposed. On that account I have added the Phibbs as parties responding to the application.

5. Turning then to the Harrop Drain, it is largely an open drain which flows generally from north to south. The community of Hagersville lies to the north of the Drain. The Drain outlets into a branch of the Sandusk Creek in Lot 11, Concession 9 in the geographic Township of Walpole. The Drain crosses Concessions 9 to 12 in the geographic Township of Walpole.

6. The Harrop Drain was established under *The Ontario Drainage Act* as a result of the adoption by the Township of Walpole of a report prepared by R. Blake Erwin, P. Eng., O.L.S. dated December 5, 1957. Before that report, portions of the watercourse were part of an Award Drain established by the award of James Williamson, Engineer, dated December 5th, 1894 and an Award Drain established by the award of Roger Lee dated June 24th, 1928.

7. The work contemplated by the 1957 Engineer's Report involved the straightening and widening of the then existing drain with other improvements reflecting engineering standards of the day.

8. As set out in the 1957 Engineer's Report the Drain was then receiving flows from:

    1. Surface run-off from farm lands and roads.

    2. Surface run-off from Streets and Lots in part of the Village of Hagersville.

    3. Treated effluent from a Sewage disposal unit operated by the Village of Hagersville.

    4. Water from electrically operated centrifugal pumps used to de-water Stone Quarries operated by Hagersville Quarries Ltd.

    5. Water from electrically operated centrifugal pumps used to de-water a Stone Quarry operated by Canada Crushed Stone Company.

9. There is no information about when effluent from the Hagersville sewage treatment plant began using this water course as its receiving stream. There is no information about the rate of effluent flows from the waste water treatment plant in 1957 or at present. There is no information about the population contributing to the effluent flows in 1957 or at present. The evidence from the plan forming part of the 1957 Engineer's Report is that the Hagersville street patterns are considerably smaller than what appears from a current

assessment based map of the same area. The evidence of Mr. Franklin is that Hagersville grew significantly to the south in the period between 2000 and 2010 and that significant grow to the north has occurred since 2007; particulars of the population and/or household increase were not provided.

10. The contribution of water to the Drain from the waste water treatment plant and from the urbanization of Hagersville is different now than it was in 1957. There is no information about how much that difference may be but it is probably significantly different today than it was in 1957.

11. At the time of the 1957 Engineer's Report Hagersville was a village and Walpole Township was a Township in a then conventional county government structure. The result of municipal restructuring since then is that local municipalities in the County have been amalgamated to form one single tier municipality. As a result the former Hagersville waste water treatment plant and streets are owned and operated by the County of Haldimand. Hagersville also has a municipal water supply which is also owned and operated by the County.

12. As mentioned, the waste water treatment plan is at the north end of the Drain so effluent travels much of its length before outletting to the Sandusk Creek.

13. The stone quarries operated by Hagersville Quarries Ltd. and by Canada Crushed Stone Company are similarly at the north end of the Drain. There was no information about the rate of flow from the electrically operated centrifugal pumps used in each of the quarries at the time of the 1957 Engineer's Report. The evidence is that there is no longer any de-watering from these quarries. Mr. McCarthy, who has lived in the area long enough to have knowledge, advised the Court that he believes de-watering pumping stopped in the 1970's.

14. The stone quarries were assessed for the contribution of water to the Drain having regard for the de-watering flows existing in 1957.

15. As mentioned, there were appeals of the assessments set out in the 1957 Engineer's Report.

16. At the time, under *The Ontario Drainage Act*, assessment appeals were to a County Court Judge. The Judge was Helen Kennear who issued her decisions in May 1958. The applicants and the individual respondents are successors in title to the lands which were the subject of the appeals.

17. In her reasons for allowing the appeals and exempting the lands from outlet liability assessments Judge Kennear explains the circumstances and the rational for the exemption. The lands of the appellants do not have direct access to the Drain. While water from the appellants' lands flow into the Drain, the water does so naturally by gravity without any artificial means across the lands of others and causes no injury to those other lands. Before the introduction of additional water from Hagersville, the then existing watercourse was sufficient to carry the water from the appellants' land therefore the new Drain provided no benefit to the appellants' lands.

