

HALDIMAND COUNTY

DESIGN CRITERIA

APPENDIX A

DRAINAGE

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FACTSHEET

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Introduction

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.

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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.

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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.

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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.

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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.

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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.

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Introduction

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.

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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 OMAFRA 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 favourably 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-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

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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.

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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.

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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 OMAFRA Factsheet Drainage Act Appeals, Agdex 557

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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
2. trenching, laying and backfilling
3. sundry
4. inspection fee, and
5. 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.

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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.

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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 effected 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.

Related Links

- OMAFRA Factsheet, [Understanding your Drainage Assessment](#), Agdex 557
- OMAFRA Factsheet [Drainage Act Appeals](#), Agdex 557

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Introduction

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.

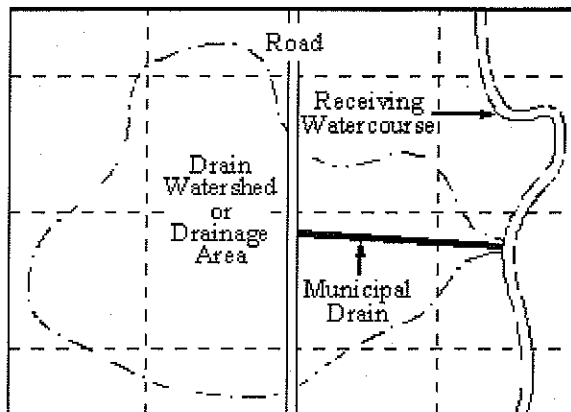


Figure 1. Plan of a Municipal Drain

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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.

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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.

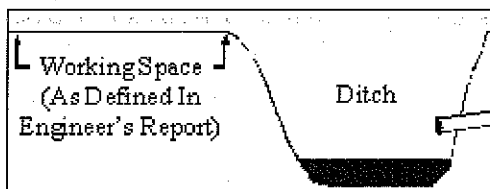


Figure 2. Cross-Section of an Open Ditch Municipal Drain

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**FACTSHEET**

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Early Agreement Drains

The Ditches and Watercourses Act was passed in 1874 although its provisions included legislation from pioneer days. It was intended to be made use of in, and provide the necessary authority for, the construction and maintenance of comparatively short and inexpensive drains, which were to carry the surplus water to a sufficient outlet so that no injury to neighbouring lands would result from their construction and use.

The owner of the land requiring drainage was authorized to set the Act in motion by serving notice on neighbouring landowners whose lands would be entered or benefitted by the construction of the drain. The notice set out a time and place to discuss the proposal.

If, at the "friendly meeting" an agreement was arrived at regarding the shared responsibility for the construction, maintenance and terms of assessment, the Act made it of binding effect and provided a remedy for enforcing the terms of the agreement against any parties who may subsequently default in performing their obligations under it.

The drain was then constructed by the parties interested, each completing his agreed upon portion of the work, without any interference by, or assistance from the municipality, except when the municipality as a landowner was a party to the agreement.

The agreement was reduced to writing and signed by all parties. A copy was then filed with the township clerk of each municipality in which the drain was situated. Township offices contain boxes of these dusty old agreements, generally unindexed. Consequently, an old agreement for a drain would likely be very difficult to locate today, except for an owner's copy. Such agreements are probably still valid.

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Award Drains

When no agreement could be reached at the "friendly meeting" the owner wishing the improved drainage

filed a requisition with the township clerk for the engineer, specially appointed under The Ditches and Watercourses Act, to appoint a time and place for a site meeting and examination of the area.

The engineer was appointed by by-law and held office until a new engineer was appointed. While he was appointed by Council he did not act as their representative, nor make any report to Council. If he found the ditch was required, he then made an "award", in labour and materials, which was filed with the township clerk. The award set forth the portion of ditch to be constructed and maintained by affected persons. The engineer supervised the work.

When the work was not completed by the appointed time, or was in default, the engineer could tender the work and collect the cost through the collector's roll as taxes.

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Maintenance of Agreement and Award Drains

Maintenance was to be by the respective owners in such proportion as provided in the original or subsequent agreement or award. If an owner who was to maintain a certain portion of the drain 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 of the ditch. The engineer could then tender the work and place the cost against the defaulting property. This was the only means of enforcing the award as the Act (R.S.O. 1960, c.109. s.38) stated that a suit could not lie.

