

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)	HEARD ON WEDNESDAY,
ANDREW C. WRIGHT)	THE 21 st DAY OF FEBRUARY, 2024
)	
)	

ORDER

The Court of the Drainage Referee fixed this date for a pre-hearing conference to begin case management of this application, to address the following:

- (a) Providing for the delivery directly to the presiding Referee, of anything a party is required to provide to the other party(ies) or is filed with the Court concurrently with its delivery or filing with the Court.
- (b) Identifying parties, including those who may be affected by the result of this application and, establishing a means of putting those potentially affected persons on notice of this application and giving them an opportunity to participate as a party.
- (c) Fixing a time for the delivery by the Township of documentation, having regard for subsection 11(1) of Regulation 232/15, being the Rules of Practice and Procedure in Proceedings Before The Referee (the “**Rules**”).
- (d) Fixing a time for the delivery of copies of the contents of the files of Stephen Brickman, P.Eng., and Headway Engineering relating to the Engineer’s Report on the Proposed Jananna Drain dated April 28, 2023 issued by Headway Engineering and signed by Mr. Brickman (the “**Engineer’s Report**”). Mr. Brickman and his firm, Headway Engineering, are jointly and severally referred to as the “**Engineer**”.

- (e) Fixing a time for the applicant to deliver supporting evidence.
- (f) Fixing a time for the respondent to deliver responding materials.
- (g) Identifying preliminary issues.
- (h) Scheduling pre-hearing production and exchange of documents, including affidavits and witness statements for expert witnesses and affidavits and evidence summaries for other witnesses.
- (i) Making provisions about access to and login credentials for participants in the hearing.
- (j) Providing for service by personal service, registered mail or electronically (unless a statute or the Referee requires another method of service).
- (k) Identifying the number and nature of witnesses to be called by each party.
- (l) Estimating the amount of time required for the hearing.
- (m) Setting the commencement date for the hearing.
- (n) Dealing with such other matters or things as may arise and which the presiding Referee may determine is expedient to permit.

and after hearing the submissions of counsel, 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. This Order is supplementary to the January 15, 2024 Order (issued the same day), which remains in effect, as augmented by this Order, except as specifically amended by this Order, and the reasons for those previous decisions remain extant. In the event of a conflict between Orders, the more recent Order shall prevail.
3. A copy of anything that is required by this Order 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. Delivery shall be in machine-readable electronic format; a hard copy may also be delivered in addition to the electronic version.

Definitions

4. For the purposes of this Order and the reasons therefor, unless the context requires a different meaning:

- (a) the “**Act**”, sometimes referred to as the “***Drainage Act***”, means the *Drainage Act*, R.S.O. 1990 Chapter D.17, as amended.
- (b) The “**Conservation Authority**” means the Grand River Conservation Authority
- (c) The “**Drainage Superintendent**” means K. Smart Associates Limited and John Kuntze P.Eng. President, in their capacity as Drainage Superintendent, appointed in accordance with the Act by by-law of the Township.
- (d) the “**Proposed Jananna Drain**” means the *Drainage Act* project administered by the Township beginning with the *Drainage Act* process leading up to the completion and adoption of the Engineer’s Report, including rights of appeal to the Tribunal, then the construction of the Proposed Jananna Drainage Works and thereafter the maintenance and repair of the Proposed Jananna Drainage Works all of the cost of which to be assessed to and paid for by the owners of lands that use the Proposed Jananna Drainage Works in accordance with the assessment schedules in the Engineer’s Report.
- (e) The “**Proposed Jananna Drainage Works**” means the physical infrastructure components of the drainage works, including both the proposed East Branch and the proposed West Branch of the Jananna Municipal Drain, to be constructed, maintained and repaired under the authority of the *Drainage Act* in accordance with the Engineer’s Report.
- (f) the “**Engineer**” means both Stephen Brickman, P.Eng., and his firm Headway Engineering, together.
- (g) the “**Engineer’s Report**” means the Engineer’s Report on the “Bamberg Creek, Jananna, and Koch-Lies Municipal Drains 2023” dated April 28, 2023 issued by the Engineer and signed by Stephen Brickman, P.Eng., including plan and profile.
- (h) the “***Municipal Act***” means the *Municipal Act, 2001*, S.O. 2001, Chapter 25, as amended.
- (i) The “**Petition**” means the petition signed by Walter Krupnik as President of Jananna Corp. on April 26, 2021 that initiated the process under the Act which has resulted in the Engineer’s Report.
- (j) the “***Statutory Powers Procedure Act***” means the *Statutory Powers Procedure Act*, R.S.O. 1990, Chapter S.22, as amended.
- (k) the “**Township**” means The Corporation of the Township of Wilmot, the respondent.
- (l) the “**Rules**” means Regulation 232/15, being the Rules of Practice and Procedure in Proceedings Before The Referee.

- (m) the “**Rules of Civil Procedure**” means R.R.O. 1990, Reg. 194, being the Rules of Civil Procedure under the *Courts of Justice Act, R.S.O. 1990, c. C.43*, as amended.
- (n) the “**Tribunal**” means the Agriculture, Food and Rural Affairs Appeal Tribunal.

Parties and Representation

- 5. The applicant is represented by Samuel Kirwin, a lawyer in the Law Office of Samuel Kirwin Professional Corporation.
- 6. The Township is represented by Paul Courey, a lawyer in the office of Courey Law Professional Corporation.
- 7. Others may be added as parties following the circulation of notice of this application in accordance with directions to be given in the future, and if they are added as parties, they and their representative will be added.