18. The engineer's evidence was to the effect that all lands within the watershed contributing water to the Drain should contribute to the cost of the work either for benefit or outlet liability. In his opinion the appellants' lands should be assessed for outlet liability as water from the lands in question flowed to and made use of the Drain.

19. Judge Kennear reviewed the case law as it then was and concluded that "There can be no assessment unless there will be a corresponding benefit." and on that basis the appeals were allowed.

20. Since those 1958 decisions, *The Ontario Drainage Act* has been replaced in 1975 by the *Drainage Act* under which jurisdiction for assessment appeals was transferred from County Court Judges to the Drainage Tribunal, since renamed the Agriculture, Food and Rural Affairs Appeal Tribunal (the "Tribunal"). Since 1975 decisions under the *Drainage Act* by the Tribunal and the Court of the Drainage Referee have been consistent with the engineering evidence given before Judge Kennear. Since 1975 outlet liability assessment has not depended upon there being a benefit; there is outlet liability assessment to land the water from which flows to and uses the Drain. Mr. DeVos gave evidence that this engineer's submission is consistent with current assessment practise in Ontario and that Judge Kennear's 1958 decisions are inconsistent with current assessment practise and decisions. Mr. DeVos' opinion is in accord with the Court's understanding of and experience with assessment practise today.

21. The disposition proposed by the parties on consent, involves continuing the 1958 assessment exemptions in connection with the 2015 maintenance and repair work done by the County on the Harrop Drain. While the Court wishes to be respectful of the local solution settled upon by the parties, the Court is concerned that what is proposed by way of settlement does not reflect intervening changes in conditions and circumstances, including changes in the law around assessments.

22. I will return to this below but first need to provide some additional history.

23. Until 2015 there had been little maintenance and repair work on the Harrop Drain. At some point the Ministry of Transportation ("MTO") changed culverts at their own cost. Then, in 1992 there was some maintenance work done at the request of MTO at a cost of some $12,700. To assess that maintenance cost to the Drain, the City of Nanticoke, a predecessor to the County of Haldimand, appointed the engineering firm of Totten, Sims Huibicki ("TSH") to revise the assessment schedule from the 1957 Engineer's Report to reflect lot creation and severances in the watershed since the time of the 1957 assessment schedule. This work was commissioned under section 65 of the *Drainage Act*. By letter dated October 4, 1996 under the signature of K.E. Weselan, P.Eng. TSH issued a revised assessment schedule; the letter specifically references section 65 of the *Drainage Act*.

24. Section 65 of the *Drainage Act*, R.S.O.1990 in effect at the time of the TSH work provides as follows:

> 65(1) Subject to subsection (6), where a parcel of land has been assessed by an engineer and, after the final revision of the assessment, the parcel is divided by the change in ownership of any part, the clerk of the local municipality in which the parcel is

situate shall instruct an engineer in writing to apportion the assessment charged against the parcel among the parts into which it is divided.

(2) The clerk of the local municipality shall forthwith send a copy of the instructions by prepaid mail to the owners of the parts into which the parcel is divided.

(3) The engineer in making the apportionment shall have regard to the part of the parcel affected by the drainage works, and shall make the apportionment in writing and file it with the clerk of the local municipality who shall attach it to the original assessment and shall send, by prepaid mail, a copy thereof to each of such owners, and, subject to subsection (5), the apportionment is binding upon the lands assessed.

(4) The costs, including the fees of the engineer, shall be borne and paid by the parties in the manner fixed and apportioned by the engineer or, on appeal, by the Tribunal.

(5) Any such owner who is dissatisfied with such apportionment and who is assessed for a sum greater than $500.00 may appeal to the Tribunal within forty days after the date a copy of the apportionment is sent to the owner by the clerk.

(6) When the owners of the subdivided land mutually agree on the share of the drainage assessment that each should pay, they may enter into a written agreement and file it with the clerk of the local municipality and, if the agreement is approved by the council by resolution, no engineer need be instructed under subsection (1).

25. In the current version of the *Drainage Act* section 65 provides as follows:

65(1) If, after the final revision of an engineer's assessment of land for a drainage works, the land is divided by a change in ownership of any part, the clerk of the local municipality in which the land is situate shall instruct an engineer in writing to apportion the assessment among the parts into which the land was divided, taking into account the part of the land affected by the drainage works. 2010, c. 16, Sched. 1, s. 2 (26).

