

ONTARIO

SUPERIOR COURT OF JUSTICE

IN THE COURT OF THE DRAINAGE REFEREE

B E T W E E N:

CORY KITTEL

Applicant

- and -

THE CORPORATION OF THE TOWNSHIP OF WILMOT

Respondent

- and -

OTHERS WHO MAY BE GRANTED PARTY  
STATUS UPON APPLICATION

Respondents

ACTING DRAINAGE REFEREE ) MONDAY THE 15<sup>th</sup> DAY  
ANDREW C. WRIGHT ) OF JANUARY, 2024  
)  
)

ORDER

The Court of the Drainage Referee has received a Motion Record from The Corporation of the Township of Wilmot (the “**Township**”) seeking procedural directions from the Court, notwithstanding that the Court has already scheduled a case management video conference on February 21, 2024 for essentially the same purpose. For the reasons that follow:

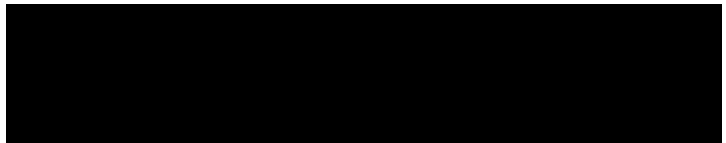
THIS COURT ORDERS that

1. The presiding Referee may vary or add to these rules at any time, either on request or as it sees fit. The presiding Referee may alter this Order by an oral ruling or by another written Order.
2. A copy of anything that is required to be delivered by a party to another or to be filed with the Court shall be delivered directly to the presiding Referee concurrently with delivery to the other party or its filing with the Court.
3. The Township’s motion for procedural directions will be heard by video conference using the Zoom platform on Wednesday, February 21, 2024, commencing at 10:00 in the morning.
4. For case management video conferences to be conducted by video conference, the following provisions shall apply:

- (a) The parties shall provide the presiding Referee the names and e-mail addresses of those who will be on hand at the video conference hearing; that includes counsel, any witnesses, and those giving instructions to counsel.
  - (b) Parties and those with a recognized interest in the proceeding, including news media, will be provided by the presiding Referee with access credentials, including a password, to log into the video conference at the appointed time.
  - (c) Parties are responsible for arranging to have their witnesses join the Zoom meeting to give their evidence at the time directed by the presiding Referee.
  - (d) Once logged on, the person will be held in a waiting area pending authorization by the presiding Referee to join the hearing.
  - (e) Parties intending to call a witness will ensure that the witness has a holy book (Bible or Koran) or an oath-taking article (such as an eagle feather) at hand if they are to be sworn to give evidence; a holy book is not required for a witness who affirms.
  - (f) Before giving testimony, each witness shall affirm to the presiding Referee orally that they are alone in the room and that they are not relying on any undisclosed document, such as speaking notes. Witnesses are not permitted to testify with others present in the room or to use undisclosed documents without the approval of the presiding Referee.
  - (g) For those joining the hearing to simply observe without participation, their microphone will be muted during the hearing conference.
  - (h) Those joining the hearing will need a device equipped with a webcam and a microphone and access to a reliable internet connection with adequate bandwidth; the device should always be plugged in to ensure that the battery does not run low.
  - (i) A smartphone may only be used at the discretion of the presiding Referee; the use of a smartphone is discouraged due to potential disruptions, such as incoming calls and messages, and the risk of running out of battery.
  - (j) Those joining the hearing will normally be alone in their location; if they are not, the presiding Referee may require such other persons to leave the room during the proceeding. There is an ongoing obligation to inform the presiding Referee if they are joined by someone else during the proceeding.
5. When any document is required or permitted to be served, it shall be served by personal service, registered mail or electronically (unless a statute or the Referee requires another method of service) and shall be sent to:
- (a) the party's representative, if any;

- (b) where the party is an individual and is not represented, to that party directly, where that party has provided an address for service and/or an e-mail address;
  - (c) where that party is a corporation and is not represented, to the corporation directly, to the attention of an individual with apparent authority to receive the document.
6. For the purposes of this Order, unless otherwise ordered, Andrew C. Wright, Acting Drainage Referee, shall be regarded as the presiding Referee.
  7. No adjournments or delays will be granted before or during the hearing except for serious hardship or illness.
  8. Costs of the day are reserved to the final disposition of this matter.
  9. Andrew C. Wright, Acting Drainage Referee, is not seized of the hearing of the merits of this application.

Dated at London this 15<sup>th</sup> day of January 2024.