Award drains had greater status and formality than an agreement. These awards of the engineer were also filed with the township clerk but are usually indexed and may be located, sometimes with difficulty. The difficulty in locating the award is in not knowing the proper name of it.

Many of the old agreement and award drains have been incorporated in municipal drains under The Drainage Act, 1975, or its predecessors.

The Ditches and Watercourses Act was repealed June 1, 1963. The construction sections were incorporated as Sections 2 and 4 of The Drainage Act, 1962-63, and are Sections 2 and 3 of The Drainage Act, 1975. The legislation review committee was of the opinion that award drains should all come under The Drainage Act as soon as possible and maintenance provisions for old awards were omitted from The Drainage Act after 1963.

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 or agreement; 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 may (1) attempt to have the old award or agreement changed to come under The Drainage Act so that a grant may be allowed, and the owner may receive an allowance for ditch already constructed; or (2) file a suite for damages for non-compliance with an agreement under civil law. A third possibility is an appeal to the Referee under sections 3(18) and 106(l)(c) of The Drainage Act.

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Creating New Agreement Drains

The Drainage Act now incorporates the requisition of award section of the *Ditches and Watercourses Act* as Section 3 and the agreement section of the old Act as Section 2.

Section 2 reads:

2. (1) When two or more owners of land desire to construct or improve a **Mutual agreement re drainage works** drainage works on any of their lands and are willing to pay the cost thereof, **drainage works**

they may enter into a written agreement for the construction, improvement, financing and maintenance of such drainage works, which shall include the following:

1. A reference to The Drainage Act, 1975. **1975, C. 79.**
2. Descriptions of the lands of the parties to the agreement sufficient for the purposes of registration in the proper land registry office.
3. The estimated cost of the drainage works.
4. A description of the drainage works, including its nature and approximate location.
5. The proportion of the cost of the construction, improvement and maintenance of the drainage works that is to be borne by each of the owners of the lands.
6. The date the agreement was entered into.
7. An affidavit of a subscribing witness to the execution of the agreement by the parties sufficient for the purposes of registration in the proper land registry office.

(2) A copy of the agreement and the plans and schedules if any, of the proposed drainage works may be filed with the clerk of the local municipality in which the land or any part thereof is situate, and the agreement or an executed copy thereof may be registered in the proper land registry office.

Filing of agreement

(3) An agreement made under this section shall, upon registration in the proper land registry office of the agreement or an executed copy thereof, be binding upon the heirs, executors, administrators, successors and assigns of each party to the agreement.

Registered agreement binding on successors

(4) The subsequent provisions of this Act do not apply to any drainage works constructed under this section. 1975, c. 79, s.2.

Exception

Oral agreements do not have legal status and cannot be enforced. A standard "Agreement by Owners - Mutual Agreement Drains" form is available from the township office.

Mutual agreement drains have a number of advantages:

- There is no limit regarding the cost or extent of the work as in Section 3, requisition drains.
- Agreement drains are usually cheaper to construct.
- Repairs and maintenance do not depend on a public body.
- Drains are constructed quickly, there are few delays.

There are also a number of disadvantages:

- Impractical when major roads, railways, or utilities are involved.
- No prescribed way to decide on the actual cost.
- Not properly engineered, owners must assume liability.
- Legal fees and filing fee for agreement.

No grants are payable under The Drainage Act for construction or maintenance of agreement drains.

A sample of a general agreement form is below showing the information that an agreement should contain. Any section can be modified to meet a particular situation.

The agreement must be written on one side only of 8½ x 14 paper using black ink and preferably signed in black ink. A Form 4 Document General must be completed and taken to the Registry Office with the agreement in order to have the document registered.