(2) If the owners of the subdivided land mutually agree on the share of the drainage assessment that each should pay, they may enter into a written agreement and file it with the clerk of the local municipality and, if the agreement is approved by the council by resolution, no engineer need be instructed under subsection (1). 2010, c. 16, Sched. 1, s. 2 (26).

(3) If an owner of land that is not assessed for a drainage works subsequently connects the land with the drainage works for the purpose of drainage, or if the nature or extent of the use of a drainage works by land assessed for the drainage works is subsequently altered, the clerk of the local municipality in which the land is situate shall instruct an engineer in writing to inspect the land and assess it for a just proportion of the drainage works, taking into account any compensation paid to the owner of the land in respect of the drainage works. 2010, c. 16, Sched. 1, s. 2 (26).

(4) If an owner of land that is assessed for a drainage works subsequently disconnects the land from the drainage works, the clerk of the local municipality in which the

land is situate shall instruct an engineer in writing to inspect the land and determine the amount by which the assessment of the land should change. 2010, c. 16, Sched. 1, s. 2 (26).

(5) No person shall connect to or disconnect from drainage works without the approval of the council of the municipality. 2010, c. 16, Sched. 1, s. 2 (26).

(6) The clerk of the local municipality shall send a copy of the instructions mentioned in subsection (1), (3) or (4) to the owners of the affected lands as soon as reasonably possible. 2010, c. 16, Sched. 1, s. 2 (26).

(7) An engineer who prepares an assessment pursuant to instructions received under subsection (1), (3) or (4) shall file the assessment with the clerk of the local municipality. 2010, c. 16, Sched. 1, s. 2 (26).

(8) The clerk of the local municipality shall attach the engineer's assessment to the original assessment and send a copy of both to the owners of the affected lands. 2010, c. 16, Sched. 1, s. 2 (26).

(9) Subject to subsection (11), the engineer's assessment is binding on the assessed land. 2010, c. 16, Sched. 1, s. 2 (26).

(10) The costs of the assessment, including the fees of the engineer, shall be paid by the owners of the lands in the proportion fixed by the engineer or, on appeal, by the Tribunal, and subsection 61(4) applies to these costs. 2010, c. 16, Sched. 1, s. 2 (26).

(11) If the engineer's assessment is for an amount greater than $500, the owner of the land may appeal to the Tribunal within 40 days after the date the clerk sends a copy of the assessment to the owner. 2010, c. 16, Sched. 1, s. 2 (26).

(12) Any amount collected under subsection (3) shall be credited to the account of the drainage works and shall be used only for the improvement, maintenance or repair of the whole or any part of the drainage works. 2010, c. 16, Sched. 1, s. 2 (26).

26. In respects material to this discussion, the two are substantially the same. The engineer appointed is to focus on the originally assessed parcel and to apportion the original assessment amongst the parcels into which it has been subdivided. Under section 65 of the *Drainage Act* the engineer is not to revisit the entire assessment schedule. While the TSH report included all properties from the 1957 assessment schedule, the only changes made were to those properties which had been subdivided in the interim.

27. In June 1998 the TSH assessment schedule was circulated to the landowners together with assessments for the 1992 maintenance work. There were a number of complaints to the municipal administration and to councillors from those assessed and there were a number of appeals to the Tribunal. Because none of those who sought to appeal had assessments in excess of $500.00 the City of Nanticoke did not process the appeals to the Tribunal relying upon subsection 65(5) as it then was, now subsection 65(11). These subsections

set $500 as the threshold for an appeal to the Tribunal under section 65 of the *Drainage Act*.

28. That said, the municipality interpreted subsection 74(3) of the *Drainage Act* as it then was, now subsection 75(3), to decide to write-off the assessments for 1992 maintenance work.

29. Both subsection 74(3) of the *Drainage Act* as it was in 1992 and 1998 and subsection 75(3) as it now exists provide as follows:

> (3) The council of any municipality shall not be required to assess and levy the amount charged for maintenance or repair of a drainage works more than once in every five years if the total expense incurred does not exceed the sum of $5,000, in which case section 65 and 66 of the Ontario Municipal Board Act do not apply.