Andrew C. Wright  
Acting Drainage Referee

## REASONS

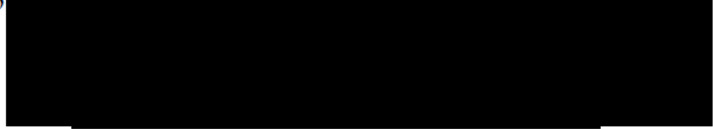
1. The Order to which these reasons are attached (the “**Order**”) is the start of an evolving case management and procedural process intended to prepare for a hearing of the merits.
2. Words and phrases defined in the Order have the same meaning when used in these reasons.
3. This application challenges the validity of a petition and the validity of an engineer’s report on the grounds that it does not comply with the requirements of the *Drainage Act*.
4. While the Notice of Application was not issued until December 20, 2023, the applicant himself gave a notice of intention to the Township in early December 2023. The Township decided to file that notice with the Superior Court of Justice in Kitchener to initiate this process. The result of the Township’s action is that the Court file was opened, and the Drainage Referee was notified weeks before the formal Notice of Application was issued. The Drainage Referee assigned the case to the Acting Drainage Referee; he is the presiding Referee.
5. By e-mail on December 14, 2023, counsel for the Township clarified for the presiding Referee that he was retained by the Township and not the Engineer. As a result, there is no solicitor-client relationship between the Engineer and the Township’s counsel and no privileged confidentiality about communication between them.
6. On December 19, 2023, the presiding Referee sent a letter to the parties and to Mr. Brickman, the Engineer, advising of his assignment, setting out an agenda for a case management video conference and asking for conflict dates in February and March 2024. The presiding Referee also asked for a copy of the petition and engineer’s report being challenged by this application. The Township was also reminded of its obligations under subsection 11(1) of the Rules to produce documentation. Subsection 11(1) of the Rules provides as follows:

11(1) Unless the referee orders otherwise, a municipality that is a party to a proceeding under the Act shall produce at the hearing all documents within its possession or control relating to the drainage works, including all reports, plans, specifications, assessments, by-laws, provisional by-laws, resolutions, correspondence and copies of notices sent to ratepayers entitled to notice.
7. As mentioned, on December 20, 2023 the Notice of Application was issued by the Superior Court of Justice in the Court of the Drainage Referee. On the same date, counsel for the applicant advised of his retainer and provided conflict dates.
8. No conflict dates were provided by counsel for the Township or by the Engineer. On December 28, 2023, the presiding Referee fixed a time and date for this case management video conference and gave notice to that effect to counsel for the parties and the Engineer by e-mailed letter on December 28, 2023. This notice letter included the following:

If the parties or Mr. Brickman do not attend or are not represented at this hearing, the presiding Referee may proceed in their absence, and they will not be entitled to any further notice of the proceeding. This notice is being given in accordance with the *Statutory Powers Procedure Act*, R.S.O. 1990, Chapter S.22.

9. By letter dated January 10, 2024, received by e-mail on Friday, January 12, 2024, counsel for the Township advised the presiding Referee for the first time that he had a conflicting engagement on February 21, 2024 and was unavailable to participate in the case management video conference.
10. If Township counsel has a conflict with the February 21, 2024 video conference date, it is because he did not provide conflict dates as requested in the Court's December 19, 2023 letter. This is not the first time this counsel has not responded about conflict dates and then complained about a hearing date fixed in the absence of his conflict information. This refusal to provide routine information as requested by the Court is an unacceptable abuse of the Court's pre-hearing process.
11. In the same vein, the Township has not provided the foundational documentation specifically requested in that December 19, 2023 letter or any documentation required of your client under subsection 11(1) of Regulation 232/15, being the Rules of Practice and Procedure in Proceedings Before The Referee. This obstructive suppression of documentary evidence is again an abuse of the Court's pre-hearing disclosure process, for which there will be consequences for the Township if this behaviour is not corrected.
12. Much of the content of the Township's counsel's January 10<sup>th</sup> letter is a distraction from the fundamental and unacceptable abuse of the Court's pre-hearing disclosure process.
13. If, in fact, the Township's counsel is unable to appear by video link at the time of the February 21, 2024 case management video conference, that hearing event will proceed in his absence. If he does appear, he will have the opportunity to put on the record points raised in his January 10<sup>th</sup> communication. Counsel for the applicant will have the opportunity to rely.
14. One way or the other, the Township's counsel will be provided with a copy of the Order issued following that February 21<sup>st</sup> video conference. The Township can then decide whether to comply to qualify to lead evidence in the hearing process.
15. With respect to the Township's January 10, 2024 motion record, it is an abuse of process, a blatant attempt to disrupt the Court's already scheduled pre-hearing process. The already scheduled case management video conference to deal with the same matters will proceed on February 21, 2024. Paragraph 3 of the Order fixes the return date for the Township's motion to coincide with the already scheduled pre-hearing case management conference. If it turns out the Township's counsel is unable to appear at that time, the Township's motion will be adjourned to be heard when calendars permit to the extent that the Township's issues have not already been addressed by the Order arising from the February 21<sup>st</sup> video conference.

Dated at London this day 15<sup>th</sup>



Andrew C. Wright  
Acting Drainage Referee