Blank Form 4 forms can be purchased at legal stationary stores. Any questions regarding completing a Form 4 Document General should be asked at the Registry Office.

| [Top of Page](#) |**Example Agreement**

Date of Agreement AGREEMENT made in duplicate this _____ day of 19 _____

BETWEEN: of Lot _____ Con. _____ of the Township of _____

hereinafter called the Party of the First Part and

_____ Lot _____, Con. _____ of the Township of _____ hereinafter called the Party of the Second Part.

Reference to Drainage Act, RSO, 1980 This agreement is made under the authority of section 2 of The Drainage Act, RSO, 1980 WHEREAS the Party of the Second Part desires to obtain an outlet for a tile drainage system on Lot _____, Con. _____ and WHEREAS it is necessary to construct the outlet on the property of the Party of the First Part on Lot _____, Con. _____, the Party of the First Part and the Party of the Second Part do hereby agree that the work shall be constructed, repaired and maintained according to the following conditions.

Legal Description of Lands 1. The properties affected by this drainage agreement are described as follows: Part _____ of registered plan # _____, Instrument Number _____, Pt. Lot _____, Concession _____ North East, Township of _____, County of _____ being the property of the Party of the First Part and Part of registered plan # _____, Instrument Number, Pt. Lot _____, Concession _____ North West, Township of _____, County of _____ being the property of the Party of the Second Part.

Description of Drainage Works 2. The drainage system leaves the Party of the Second Part's property approximately 100 feet South of the North East corner of the property and crosses the property of the Party of the First Part in a straight line at approximately 90 degrees to the property line and empties into the ditch, 400' east of the west boundary line of the property of the Party of the First Part.

3. The drain on the property of the Party of the First Part shall be constructed of 10" clay tile approximately 3' below the ground surface. The outlet shall be of corrugated metal pipe with a rodent grate. The pipe is to be 10' long.

Construction 4. The Party of the Second Part, his employees and workmen may enter on and may construct the drain on the property of the Party of the First Part within six months of the date of agreement.

5. The Party of the First Part shall not be liable for any damages to the drain caused by the Party of the First Part provided that the Party of the First Part exercises reasonable care.

Maintenance 6. The Party of the First Part shall not be responsible for maintaining the ditch at the outlet at a depth that will ensure free flow of water away from the drain. The Party of the First Part shall not obstruct the flow from the drain by filling in the ditch or by placing obstructions.

7. On reasonable notice in writing to the Party of the First Part, the Party of the Second Part may have reasonable access to the property of the Party of the First Part to repair or maintain the drain. The Party of the first Part shall allow access for repairs, maintenance

or inspection of the drain within 1 week of the Party of the Second Part giving notice.

Costs

8. The entire cost of the construction, repair and maintenance of the drain shall be borne and paid by the Party of the Second Part.

9. This agreement herein contained when executed by the Parties hereto, shall be registered in the proper Registry Office and any costs shall be borne by the Party of the Second Part. The provisions herein contained shall endure to the benefit of and be binding upon the parties hereto and their respective heirs, administrators, executors, successors and assigns.

In Witness Whereof the Parties hereto have hereunto set their hands this ____ day of _____, 19____.

Party of the
First Part _____

Witness

Party of the
Second Part _____

Witness

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Last Updated: June 14, 2007

MUTUAL DRAINAGE AGREEMENT

THIS AGREEMENT made in duplicate this ____ day of _____, 20__.

BETWEEN:

Name / land description / municipal address

hereinafter called the "Party of the First Part"

-and-

Name / land description / municipal address

hereinafter called the "Party of the Second Part"

THIS AGREEMENT is made under the authority of Section 2 of the Drainage Act,
R.S.O. 1990

WHEREAS the Party of the First Part desires access to the lands of the Party of the Second Part to permit drainage from the lands of the Party of the First Part to the lands of the Party of the Second Part on Pt Lot ____, Con ____ Geographic Township of _____

AND WHEREAS the Party of the Second Part desires to maintain a drainage swale across the lands of the Party of the First Part on Pt Lot ____, Con ____ Geographic Township of _____. Said swale leaves the Party of the Second Part's property approximately 12 meters south of the northwest corner of the property of the Party of the First Part and crosses the property line in a straight line at approximately 45 degrees and travels north and east to the roadside ditch adjacent to the lands of the Party of the First Part.

AND WHEREAS it is necessary to maintain the drainage on the property of the Parties hereto. The Party of the First Part and the Party of the Second Part do hereby agree that the work shall be constructed, repaired and maintained as shown on lot grading plan number _____ as prepared by _____ dated month/day/year which is attached hereto.