30. The municipality interpreted this as a limitation period prohibiting assessing maintenance and repair costs after five years. I doubt that interpretation. It seems to me that the purpose of the provision is to avoid the nuisance to assessed owners of frequent assessments of *de minimus* amounts; anything more than $5,000 is not to be regarded as *de minimus* and can be assessed more frequently than every five years. I see no prohibition against assessment of accumulated maintenance and repair greater than $5,000 beyond five years. Be that as it may, I appreciate that writing off $12,700 represents a certain political expediency.

31. The problem left behind by that expediency and by the $500 appeal threshold in section 65 is that the 1996 TSH assessment schedule remains untested and the forty day appeal period under section 65 has long since run.

32. And there are problems with the 1996 TSH assessment schedule which are the focus of this application.

33. The evidence from Mr. Franklin is that TSH was not made aware of Judge Kennear's 1958 decisions exempting that applicants' and the individual respondents' lands from outlet liability assessment. As mentioned, while the mandate of TSH under section 65 of the *Drainage Act* was to apportion assessments where parcels had been subdivided, TSH reproduced all of the assessments for the 1957 Engineer's Report changing only the assessments where parcels had been divided. The result is that the 1996 TSH assessments schedule reinstated the outlet liability assessments which Judge Kennear had eliminated on appeal.

34. My concern during the hearing of evidence was that, perhaps, TSH was attempting to revise the 1957 assessment schedule to reflect then current 1992 assessment practised by assessing the lands in question. Had that been TSH's intention and mandate, I would have been inclined to give more weight to the TSH work. On the evidence, I am satisfied that, by inadvertence, the municipality did not inform TSH of the Kennear decisions in 1958 so that TSH was not in a position to direct their minds to the question of appropriate assessments. I am also satisfied that TSH would not have had the authority under section 65 of the *Drainage Act* to make such a change, even if they had had a chance to think about it. As mentioned previously, an engineer appointed under section 65 is to focus on the originally assessed parcel and to apportion the original assessment amongst the parcels into which it has been subdivided. While in this case TSH reproduced the entire assessment

schedule for the sake of completeness, no changes were made which did not involve subdivided parcels and the evidence does not suggest that TSH did other than review subdivided parcels.. Under section 65 of the *Drainage Act* the engineering is not to revisit the entire assessment schedule and I am satisfied that TSH did not do so in 1996.

35. To revisit the entire assessment schedule, recourse is to be had to section 76 of the *Drainage Act*. Section 76 deals with the changes in conditions or circumstances such as have occurred in the 60 years since the 1957 Engineer's Report was issued; more will be said below about section 76 of the *Drainage Act*.

36. The applicants initiated this proceeding following assessment for maintenance and repair work on the Harrop Drain in 2015 and completed in 2016. The work was initiated by the County as maintenance and repair under section 74 of the *Drainage Act*. This was done as part of the County's policy of regularly maintaining and repairing all of its municipal drains over a period. Mr. Franklin's evidence was that it takes the County about 10 years to get around to all of the municipal drains for which it has responsibly under the *Drainage Act*.

37. The cost of the work on the Harrop Drain in 2015 and 2016 was about $120,000 and that cost was assessed to the landowners by County by-law 1879/17 based on the 1996 TSH assessment schedule. The By-law assessment schedule was further updated by the County to account for development since 1996. That updating was done without the involvement of an engineer appointed under the *Drainage Act*; that said the updating does not bear upon the issues arising from Judge Kennear's 1958 decisions.

38. The applicants' submission is that the 1996 TSH assessment schedule is wrong because it does not incorporate the 1958 decisions on Judge Kennear. Even though conditions in the watershed and assessment practises may have changed since 1957, the 1957 assessment schedule from the Engineer's Report, as amended on appeal by Judge Kennear, continues to apply unless and until changed. Such a change cannot be made under section 65 of the *Drainage Act*, particularly with respect to the applicants' properties which have not been subdivided since 1957. Mr. McCarthy argued that any municipal by-laws or resolutions based on the 1996 TSH work need to be amended to reflect the exemption for his client's lands granted by Judge Kennear on appeal. I agree as does the County. Based on the evidence provided to me, the following disposition gives effect to that agreement:

Haldimand County By-law 1879/17 should be amended as follows:

(a) The assessment in respect of the applicant, Teresa Beischlag (Roll #7-049) is reduced to zero;

(b) The assessment in respect of the applicant, Douglas James Wilson (Roll # 7-120) is reduced to zero;

(c) The assessment in respect of the individual respondents, Blanche Dorothy Phibbs and David Allan Phibbs (Roll # 7-047 and 7-047-50) is reduced to $109.96 and $1.42 respectively; and

(d) The assessment to the roads of the respondent County is increased by $214.92.