Exchange of Documentation

- 8. On or before March 31, 2024, the applicant shall deliver to the Township the applicant's supporting affidavit or affidavits together with all relevant documents in the possession and control of the applicant which are not attached as exhibits to the supporting affidavit or affidavits.
- 9. If, after review of the productions from the Township and the Engineer as required by paragraphs 10 and 13 below, respectively, the applicant wishes to deliver one or more supplementary supporting affidavits, the applicant may do so.
- 10. On or before March 31, 2024, the Township shall deliver to the applicant all documentation related to the Proposed Jananna Drain, which is in the possession or control of or accessible by the Township, having regard for subsection 11(1) of the Rules, and without limiting the generality of the foregoing, the following will be delivered:
 - (a) Any correspondence, including letters and e-mails, and notes made regarding meetings or conversations, by telephone or in person, between the petitioner and the Township and/or the Drainage Superintendent with respect to the Petition, the Engineer’s Report, or the Proposed Jananna Drain, whether before or following the submission by the petitioner and receipt of the Petition by the Township.
 - (b) Any correspondence, including letters and e-mails, and notes made regarding meetings or conversations, by telephone or in person, between the applicant and the Township and/or the Drainage Superintendent with respect to the Petition, the Engineer’s Report, or the Proposed Jananna Drain, whether before or following the submission by the petitioner and receipt of the Petition by the Township.
 - (c) Any correspondence, including letters and e-mails, and notes made regarding meetings or conversations, by telephone or in person, between the Township and the Drainage Superintendent with respect to the Petition, the Engineer’s Report,

or the Proposed Jananna Drain, whether before or following the submission by the petitioner and receipt of the Petition by the Township.

- (d) Any correspondence, including letters and e-mails, and notes made regarding meetings or conversations, by telephone or in person, between the Township and/or the Drainage Superintendent and the Engineer related to the Petition, the Engineer's Report or the Proposed Jananna Drain, including any request-for-proposal (RFP) document and related documents issued by the Township leading to the selection and appointment of the Engineer.
- (e) The contract between the Township and the Engineer related to the Petition, the Engineer's Report or the Proposed Jananna Drain.
- (f) Minutes of meetings of Council or a Committee of Council, including Committee of the Whole, related to the Petition, the Engineer's Report or the Proposed Jananna Drain.
- (g) All reports by Township staff, the Drainage Superintendent or the Engineer to Council or Committees of Council related to the Petition, the Engineer's Report or the Proposed Jananna Drain. All submissions made at any time by any other person to Council or a Committee of Council relating to the Petition, the Engineer's Report or the Proposed Jananna Drain.
- (h) Notice of the on-site meeting for the Proposed Jannana Drain and the notes made at the time of the on-site meeting or immediately following by the Drainage Superintendent or an employee or other agent of the Township in attendance at the on-site meeting for the purpose of recording that proceeding. If there was more than one on-site meeting, the same information is to be provided about each on-site meeting.
- (i) If the finally adopted Engineer's Report is different than the one initially presented by the Engineer, circulated to the stakeholders and considered by the Council, then a copy of the initially presented report.
- (j) While it is a duplication of items (f) and (g) above, minutes of the Council's meeting(s) to consider the Engineer's Report, including all reports by Township staff, the Drainage Superintendent or the Engineer to Council and all submissions made at any time by any other person.
- (k) If Council did not make a decision at the time of the meeting to consider, then the minutes of the meeting at which the decision was made, again including all reports made by Township staff, the Drainage Superintendent or the Engineer at that time to Council and all submissions made at any time by any other person.
- (l) If the Engineer's Report, as provisionally adopted, is different than the one initially presented, then a copy of the Engineer's Report as provisionally adopted.

- (m) Minutes of the meeting of the Court of Revision, including all reports by or submissions made by Township staff, the Drainage Superintendent or the Engineer to the Court of Revision and all submissions made by any other person.
 - (n) The Minutes of the Council meeting at which the provisional by-law was finally adopted, the Engineer's Report, and a copy of the finally passed by-law adopting the Engineer's Report.
 - (o) The most recent engineer's report on the Koch-Leis Drain, including plan and profile to the extent that such engineer's report is not superseded by the Engineer's Report.
 - (p) If any part of Bamberg Creek in the vicinity of the proposed outlet for the Proposed Jananna Drainage Works is part of a municipal drain under the Act, the most recent engineer's report on such municipal drain(s), including plan and profile.
 - (q) Unless already produced by the Engineer, maps and plans, in hard copy or electronic, related to the Petition, the Engineer's Report or the Proposed Jananna Drain, used by the Engineer or which could have been used by the Engineer to determine an "area requiring drainage" for purposes of the Petition and/or the watershed for the Proposed Jananna Drain. This documentation includes topographical information, maps or surveys available from the Waterloo Region's GIS database, the location and elevation contours of any floodplain areas and wetlands regulated by the Conservation Authority, all topographical data and plans generated for the Township by the Engineer's survey work in connection with the Petition, the Engineer's Report or the Proposed Jananna Drain and any other topographical data and plans otherwise available to the Engineer pertaining to the Petition, the Engineer's Report or the Proposed Jananna Drain.
11. For the purposes of paragraph 10 of this Order, all documentation related to the Proposed Jananna Drain, which is in the possession or control of or accessible by the Drainage Superintendent, as an employee-like, contracted agent of the Township, shall be deemed to be in the possession or control of or accessible by Township.
12. For the purpose of giving notice of this application to those who may potentially be affected by the result of this application and giving them an opportunity to participate as a party, on or before March 31, 2024, the Township shall deliver to the applicant
- (a) a list of the names and addresses, according to the last revised assessment roll, of the owners of lands identified in the Engineer's Report as being assessed or awarded allowances for the Proposed Jananna Drain; if the petitioner for the Proposed Jananna Drain are not amongst those listed, their names and addresses will also be included;
 - (b) the address of the Township office where hearing-related material will be made available for review by members of the public during normal business hours; and