1. The Party of the Second Part, his employees and workmen may enter on the property of the Party of the First Part to make certain existing drainage is maintained.
2. The Party of the Second Part shall not be liable for any damages to the drain caused by the Party of the Second Part provided the Party of the Second Part exercises reasonable care.
3. The Party of the First Part shall not obstruct the flow from the drain by filling in the ditch or by placing any obstruction therein.
4. On reasonable notice in writing to the Party of the First Part, the Party of the Second Part may have reasonable access to the property of the Party of the First Part to repair or maintain the drain. The Party of the First Part shall allow access for repairs, maintenance or inspection of the drain within 1 week of the Party of the Second Part giving notice.
5. The entire cost of the repair and maintenance of the drain shall be borne and paid by the Party of the Second Part.
6. This Agreement herein contained when executed by the Parties hereto, shall be registered in the proper Registry Office and any costs shall be borne by the Party of the First Part. The provisions herein contained shall enure to the benefit of and be binding upon the parties hereto and their respective heirs, administrators, executors, successors and assigns.

IN WITNESS WHEREOF the Parties hereto have hereunto set their hands this ____ day of _____, 20__

_____	Party of the	_____
Witness	First Part	
_____	Party of the	_____
Witness	Second Part	

MUTUAL DRAINAGE AGREEMENT

THIS AGREEMENT made in duplicate this ____ day of _____, 20__.

BETWEEN:

Name / land description / municipal address

hereinafter called the "Party of the First Part"

-and-

Name / land description / municipal address

hereinafter called the "Party of the Second Part"

THIS AGREEMENT is made under the authority of Section 2 of the Drainage Act,
R.S.O. 1990

WHEREAS the Party of the First Part desires to construct a drainage swale along the common lot line with the lands of the Party of the Second Part located on Pt Lot ____, Con ____ Geographic Township of _____.

AND WHEREAS the Party of the Second Part is agreeable to said swale along the common lot line with the lands of the Party of the First Part located on Pt Lot ____, Con ____ Geographic Township of _____.

AND WHEREAS it is necessary to maintain the drainage on the properties of the Parties hereto. The Party of the First Part and the Party of the Second Part do hereby agree that the work shall be constructed, repaired and maintained as shown on lot grading plan number _____ as prepared by _____ dated month/day/year which is attached hereto.

1. Each of the Parties, their employees, agents and workmen may enter on the property of the other Party to make certain existing drainage is maintained.
2. Either Party maintaining drainage shall not be liable for any damages to the drain caused by themselves, provided they exercise reasonable care.

3. Neither Party shall obstruct the flow of the drain by filling in the ditch or by placing any obstruction therein.
4. On reasonable notice in writing to the other Party, either Party may have reasonable access to the property of the other Party to repair or maintain the drain. Each Party shall allow the other Party access for repairs, maintenance or inspection of the drain within 1 week of either Party giving notice to the other Party.
5. The entire cost of the repair and maintenance of the drain shall be borne and paid by the Party of the First Part.
6. This Agreement herein contained when executed by the Parties hereto, shall be registered in the proper Registry Office and any costs shall be borne by the Party of the First Part. The provisions herein contained shall enure to the benefit of and be binding upon the parties hereto and their respective heirs, administrators, executors, successors and assigns.

IN WITNESS WHEREOF the Parties hereto have hereunto set their hands this _____ day of _____, 20__

_____	Party of the	_____
Witness	First Part	
_____	Party of the	_____
Witness	Second Part	

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FACTSHEET

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History: Original Factsheet**Written by:** Hugh Fraser - Agricultural Engineer/OMAF; Sid Vander Veen - Drainage Coordinator/OMAF

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2. [Natural Watercourses](#)
3. [Surface Water](#)
4. [Top 10 Common Law Drainage Problems Between Rural Neighbours](#)