39. My authority for amending Haldimand County By-law 1879/17 is derived from clause 106(1)(b) of the *Drainage Act* which provides as follows:

> 106(1) The referee has original jurisdiction,
>
> (b) to determine the validity of, or to confirm, set aside or amend any petition, resolution of a council, provisional by-law or by-law relating to a drainage works under this Act or a predecessor of this Act;

40. I now turn my attention to my concern that the 1957 assessment schedule from the Engineer's Report, as amended by Judge Kennear on appeal in 1958. Quite simply it is out of touch with existing conditions and current assessment practises.

41. Hagersville is significantly larger than it was in 1957 and will now be contributing significantly more waste water treatment plant effluent to the Drain. There are now more streets and development in Hagersville which will be contributing significantly more storm water runoff to the Drain, though there is some evidence that some of the recent development has diverted storm water to a different watershed. While it will take an engineering exercise to quantify it, it seems clear that the County is contributing more water to the Drain than the Village of Hagersville was doing in 1957. While specifics would need to be worked out by a drainage engineer, it is likely that the County's assessment to the Drain is understated under current conditions.

42. The updating by the County of the 1992 TSH assessment schedule for By-law 1879/17 to account for development since 1996 was done without the involvement of an engineer appointed under the *Drainage Act*. No doubt that updating was done in good faith and with good intentions and probably is fair but it may not be.

43. The two quarries that were contributing water in 1957 from electrically operated centrifugal de-watering pumps have not been doing so for decades. Those lands should not be assessed as if they were.

44. With respect to Judge Kennear whose decision were supportable back in the day, Judges no longer have assessment jurisdiction and those that do now have that authority would assess the applicants and the individual respondents for outlet liability because their lands contribution water to and therefore use the Drain. Again, a drainage engineer will have to work out the details; their outlet liability assessments will probably be small but it will not be zero.

45. With that in mind I advise that parties that I was giving serious consideration to making an order requiring the County to initiate a process under section 76 of the *Drainage Act* to update and modernize the assessment schedule for maintenance and repair of the Harrop Drain.

46. Section 76 of the *Drainage Act* is as follows:

> 76(1) The council of any local municipality liable for contribution to a drainage works in connection with which conditions have changed or circumstances have arisen such as to justify a variation of the assessment for maintenance and repair of the drainage

works may make an application to the Tribunal, of which notice has been given to the head of every other municipality affected by the drainage works, for permission to procure a report of an engineer to vary the assessment, and, in the event of such permission being given, such council may appoint an engineer for such purpose and may adopt the report but, if all the lands and roads assessed or intended to be assessed lie within the limits of one local municipality, the council of that municipality may procure and adopt such report without such permission. R.S.O. 1990, c. D.17, s. 76 (1); 2006, c. 19, Sched. A, s. 6 (1).

(2) The proceedings upon such report, excepting appeals, shall be the same, as nearly as may be, as upon the report for the construction of the drainage works. R.S.O. 1990, c. D.17, s. 76 (2).

(3) Any council served with a copy of such report may, within forty days of such service, appeal to the Tribunal from the finding of the engineer as to the portion of the cost of the drainage works for which the municipality is liable. R.S.O. 1990, c. D.17, s. 76 (3); 2006, c. 19, Sched. A, s. 6 (1).

(4) Any owner of land assessed for maintenance or repair may appeal from the assessment in the report on the grounds and in the manner provided by section 52 in the case of the construction of the drainage works. R.S.O. 1990, c. D.17, s. 76 (4).

(5) An assessment determined under this section shall thereafter, until it is further varied, form the basis of any assessment for maintenance or repair of the drainage works affected thereby. R.S.O. 1990, c. D.17, s. 76 (5).