- (c) the URL (Uniform Resource Location) for the part of the Township's website where that material will be posted and made available for review by the public.
13. On or before March 31, 2024, the Engineer shall deliver to the parties copies of the contents of the Engineer's files relating to the Petition, the Engineer's Report and the Proposed Jananna Drain, and without limiting the generality of the foregoing, the following will be delivered.
- (a) The Engineer's *curriculum vitae*.
 - (b) All correspondence, including letters and e-mails, and notes made regarding meetings or conversations, by telephone or in person, between the Engineer and the Township and/or the Drainage Superintendent related to the Petition, the Engineer's Report or the Proposed Jananna Drain.
 - (c) The contract between the Township and the Engineer related to the Petition, the Engineer's Report or the Proposed Jananna Drain if it has not been provided by the Township.
 - (d) All correspondence, including letters and e-mails, and notes made regarding meetings or conversations, by telephone or in person, between the Engineer and the petitioner, the applicant or any other person related to the Petition, the Engineer's Report or the Proposed Jananna Drain.
 - (e) All correspondence, including letters and e-mails, and notes made with respect to meetings or conversations, by telephone or in person, between the Engineer and the Township's legal counsel related to the Petition, the Engineer's Report or the Proposed Jananna Drain.
 - (f) Notes made by the Engineer at the time of or following the on-site meeting for the purpose of recording that proceeding. If there was more than one on-site meeting, the same information is to be provided about each on-site meeting.
 - (g) All documentation, including maps and plans, in hard copy or electronic, related to the Petition, the Engineer's Report or the Proposed Jananna Drain, used by the Engineer or which could have been used by the Engineer to determine an "area requiring drainage" for purposes of the Petition and/or the watershed for the Proposed Jananna Drain. This documentation includes any topographical information, maps or surveys available from the Waterloo Region's GIS database, the location and elevation contours of any floodplain areas and wetlands regulated by the Conservation Authority, all topographical data and plans generated by the Engineer's survey work in connection with the Petition, the Engineer's Report or the Proposed Jananna Drain and any other topographical data and plans otherwise available to the Engineer pertaining to the Petition, the Engineer's Report or the Proposed Jananna Drain.

14. Documents to be delivered as contemplated by paragraphs 8, 10, 12, 13 and 8 shall be in machine-readable electronic format. Hard copy may also be delivered in addition to the electronic versions.

Future Case Management Conferences

15. There will be a further case management video conference on Monday, April 15, 2024 commencing at 10:00 am, the purpose of which will be
 - (a) to give directions for the giving of notice to those who may be affected by the result of this application and establishing a process for giving them an opportunity to participate as a party;
 - (b) to determine whether the Township has sufficiently satisfied the requirements of paragraphs 10 and 12 of this Order to qualify to provide evidence in this process either before or at the time of the hearing of the merits of this application;
 - (c) to determine whether the Engineer has sufficiently satisfied the requirements of paragraph 13 of this Order to qualify to provide evidence in this process either before or at the time of the hearing of the merits of this application;
 - (d) to fix a time for the Township to deliver its responding affidavits if it is determined that the Township is then qualified to provide evidence in this application process; and
 - (e) to deal with such other matters or things as may arise and which the presiding Referee may determine is expedient to permit.
16. There will be a further case management video conference on Wednesday, September 11, 2024 commencing at 10:00 am, the purpose of which will be
 - (a) to determine who, amongst those seeking party status, are to be added as parties and to establish a schedule for any added party to provide a position or witness statement and to produce any documentation upon which they intend to rely, including any supporting affidavits;
 - (b) to amend the Style of Cause of the application to reflect the parties proceeding the hearing of the merits;
 - (c) to establish a date for the applicant to deliver evidence in reply to the Township's responding material as well as to evidence from any added parties; and
 - (d) to deal with such other matters or things as may arise and which the presiding Referee may determine is expedient to permit.
17. Future case management video conferences will be scheduled to address:
 - (a) Hearing of preliminary motions.

- (b) Establishing an issues list and scheduling pre-hearing production and exchange of documents, including affidavits or witness statements for expert witnesses and affidavits or evidence summaries for other witnesses.
- (c) Identifying the number and nature of witnesses to be called by each party.
- (d) Estimating the amount of time required for the hearing.
- (e) Setting the commencement date for the hearing.
- (f) Making provisions about access to and login credentials for participants in the hearing.
- (g) Providing for service by personal service, registered mail or electronically (unless a statute or the Referee requires another method of service).
- (h) Dealing with such other matters or things as may arise and which the presiding Referee may determine is expedient to permit.

Township's January 2024 Motion for Procedural Directions

18. The Township's January 2024 Motion for procedural directions is dismissed.

Video Conference Protocols

19. For case management video conferences and the hearing on the merits 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.