Introduction

It has often been said that *good drainage makes for good neighbours*. Unfortunately, drainage of water is one the most common areas of dispute between rural neighbours, whether they be farmers or not. Drainage disputes generally fall into the realm of *Common Law*, a system of law that Ontario inherited from Great Britain. *Common Law* forms the basis of our legal system. It always applies, unless it is specifically altered by a statute passed by our Provincial or Federal Governments. *Common Law* disputes are arguments between landowners, and if they cannot be mutually resolved, **final solutions can be determined through the courts.**

Landowners are considered to be equal under *Common Law*, whether they be private citizens, companies, road authorities, municipalities, or Provincial and Federal governments. So, if you get advice on *Common Law* drainage problems from a drainage contractor, a drainage Engineer, a lawyer, a Conservation Authority, or a Government Agency, remember that *it is not their responsibility to solve the problem*. Only the courts can make the final decision in the dispute. To obtain a ruling by a court, a civil action must be initiated by the damaged party.

Even though the courts have the ultimate decision on drainage disputes, neighbours should try to reach some common ground, and solve the problem in a neighbourly fashion without going to court. Court rulings in *Common Law* may not make either side happy. It is the intent of this Factsheet to help rural neighbours come to their own solutions and to avoid taking legal action against each other. **This Factsheet is not a substitute for good legal advice. Always consult a lawyer if a professional legal opinion is needed.**

Previous *Common Law* court decisions have established precedents in drainage disputes, and from these precedents, a set of rules or principles have been developed that apply to water rights. These rules under *Common Law* can change as customs change and as new precedents are set. Also, the rules differ significantly between *natural watercourses* and *surface water*.

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Natural Watercourses

Almost the whole definition of a *natural watercourse* is founded on the saying *aqua currit et debet currere*, or "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 a bed and banks, for a sufficient time to give it substantial existence". See Figure 1. It must, on casual examination, "present the unmistakable evidence of the frequent action of running water". It is not essential that the supply be continuous, or form a perennial living source for flora or fauna. It is enough if "the water rises periodically from natural causes and reaches a plainly defined channel of a permanent character". One can usually identify a *natural watercourse* on an aerial photo or a topographic map. See Figure 2. 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 defined channel". Often, it is "the valley through which the stream runs, and not its low level or low water channel, which is the water course". If water is in a *natural watercourse*, it must be permitted to flow.

Figure 1. A Natural Watercourse With A Defined Bed, Banks and Sufficient Flow

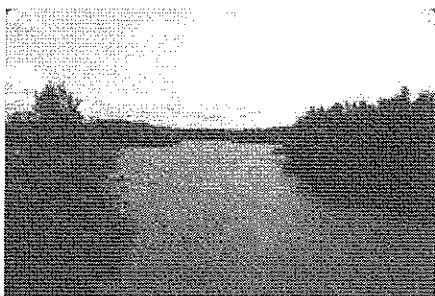
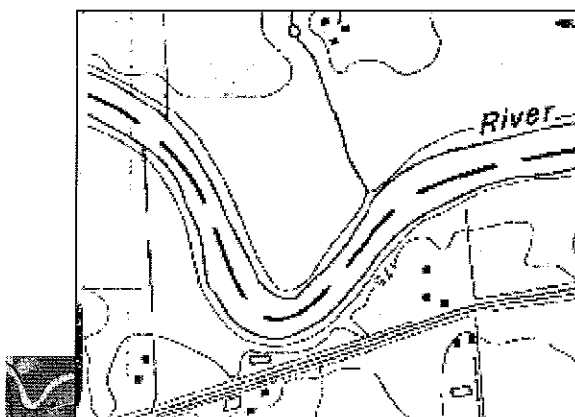


Figure 2. A Natural Watercourse Shows Up On An Aerial Photo (Left) And Topographical Map (Right)



Farmers, and others, often have their own ideas about what is or isn't a *natural watercourse*. Obvious examples of *natural watercourses* in Ontario include: the St. Lawrence River, the Niagara River, and the Grand River. Many creeks and streams might also be considered to be *natural watercourses*. However, private ditches and channels across low areas on one's own property are not usually considered to be *natural watercourses*. See Figure 3. The courts have the final say on whether a channel is a *natural watercourse* or not. Everyone else can only offer an opinion.