47. I observe that, unlike section 65, there is no $500 threshold for appeals to the Tribunal.

48. Also, unlike section 4 where landowners can petition for a drain and associated assessment schedule or section 78 where landowners can require an improvement to a drain and associated assessment schedule, the land owners assessed to a municipal drain cannot require the responsible municipality to initiate a process under section 76 to get an updated assessment schedule.

49. In this case, following the 2015/2016 clean out of the Harrop Drain, there is apparently no need for a section 78 improvement so, unless the County decides to do it on its own, the Drain is stuck with a 60 year old assessment schedule. I also observe that it is not in the County's financial interest to update the assessment schedule under which it is contributing to maintenance and repair costs based on roads and effluent from a 1957 Village rather than from the urban growth centre which Hagersville has become.

50. Finally, I observe that there is no right of appeal to the Tribunal with respect to maintenance and repair work completed under section 74 of the *Drainage Act*. Having been deprived of an appeal under section 65 from the TSH assessment schedule in 1996, landowners now have no recourse to the Tribunal in connection with the $120,000 maintenance and repair project in 2015 and 2016. In the absence of an appeal to the Tribunal, the applicants brought this application to the Referee.

51. In response to my question of Mr. DeVos about the relative merits of undertaking a section 76 exercise, he gave it as his opinion that while it would be in order, the downside was the cost of the process, including the cost of potential appeals.

52. Because this question of section 76 was raised by the Court for the first time during the October 10, 2018 hearing, counsel were given 15 days within which to make submissions about my potentially ordering the County to initiate a process under section 76 to prepare an updated assessment schedule for the Harrop Drain to reflect changes in conditions and circumstances since the most recent report on the Drain prepared by R. Blake Erwin, P. Eng., O.L.S. dated December 5, 1957.

53. Ms. Premi for the County has advised that her client has no submissions on the point. Mr. McCarthy for the applicants and for the individual respondents has advised that his clients have no submissions either but McCarthy questions the Court's jurisdiction to make such an order.

54. Let me start with the question of jurisdiction. The Referee's authority is derived from section 106 of the *Drainage Act* which provides as follows:

> 106(1) The referee has original jurisdiction,
>
> (a) to entertain any appeal with respect to the report of the engineer under section 47;
>
> (b) to determine the validity of, or to confirm, set aside or amend any petition, resolution of a council, provisional by-law or by-law relating to a drainage works under this Act or a predecessor of this Act;
>
> (c) to determine claims and disputes arising under this Act, including, subject to section 120, claims for damages with respect to anything done or purporting to have been done under this Act or a predecessor of this Act or consequent thereon;
>
> (d) to entertain applications for orders directing to be done anything required to be done under this Act;
>
> (e) to entertain applications for orders restraining anything proposed or purporting to be done under this Act or a predecessor of this Act; and
>
> (f) over any other matter or thing in relation to which application may be made to him or her under this Act. R.S.O. 1990, c. D.17, s. 106 (1).
>
> (2) Subject to section 101, the referee has jurisdiction to hear appeals from any decision or order of the Tribunal and for such purpose may make any order that the Tribunal might have made and may substitute his or her opinion for that of the Tribunal. R.S.O. 1990, c. D.17, s. 106 (2); 2006, c. 19, Sched. A, s. 6 (1).

(3) The referee has jurisdiction to entertain and dispose of any interlocutory application relating to any matter otherwise within his or her jurisdiction and his or her order thereon is final. R.S.O. 1990, c. D.17, s. 106 (3).

(4) The referee has power to determine all questions of fact or law that it is necessary to determine for the purpose of disposing of any matter within his or her jurisdiction and to make such decision, order or direction as may be necessary for such purpose. R.S.O. 1990, c. D.17, s. 106 (4).

55. There is no issue that I have authority to deal with and to amend the assessment schedule in Haldimand County By-law 1879/17. A consideration of the reason for making such an amendment to Haldimand County By-law 1879/17 puts before me the assessment schedule for the Harrop Drain as found in the 1957 Engineer's Report, as amended by the 1958 decisions of Judge Kennear and the updated assessment schedule authored by TSH in 1992. In my view, in this case requiring the further updating of the assessment schedule for the Harrop Drain to reflect current conditions and circumstances qualifies as "any other matter or thing in relation to which application may be made to him or her under this Act" as contemplated by clause 106(1)(f) of the *Drainage Act*.