Documents and Exhibits

20. Because case management video conferences and the hearing on the merits are to be conducted by video conference, protocols concerning the entering of exhibits are warranted and the following apply in that connection:
- (a) A document, including a plan or photograph, to be relied upon at a hearing must be identified as an exhibit.
 - (b) To be identified as an exhibit, the document must be provided to the presiding Referee and to all other parties at least 2 days in advance of the video conference hearing at which it is to be presented as an exhibit; the presiding Referee may abridge this time.
 - (c) The presiding Referee will decide whether to enter the document as an exhibit and, if it is allowed, the presiding Referee will assign an exhibit an alpha/numeric identifier.
 - (d) Once the document has been entered as an exhibit, the party that introduced the exhibit shall, within 3 business days following the conclusion of the video conference hearing, file an electronic copy of the exhibit with the court registrar and, when doing so, shall identify Court File No.: CV-23-00001662-0000 (Kitchener) and the exhibit identifier assigned by the presiding Referee; a copy of the letter or e-mail of transmittal shall be provided to the presiding Referee.
 - (e) Court Orders, the pleadings, notices of motion, facta, case law, legislation and compendiums of authorities will not be marked as exhibits though Court Orders,

pleadings, notices of motion and facta should be filed with the court and item 20(d) above applies *mutatis mutandis*.

21. At the time of this Order, the following document is part of the record:

Exhibit No.	
	Notice of Application issued December 20, 2023
No.: 1	Reserved for the Petition when produced
No.: 2	the Engineer's Report
No.: 3	<p>Township's January 10, 2024 Motion Record for Procedural Directions</p> <p>Tab 1 – Notice of Motion</p> <p>Tab 2 – Affidavit of Jeffery Bunn sworn January 10, 2024 with three Exhibits;</p> <p>Exhibit A - copy of the applicant's Notice of Intention to bring this application.</p> <p>Exhibit B - chronology of documents and events with copies of correspondence, including the December 19, 2023 agenda letter and the December 28, 2023 notice letter from the presiding Referee, the Notice of Application and e-mail traffic.</p> <p>Exhibit C - Township's proposed procedural order.</p>
	Order issued by Acting Referee Andrew Wright on January 15, 2024 fixing the return date for the Township's Motion for Directions
No. 4	<p>Affidavit of Cory Kittel sworn January 29, 2024 in response to the Township's January 10, 2024 Motion for Procedural Direction including four Exhibits:</p> <p>Exhibit A – the Petition</p> <p>Exhibit B – the Engineer's Report</p> <p>Exhibit C – Township of Wilmot By-law No. 2023-32 provisionally adopting the Engineer's Report with first and second reading on June 26, 2023 and not yet finally passed.</p> <p>Exhibit D – Examples of Styles of Cause in three cases: <i>Herron v St. Charles (Municipality)</i>, 2019 ONDR 1; <i>Geotz v South Bruce (Municipality)</i>, 2020 ONRD 1; <i>Chrustie v Ottawa (City)</i>, 2021 ONDR 1</p>
	Decision of Referee R.G. Waters in the case of <i>Brzezka v Niagara on the Lake (Town)</i> issued October 19, 2022 and reported at 2022 ONDR 1 (CanLII)

	Decision of Referee Wm.D. Turville in the case of <i>Jones v Derby (Town)</i> issued December 8, 1986 and reported at 1986 ONDR 3 (CanLII)
	Decision of Referee D.A. O'Brien in the case of <i>M&M Farms v Kingsville (Town)</i> issued September 29, 2004 and reported a 2004 ONDR 1 (CanLII)
	Decision of Referee S.L. Clunis in the case of <i>McKeen v East Williams (Township)</i> issued May 31, 1966 and reported at 1966 ONDR 1 (CanLII)
	Decision of referee D.A. O'Brien in the case of <i>Pannabecker v West Wawanosh (Township)</i> issued June 12, 2000 and reported at 2000 ONDR 2 (CanLII)
	Decision of Referee Wm.D. Turville in the case of <i>Westendorp v Elizabethtown (Township)</i> issued June 10, 1986 and reported at 1986 ONDR 1 (CanLII)
	Decision of Acting Referee A.C. Wright in the case of <i>Melidy v Holland Marsh Drainage System Joint Municipal Service Board</i> , issued February 25, 2023 and reported at 2023 ONDR 6 – Note: this decision is under appeal to the Divisional Court

This list will expand as production occurs, as contemplated by paragraphs 8, 10, 13 and 8 of this Order.


22. The documents that have exhibit numbers will retain their exhibit numbers through the case management hearings and hearing(s) on the merits of this case. New exhibits will be identified by the next ensuing exhibit number and be added to the list as the hearing(s) progresses.
23. The documents listed are intended to reflect those things which would normally be filed in court or which would be used in the course of the hearing; it does not include but does not intend to dispense with routine items such as appearances, affidavits of service required by the court staff for filings such as the pleadings, appearances, any motions and routine affidavits of service for supporting affidavits.
24. If counsel or a witness intends to rely upon case law, other than the cases listed in paragraph 21 or legislation other than the Act, copies must be provided to the presiding Referee and to all other parties at least 2 days in advance of the video conference hearing at which it is to be referred to; the presiding Referee may abridge this time.

General Matters

25. 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.
26. For the purposes of this Order, unless otherwise ordered, Andrew C. Wright, Acting Drainage Referee, shall be regarded as the presiding Referee.
27. No adjournments or delays will be granted before or during the hearing except for serious hardship or illness.
28. Costs of the day are reserved to the final disposition of this matter.
29. Andrew C. Wright, Acting Drainage Referee, is not seized of the hearing of the merits of this application.

Dated at London this 22nd day of February 2024.



Andrew C. Wright
Acting Drainage Referee

REASONS

1. The Order to which these reasons are attached (the “**Order**”) is part 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 the Petition and the validity of the Engineer’s Report on the grounds that it does not comply with the requirements of the 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. Someone decided to file that notice with the Superior Court of Justice in Kitchener to initiate this process; the Township was involved in that filing exercise. The result 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.