Figure 3. A Private Ditch Or Channel Across A Low Area Is Not Usually Considered To Be A Natural Watercourse

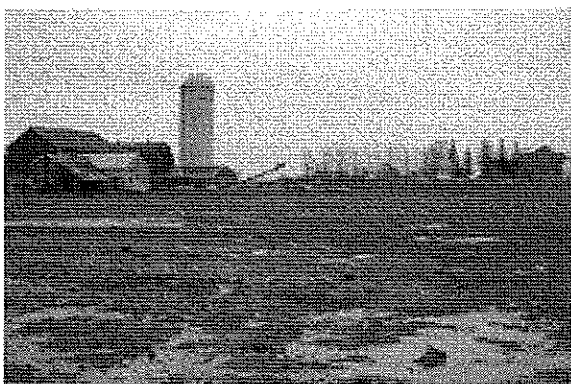


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Surface Water

Surface water has no defined course. See [Figure 4](#). It is "the water that falls as precipitation, but which finds its way to a *natural watercourse* by percolation or flow". *Common Law* can be confusing when it comes to *surface water* because, under most circumstances, it has no right of drainage and the law appears to deny the right of water to flow downhill. This is described further in this Factsheet.

Figure 4. Surface Water Has No Defined Course And No Right Of Drainage



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Top 10 Common Law Drainage Problems Between Rural Neighbours

The following questions are commonly asked by rural landowners.

My neighbour's land is higher than mine, but can he simply dump his water on my land?

If "his water" is *surface water*, then it has no right of drainage. Neighbours can either choose to keep their water on their property, or allow it to pass along onto property at a lower elevation. Similarly, property owners at a lower elevation can either accept the water from neighbours above them or reject it. However, once the water reaches a *natural watercourse* it **must** be allowed to continue to flow through all properties.

Suppose there are two owners of adjacent parcels of land, **A** and **B**, where **A** is at a higher elevation than **B**. Obviously, precipitation that falls on the lands of **A** will flow towards the lands of **B**. If **B** objects to the flow of the surface water onto his lands, and **A** has done nothing to collect or concentrate the flow of water from his land, the courts are unlikely to rule against **A**, since they recognize that water flows downhill naturally. However, if **B** does not want the water from **A**, he can reject the water by building an impervious wall, berm or dyke along the boundary of his land, and in effect dam the water back upon the higher lands of **A**. Even though this may cause damage to **A**'s property, **B** would not likely be liable, since surface water has no right of drainage, and **A** must accept the flooding. **B** may even fill his land until it

exceeds the height of the higher ground of **A**. This apparent paradoxical circumstance would not make good neighbourly sense, does not solve anything, and simply would cause hard feelings between the neighbours.

Can my neighbour outlet his tile over the fence onto my land, end it a few metres away from the property line on his side, or outlet it into my private ditch?

Water from tile drainage systems is considered to be *surface water*, so it has no right of drainage. Therefore, the situation is similar to the previous question, and the owner of the lower land, **B**, could again dam the water at the property line to protect his property. However, because water is being collected and deposited on **B**, **B** could also take legal action against **A**, the owner of the tile. **B** would have to prove that **A** is collecting water, dumping it on him, and causing damage that can be assessed a dollar value.

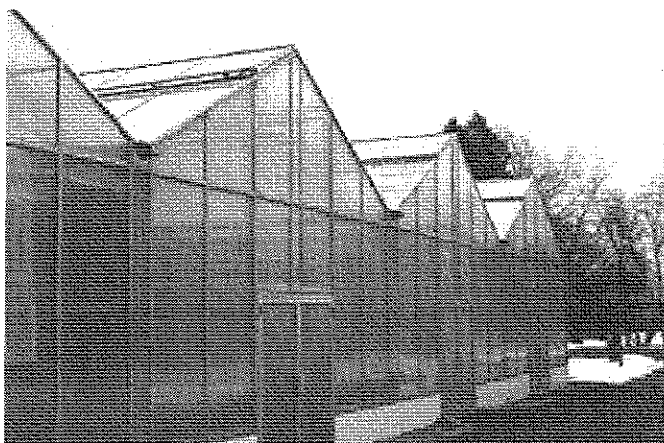
When someone tile drains their property, they are obliged to take this collected water to a *sufficient outlet*. When trying to find a *sufficient outlet*, they should follow the path the tile water would follow. Then, they should ask themselves if a reasonable person would think that water could flow down this path and not cause any harm to any land or road. If so, this is probably a *sufficient outlet*, and many potential disputes can be avoided.