56. I believe I have the authority, the question is whether I should exercise it.

57. What exists now is unfair. I have outlined some of those factors previously. Suffice it to say here that the County is not paying what it should, given the significant growth of the Hagersville community's contribution of waste water effluent and stormwater. It is unfair that the two quarry properties are being assessed for water from de-watering pumping which has not occurred for decades. Finally some parcels that are using the Drain are not paying for it because they are not being assessed for outlet liability as they should under current assessment practises.

58. The principal negative factor is the cost of the process. It is regrettable that the County did not undertake a section 76 process in anticipation of the $120,000 project in 2015; the cost of the process could have been subsumed into the cost of the project and the result used to assess that significant cost more fairly. That was not done and, given the 10 or so year cycle the County has for maintaining its drains, it will be another 8 or 9 years before the opportunity comes around again. That said, if a start is made now, the new assessment schedule will most likely be in effect when the time comes. Perhaps the cost of the section 76 process can be incorporated into or assessed out with the cost of the next major maintenance and repair project in 8 or 9 years.

59. In any event, at some point, the cost will have to be incurred, it is just a question of when.

60. There is little incentive for the County to seek to change the status quo because of the financial advantage it provides the County. I believe it is unlikely the County will initiate a section 76 process unless ordered to.

61. The affected landowners have no mechanism for compelling a section 76 process.

62. In my view the Court of the Drainage Referee should require that to be done which should be done. The current assessment schedule for the Harrop Drain is unfair as it does not

reflect current conditions and circumstances and should be made to do so. I will therefore order that the County is to procure, in accordance with section 76 of the *Drainage Act*, the report of an engineer to vary the assessment schedule for the maintenance and repair of the Harrop Drain having regard for changes in conditions and circumstances since the most recent report on the Drain prepared by R. Blake Erwin, P. Eng., O.L.S. dated December 5, 1957.

63. To that order let me add a qualification. The evidence before me is that Hagersville has an urban growth boundary which extends a beyond existing development. This is an Official Plan delineation which anticipates growth for a decade or more into the future. The evidence is that, with the maintenance and repair of the Harrop Drain in 2015 and 2016, the Drain is adequate for the drainage area is serves. However, if, having regard to the anticipated future growth of Hagersville and the anticipated additional waste water effluent and stormwater from that future growth, improvements are required to the Harrop Drain under section 78 of the *Drainage Act*, then the updated assessment schedule to be prepared under section 76 can and should be incorporated into and become part of the assessment schedule prepared for the Drain in connection with the section 78 improvement engineer's report and project.

64. I should also comment that, in my view, Mr. DeVos's appearance as a witness for the County in this matter does not disqualify him from undertaking the required section 76 exercise if the County is otherwise inclined to appoint him. His evidence was given at my request that the County have available at the hearing an engineer familiar with the situation to give background evidence and to provide opinion evidence about assessment principles. I took his evidence to be impartial and independent and in accordance with the obligations of an engineer under section 11 of the *Drainage Act*. His appointment would result in some efficiencies as he has some background knowledge of the Drain and its history. This is not to be taken as any sort of direction about Mr. DeVos being appointed; that is in the discretion of the County.

65. The parties will bear their own costs.

66. The County's costs and expenses of this proceeding shall be assessed to the Drain in the same manner as for maintenance under the *Drainage Act* and shall be assessed in accordance with the updated assessment schedule resulting from the process I have ordered to occur under section 76 of the *Drainage Act*. This order is made pursuant to subsection 118(1) of the *Drainage Act*, because the updated assessments should replace the 60 year old assessment schedule to take effect immediately.

Issued at London the 5th day of November, 2018.

Andrew C. Wright
Acting Drainage Referee

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TERESA BEISCHLAG et all v. HALDIMAND COUNTY Court File No: CV 18-03
Applicants Respondent

ONTARIO
IN THE COURT OF THE DRAINAGE REFEREE

Proceeding commenced at Cayuga

ORDER