Production of Documents by Parties

6. On December 19, 2023, the presiding Referee sent a letter to the parties and to 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, which are 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 so advised counsel for the parties and the Engineer by e-mailed letter on December 28, 2023.

9. Counsel for the Township now asserts that he could not provide conflict dates because the Township's offices were closed between Christmas and New Year's. If, as now claimed, on account of prior commitments to hearings and holidays, counsel had no availability in February and March 2024 for a two-hour case management video conference, that would have been evident from a glance at his calendar on December 19, 2023. His failure to provide that information, at the request of the Court, has nothing to do with the Township's offices being closed for the holiday season.
10. 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.
11. Concurrently, the Township brought a motion for procedural directions, notwithstanding that the Court has already scheduled a case management video conference on February 21, 2024, for essentially the same purpose. By Order issued on January 15, 2024 – now reported as *Kittel v Wilmot (Township)*, 2024 ONDR 1 - the Court fixed the return date for the Township's motion to coincide with the already scheduled case management video conference on February 21st and added that, 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 21st video conference.
12. Both Mr. Courey and the Engineer were provided with login credentials for the February 21, 2024 case management video conference hearing.
13. Mr. Courey appeared at the video conference at the appointed time without an explanation or the hint of an apology for having misinformed the court about his unavailability for the case management hearing and hearing of the Township's motion for procedural directions.
14. The Engineer did not appear.
15. The agenda for the case management hearing was addressed first, and then submissions with respect to the Township's motion were heard to the extent the procedural matters had not already been dealt with as part of the case management hearing. Because there is nothing that had not already been addressed in the Order, the Township's January 2024 Motion for procedural directions is dismissed.

Consequences of Not Producing Pertinent Documentation

16. The Township's obstructive non-disclosure or suppression of documentary evidence to date, is an unacceptable subversion of the Court's pre-hearing disclosure process and is an abuse of that process. To the extent that the Township is responsible and accountable for the Engineer's production of the Engineer's file, that too is an abuse of the Court's pre-hearing disclosure process.

17. The Order's end-of-March 2024 deadline for delivery of documents by the Township and Engineer reflects a reasonable time of more than three months from the time of the initial December 19, 2023 request¹ by the presiding Referee. This is also consistent with paragraph 5 of the Township's draft procedural order², which proposes production within 60 days.
18. On January 26, 2024, the Township produced the Engineer's Report; otherwise, the Township has not provided the documentation specifically requested on December 19, 2023, nor any other documentation as contemplated by subsection 11(1) of the Rules.
19. On January 29, 2024 the applicant provided an affidavit sworn that day in response to the Township's January 10, 2024 motion for procedural direction, and in that affidavit the applicant provided as Exhibits the Petition, the Engineer's Report and Township's By-law No.: No. 2023-32 provisionally adopting the Engineer's Report on June 26, 2023. These are the three things the presiding Referee specifically asked the Township to produce on December 19, 2023.
20. I regard the Township's obstructive suppression of documentary evidence as 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. Subsection 23(1) of the *Statutory Powers Procedure Act* provides as follows:

23(1) A tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes.
21. In paragraphs 10, 11 and 12 of the Order I have given a detailed description of the documentation the Township is to produce in order that the Court and the other parties will have full and fair pre-hearing disclosure of pertinent documents. Last-minute walk-on witnesses and documents are not acceptable for a fair trial and are an abuse of the pre-hearing disclosure process in the Court of the Drainage Referee. If the Township does not produce all documentary evidence in its possession or control or to which it has access, either directly or via the Drainage Superintendent or through the Engineer, it cannot reasonably expect to lead any other evidence and it would be unfair to the other party or parties to allow the Township to do so. If the Township does not produce the documentation referred to in paragraphs 10, 11 and 12 of the Order by the date mentioned in those paragraphs, it is my intention to exercise my authority under subsection 23(1) of the *Statutory Powers Procedure Act* to disqualify the Township from leading evidence in response to the application.

¹ The December 19th letter containing that request is among the unnumbered pages of Exhibit B to the Affidavit of Jeffery Bunn sworn January 10, 2024 and found under Tab 2 of the Township's January 2024 Motion Record entered as Exhibit No.: 3.

² That draft procedural Order is Exhibit C to the Affidavit of Jeffery Bunn sworn January 10, 2024 and found under Tab 2 of the Township's January 2024 Motion Record which has been entered as Exhibit No.: 3 in this proceeding.

22. In the usual course, it is not necessary to specify in detail the documentation to be produced by a party, but rather, a direction to produce all relevant documents usually suffices, as has been done with the direction to the applicant in paragraph 8 of the Order.
23. For reasons difficult to understand, experience in the case of Mr. Courey's clients indicates that more specific descriptions are required to avoid misunderstandings and misinterpretations about what is being asked for and about what is relevant. In the Township's January 2024 motion for procedural directions, paragraph 5 of the proposed draft procedural Order³ appears to propose negotiating the relevant documents to be produced. Relevance is not something to be negotiated; a document is relevant to the Proposed Jananna Drain, or it is not and if in doubt, it should be produced. Neither the Court nor the other parties know what they don't know, so it is difficult to guess what the Township has in its files. The result is a broadly cast litany of generic descriptions of documents that are most probably in the Township's possession and control. This may result in the production of some documentation which has little or no probative value, but it is the consequence of the Township's failure to respond to the Court's requests to date. If examination of documents produced by the Township suggests the existence of other potentially relevant documents, supplementary Orders will be issued requiring that those other documents be produced as well. None of this should be necessary, but this is the way of it with Mr. Courey's clients and another aspect of abuse of the pre-hearing disclosure process in the Court of the Drainage Referee.
24. In the same vein, paragraph 13 of the Order details the documentation the Engineer is expected to produce in order that the Court and the other parties will have full and fair pre-hearing disclosure of pertinent documents, the suppression of which documentation amounts to an abuse of the pre-hearing disclosure process in the Court of the Drainage Referee.
25. While the Engineer may not be a party, the Engineer is bound to be fair, honest, and independent by section 11 of the Act, which provides as follows:

The engineer shall, to the best of the engineer's skill, knowledge, judgment and ability, honestly and faithfully, and without fear of, favour to or prejudice against any person, perform the duty assigned to the engineer in connection with any drainage works and make a true report thereon.
26. The Engineer is not an employee or the agent of the Township but is an independent statutory official with obligations and duties to discharge in accordance with and under the aegis of the Act. In my view, the duties imposed by section 11 of the Act extend to the Engineer's relationship with the Court of the Drainage Referee. That duty requires the Engineer to bring to the Court of the Drainage Referee his skill, knowledge, judgement, ability, honesty, and good faith. The Engineer's failure to produce the documentation referred to in paragraph 13 of the Order by the date mentioned in that

³ The proposed procedural Order is included as Exhibit C to the Affidavit of Jeffery Bunn, sworn January 10, 2024, and found under Tab 2 of the Township's January 2024 Motion Record, which has been entered as Exhibit No.: 3 in this proceeding.

paragraph, whether on the Engineer's own initiative or on the advice or direction of the Township, is inconsistent with that duty. Much like the Township, if the Engineer does not produce, without any exclusions, all documentary evidence in the Engineer's possession or control or to which the Engineer has access, the Engineer cannot reasonably expect to give any other evidence in defence of the Engineer's Report, and it would be unfair to the other party or parties to allow the Engineer to do so. Should the Engineer fail to produce the documentation referred to in paragraph 13 of the Order by the date mentioned in that paragraph, it is my intention to exercise my authority under subsection 23(1) of the *Statutory Powers Procedure Act* to disqualify the Engineer from giving evidence in defence of the Engineer's Report.

27. The Engineer was told by the Court on December 19, 2023⁴ that, if he wished to exclude any part of the Engineer's file from the Order to produce, the Engineer was to appear at the time of this case management conference to explain which part he wished to exclude and why. The Engineer has not appeared so there will be no exclusions from the Engineer's requirement to produce the documentation referred to in paragraph 13 of the Order.
28. I am going to digress to address a couple of extraneous matters raised by Mr. Courey in his January 10, 2024 letter (not sent until January 12, 2024)⁵. Mr. Courey says his client is troubled that I am even aware of Mr. Brickman, P.Eng., much less that he signed the Engineer's Report. Mr. Courey says that Mr. Brickman's name does not appear in the notice of intent or the Notice of Application. It is unclear what Mr. Courey is suggesting, but the notice of intent and the Notice of Application both identify Headway Engineering as having issued the Engineer's Report. Not being familiar with that entity, the presiding Referee "Googled" Headway Engineering and discovered its address and contact information and that Mr. Brickman is the only professional engineer amongst the Headway Engineering personnel. A reasonable assumption was made that Mr. Brickman signed the Engineer's Report.
29. Again, in Mr. Courey's letter dated January 10th (not sent until January 12, 2024), there is a complaint that the presiding Referee is communicating with Mr. Brickman directly about the production of documents and his evidence. Section 13(2) of the Rules provides that
 - 13(2) At the start of the hearing and before any evidence is given, the referee may call the engineer to give evidence in respect of any matters within the engineer's knowledge the referee considers likely to help describe the issues in dispute, and the engineer is to be regarded as an expert witness

⁴ The December 19, 2023 letter referred to is amongst the unnumbered pages of Exhibit B to the Affidavit of Jeffery Bunn sworn January 10, 2024 found under Tab 2 of the Township's Motion to the Township's January 2024 Motion Record entered as Exhibit No.: 3. The part of that letter which cautions the Engineer about needing to appear is quoted in paragraph 32.

⁵ This letter January 10, 2024 letter is amongst the unnumbered pages of Exhibit B to the Affidavit of Jeffery Bunn sworn January 10, 2024 and found under Tab 2 of the Township's January 2024 Motion Record entered as Exhibit No.: 3.

called by the referee and is not eligible, while giving the evidence, to be examined or cross-examined by any of the parties.

13(3) An engineer who is called to give evidence under subsection (2) is eligible to be called later in the hearing as a witness for any party.

30. The presiding Referee may call the engineer to give evidence at the start of the hearing of the merits, and Mr. Courey is aware that I have done so in previous hearings.

31. With respect to calling upon the engineer to produce his file in advance of the hearing, reference is made to Rule 17, which says that “The referee may consider the Rules of Civil Procedure when determining a procedural matter, not expressly provided for in these rules.” I take that to mean that the Referee need not but has the discretion to look to the Rules of Civil Procedure for guidance with respect to matters not addressed by the Rules. In this case, guidance is found in section 30.10 of the Rules of Civil Procedure with respect to the production of documents in the possession, control or power of a person not a party which are not privileged when the court is satisfied that, (a) the document is relevant to a material issue; and (b) it would be unfair to proceed to trial without having discovery of the documents. The procedural requirement is that the parties and the non-party be put on notice and be given an opportunity to respond.