If one has a private ditch on his property (not constructed under any legislation, such as a *Municipal Drain*), he is not obliged to clean it out for his neighbour's benefit. That is, one does not have to clean out a private ditch to accommodate the tile drains from a neighbour on higher ground. Also, a neighbour is not permitted to trespass on another property to clean the private ditch out, or to dig a new ditch without the owner's permission, unless there was some previously arranged, **written Mutual Agreement Drain**.

Can my neighbour dump the eavestroughs from his greenhouses onto my land?

Again, the water collected off a roof in an eavestrough (*Figure 5*) is considered to be *surface water*, and it has no right of drainage. It must be taken to a *sufficient outlet*. Since this water has been collected, the greenhouse owner could be liable for the damage that this water causes on the downstream land. Other examples of collecting water include: private ditches that are **not natural watercourses**, swimming pool water, road ditches, irrigation water, water collected in catch basins, or runoff from parking lots and yard areas. The same answer applies as previously indicated.

Figure 5. Surface Water Drained Off Greenhouse Roofs Has Been Collected Into Eavestroughs, So It Must Be Taken To A Sufficient Outlet



Can I plug up the tile I found outletting onto my property, or into my private ditch?

Sometimes a new rural owner, say **B**, finds a tile draining out onto their land, or into their private ditch from higher neighbouring ground, say **A**. Normally, this would not be permitted under *Common Law* as outlined previously, since this tile water would be considered to be simply *surface water*. The only **exception** to this is if **A**'s tile outlet into **B**'s private ditch has existed for more than 20 years, and if during that time **B** never disputed or opposed the tile outlet. In this case, **A** acquires the *right* to outlet into the private ditch owned by **B**. This is called *Prescriptive Rights*, which is similar to *Squatter's Rights*, established through the *Statute of Limitations*. However, even if one has the right to plug the tile outlet, it certainly would not make for good neighbourly relations. The best option would be to discuss the matter with the owner of the tile system upstream, **A**, and come to some agreement on how to proceed.

Do I have to let my neighbour run his tile into my tile drainage system?

No. Drainage tile is privately owned, and landowners are under no obligation to let a neighbour tile into it, as long as the tile is not part of a *Municipal Drain*. However, it would be neighbourly to come to some *Mutual Agreement*. A neighbour on higher land might pay for the privilege of using someone else's tile, or pay to install a larger one beside it that might be of some benefit in the future to either party. Landowners should be careful that they do not put their own tiled land at jeopardy, because they have allowed too much water into their main tiles. The main collector tile might not be designed to handle the extra water. Once a tile connection is made at the property line, it is very difficult for a landowner to know what other connections are being made further upstream for other owners or catch basins. Water from land at higher elevations above will always drain out first, while land at the lower elevation will drain more slowly if the main collector tiles are already full. It is strongly recommended that a written *Mutual Agreement Drain* be drawn up to keep these potential problems in mind. This agreement should be registered against both deeds for future reference and future owners. Unfortunately, landowners and their lawyers are often reluctant to sign *Mutual Agreement Drain Documents* because it adds something to the property deed that could make a future property sale less attractive to buyers.

Do I have to let my neighbour run his tile across my place to a sufficient outlet, and do I have to help pay the costs?

Again, there is no requirement for a neighbour of lower land to let an owner of higher land run a tile through their property. However, it would be neighbourly to come to some agreement that benefits both parties. Perhaps, if the tile was increased in size at the time of construction, then both owners could use it. However, as in the previous questions, both parties should draw up a *Mutual Agreement Drain* that is registered against both deeds for future reference and owners. This avoids misunderstandings about who pays what, and who is responsible for what. Even if an owner of lower land agrees to let the neighbour run a tile across their farm, he is under no obligation to help pay the costs. He may, however, receive some benefit from the tile and, if so, it would be neighbourly to help share the costs in that case.

The neighbour has another option, though, and that is to petition for a drain across the lower land under the *Drainage Act*. If he is successful, all neighbours would be forced to pay for their fair share of the costs based on how much water they drained into the watershed of the *Municipal Drain*, and how much benefit they received from it. However, in most cases, the *Municipal Drain* option might end up costing everyone more in the long run.

Sometimes a *Municipal Drain* does not flow through a landowner's property even if he paid toward its cost. Paying toward the cost of a *Municipal Drain* still does **not** give a landowner the right to cross anyone's property with a tile or ditch to gain access to the *Municipal Drain*. By paying towards a *Municipal Drain*, an owner acquires the "right to outlet his tile drainage system into the drain", but this same owner must still "acquire the right to cross someone else's farm, since the neighbouring farm is a private property". If a landowner wanted access to the *Municipal Drain*, he should have brought this to the attention of the Drainage Engineer who designed the *Municipal Drain* in the first place. The Drainage Engineer could have designed a branch drain from the *Municipal Drain* through the neighbour's property. Petitioning for this branch drain can be done at a later date under the *Drainage Act*, but it would be more complicated and costly after the fact.

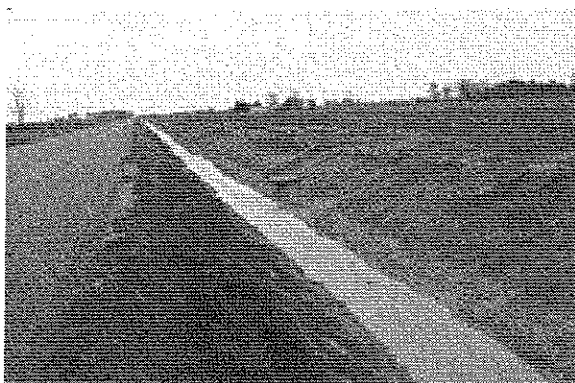
I am putting in a 150 mm (6 inch) main tile for my farm, but my neighbour wants me to put in a 200 mm (8 inch) tile, so he can tile into it as well. Do I have to?

This question is similar to the previous one. One does not have to install a bigger tile to satisfy the neighbour's wishes, although again it would be neighbourly to come to some mutual agreement.

Why doesn't the road department make their road ditches deep enough to outlet my tile drains?

The road department is not required to dig their ditches deep enough to provide outlet for tile drains. See [Figure 6](#). Road ditches are just another form of private ditch, and the road authorities are only obligated to dig their ditches deep enough to handle the *surface water* off their own roads. They are not even required to take *surface water* from surrounding land. There is no right of drainage of *surface water* even if it is in a road ditch, unless the ditch is part of a *Municipal Drain* and access for tile drains is permitted. That is, an owner of lower land can block the passage of ditches that are not *natural watercourses* or part of a *Municipal Drain*. For normal road ditches, permission must be obtained from the road department to outlet tile drains into them.

Figure 6. Municipalities Are Not Obligated To Dig Their Road Ditches Deep Enough To Outlet Tile Drains, Although These Ditches Often Provide Excellent Outlets. Permission From The Municipality Is Required.



Can my neighbour force me to take down my trees on my side of our property line because he says their roots are plugging his tile drains?

No, a neighbour cannot force anyone to take down the trees. However, if the trees are not removed and the situation is ignored, the neighbour may do some serious root pruning on their side of the property line that may affect the health of the trees. Some tree roots are known to travel more than 30 metres (100 feet). Unless absolutely necessary, trees should not be planted too close to property lines, especially water loving varieties such as willows and poplars. Conversely, tile drains and especially main collector tiles should not be installed too close to property lines that are already treed, or are likely to be treed in the future.

Can I take logs and debris out of a natural watercourse adjacent to my property to get the water moving?

Anyone who interferes with the channel of a *natural watercourse* is liable for the damages that result from their actions. Before removing the obstructions, one should estimate the flow and volume of water being stored to see if the channel downstream can accommodate the sudden increase in flow without damage.

The authors are indebted to Ross Irwin, P.Eng. and John Johnston, P.Eng. whose previous work in interpreting the Common Law aspects of drainage was very helpful in the preparation of this Factsheet. Competent legal counsel should be procured for any drainage problems that may arise between rural neighbours.

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