32. In the Court’s December 19, 2023 agenda letter⁶ to the parties and to Mr. Brickman, paragraph 3 explains

Mr. Brickman, the reason you are receiving this correspondence relates to the production of your file relating to your Engineer’s Report on the proposed Jananna Drain dated April 28, 2023. Mr. Courey has been retained by Wilmot Township, but he has confirmed that he is not acting for you or your firm. In another case, recently, he asserted that not being in possession or control of the engineer’s files, his municipal client was not able to produce the engineer’s file contents or persuade the engineer to do so. And, not being the lawyer for the engineer, he has no authority to speak for the engineer. My intention, therefore, is to address that part of the Order for production of the contents of your engineering file directly to you and your firm, but before doing so, I want to give you the opportunity to be heard. If you wish me to exclude any part of your file from my proposed Order to produce, I will want to hear from you which part and why at the time of the case management conference I am trying to schedule.

33. As indicated previously, the procedural requirement inspired by section 30.10 of the Rules of Civil Procedure for the production of documents in the possession, control or power of a person, not a party, is that the parties and the non-party be put on notice and be given an opportunity to respond. Mr. Courey’s complaint is that the parties and non-party are on notice and being given an opportunity to respond. There is no suggestion by

⁶ This December 19th agenda letter is amongst the unnumbered pages of Exhibit B to the Affidavit of Jeffery Bunn sworn January 10, 2024, found under Tab 2 of the Township’s Motion to the Township’s January 2024 Motion Record entered as Exhibit No.: 3.

Mr. Courey that the Engineer's file is not relevant to material issues in this case, nor could there be. Mr. Courey's solution is to offer the Engineer for examinations for discovery which, in my view, is an entirely inadequate alternative.

30. Another example of extraneous distractions is a more recent demand by Mr. Courey for a report from the presiding Referee under section 114 of the Act. Section 114 of the Act provides that "When the referee proceeds partly on view or on any special knowledge or skill possessed by him or her, he or she shall put in writing a statement thereof sufficiently full to allow the Divisional Court to form a judgment of the weight that should be given thereto, ...". The notion that the presiding Referee would drive from London in the dead of winter to view the applicant's and the petitioner's rural properties from the roadside in a remote part of the Region of Waterloo is far-fetched. To be clear, it did not happen. That said, the presiding Referee's internet browsing has revealed that the petitioner's and the applicant's properties are shown on assessment-based mapping, showing lot fabric, roads and watercourses superimposed on aerial photography and on maps or surveys available from the Waterloo Region's GIS database, which likely include topographical information, and on Conservation Authority maps showing the location and elevation contours of floodplain areas and wetlands regulated by the Conservation Authority. This internet browsing does not constitute the taking of a view, but it does form the basis for the presiding Referee's expectation and requirement that details of all of that mapping are to be produced by the Township as part of the pre-hearing disclosure process along with all topographical data and plans generated for the Township by the Engineer's survey work in connection with the Petition, the Engineer's Report or the Proposed Jananna Drain and any other topographical data and plans otherwise available to the Engineer pertaining to the Petition, the Engineer's Report or the Proposed Jananna Drain; hence clause 10(q) of the Order

34. These are examples of extraneous matters raised to attempt to distract from the Township's fundamental and unacceptable abuse of the Court's pre-hearing disclosure process. To quote Winston Churchill,

You will never reach your destination if you stop and throw stones
at every dog that barks.

So, I do not intend to respond to every diversionary gambit other than to reiterate that the Township's non-disclosure or suppression of documentary evidence to date is an unacceptable obstruction of the Court's pre-hearing disclosure process and is an abuse of that process. To the extent that the Township is responsible and accountable for the Engineer's production of the Engineer's file, that too is an abuse of the Court's pre-hearing disclosure process.

35. Before leaving the matter of document production, a comment is warranted about the approach to document production that the presiding Referee prefers and welcomes. It facilitates the pre-hearing disclosure process if the municipality takes responsibility for producing the engineer's file and promptly provides all documentation in the possession, control and available to both the municipality and the engineer with the caveat that, if the municipal has reservations about privilege attached to some productions and/or if the engineer wishes to exclude some part of the engineer's file from production, counsel

and/or the engineer may identify the part sought to be excluded and why; and the presiding Referee will then schedule a case management conference to consider the matter and give directions.⁷ Leaving aside convenience and efficiency, amongst other things, this approach has the advantage of avoiding for the engineer the awkward position of a potential divergence of duties to the Court and direction from the municipal client.

36. For the record, I have entered a stand-alone copy of the Petition as Exhibit 1 (even though it is also Exhibit A to the Kittel affidavit sworn January 29, 2024), and a stand-alone copy of the Engineer's Report has been marked as Exhibit No.: 2 (even though it is also Exhibit B to the Kittel affidavit sworn January 29, 2024). I have identified as Exhibit No.: 3 the Township's January 2024 Motion Record for procedural directions, and I have marked the responding affidavit of Mr. Kittel sworn on January 29, 2024 as Exhibit No.: 4. The Township is to file Exhibit No.: 2 with the Court and the applicant is to file Exhibit No.: 1 with the Court.
37. I have also included at the end of the documentation list in paragraph 21 of the Order a number of Referee decisions which may be relevant to the issues in this case. It is not intended to imply that this list of decisions is exhaustive or that all are applicable. Counsel are, of course, at liberty to bring to my attention additional jurisprudence.

April 15, 2024 Case Management Video Conference

38. As indicated in paragraph 15 of the Order, there will be a further case management video conference on Monday, April 15, 2024 the purpose of which will be
- (a) to give directions for the giving of notice to those who may be affected by the result of this application and to establish a process for giving them an opportunity to participate as a party;
 - (b) to determine whether the Township has sufficiently satisfied the requirements of paragraphs 10, 11 and 12 of the Order to qualify to provide evidence in this process either before or at the time of the hearing of the merits of this application;
 - (c) to determine whether the Engineer has sufficiently satisfied the requirements of paragraph 13 of the Order to qualify to provide evidence in this process either before or at the time of the hearing of the merits of this application;
 - (d) to fix a time for the Township to deliver its responding affidavits if it is determined that the Township is qualified to provide evidence in this process; and
 - (e) to deal with such other matters or things as may arise and which the presiding Referee may determine is expedient to permit.
39. Mr. Courey has advised that he is available for a case management hearing on April 15, 2024, as has Mr. Kirwin.

⁷ For an example, see paragraphs 8 and 9 of the Order in *Collins v Middlesex Centre*, 2023 ONDR 11.

40. The validity of the Petition and the validity of the Engineer's Report is going to be decided in this case by the Court of the Drainage Referee. If the Petition and the Engineer's Report are found to be valid, then the Proposed Jananna Drain and the legal rights and obligations of those property owners in the watershed identified in the Engineer's Report will be affected by the Proposed Jananna Drainage Works and/or in the form of assessments for the cost of the resulting drainage works and its subsequent maintenance and repair in accordance with the Engineer's Report.
41. The present intention is that the notice will be sent to the names and addresses, according to the last revised assessment roll, of the owners of land identified in the Engineer's Report as being assessed or awarded allowances for the Proposed Jananna Drain, hence paragraph 12 of the Order. The Order arising from the April 15, 2024 case management video conference (the "**April 15, 2024 Order**") will establish the form of the notice to be given and the date by which the applicant is to give that notice by ordinary mail; it is anticipated that the notice will be sent on some date in June 2024.
42. The principal purpose of the video conference hearing on April 15, 2024 is to give directions for the giving of notice to those property owners who may be affected by the decision about the validity of the Petition and Engineer's Report and to give those potentially affected persons an opportunity to be parties to that validity decision. The notice will direct those receiving it to the Township's website for copies of all documents exchanged between the parties to the time of the giving of notice, so that documentation needs to be in machine-readable form, hence paragraph 14 of the Order.
43. At the time of the April 15, 2024 management video conference, a determination will be made about whether the Township is disqualified from providing evidence in the hearing process having regard for the Township's production of documentation evidence detailed in paragraphs 10 and 12 of the Order. A similar determination will be made about whether the Engineer is disqualified from providing evidence in the hearing process having regard for the Engineer's production of documentation detailed in paragraph 13 of the Order. If the Township is not disqualified, then at the time of the April 15, 2024 case management video conference, a date will be established by which the Township must provide its affidavit evidence in response to the application. It is anticipated that this date will be in mid-May 2024. If the Engineer is not disqualified, then his evidence will be provided as part of the Township's affidavit evidence in response to the application; if the Township is not disqualified, but the Engineer is, then the Township's evidence in response to the application will not include any evidence from the Engineer.
44. If it is determined that the Township is to provide evidence in response to the application, that evidence needs to be part of the record to be made available on the Township's website referred to in the notice to be given notice to those who may be affected by the result of this application as contemplated by paragraph 41 above, so the delivery of the Township's evidence must precede the giving of the notice. Those details will be addressed at the time of the April 15, 2024 case management video conference.

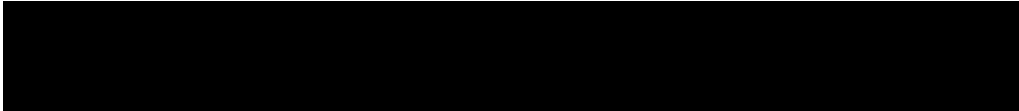
Going Forward from the April 15, 2024 Case Management Hearing

45. I will now summarize how I propose that this case is to be conducted procedurally. This summary is to be regarded as being malleable and open to adjustments to accommodate unforeseen circumstances as they may arise and generally to expedite the hearing process.
46. Going forward from the April 15, 2024 case management video conference, if the Township has not been disqualified from leading evidence, the Township's evidence will be delivered to the applicant on or before a date to be specified in the April 15, 2024 Order but anticipated to be in May 2024. The Township's evidence will then become part of the record to be referred to in the notice. That notice will then be given in accordance with the April 15, 2024 Order to those persons whose rights may be affected by the result of this application so they will be aware of the application and have an opportunity to become a party. It is anticipated that the mailing of this notice by the applicant will occur in June or early July 2024.
47. The notice will advise of a further case management video conference to determine who, amongst those seeking party status, are to be added as parties and to establish a schedule for any added party to provide a position or witness statement and to produce any documentation upon which they intend to rely, including any supporting affidavits. The date of this further case management video conference is Wednesday, September 11, 2024 commencing at 10:00 in the morning. This date and time will be formally entrenched in the April 15, 2024 Order, but in the meantime, the parties are directed to reserve that date on their respective calendars.
48. The applicants will be afforded the opportunity to reply to the Township's responding material as well as to any evidence from added parties. This will be important should documentation and information be forthcoming in the Township's responding material not disclosed to the applicants before the applicant's supporting affidavits are delivered. Again, the date for the applicant's reply will be established in the Order issued following the September 11, 2024 case management hearing. If there are no parties to be added, the applicant's reply evidence will be due sometime in October 2024; if there are parties added at the time of the September 11, 2024 case management hearing, then the applicant's reply evidence will be delayed until a month after the added parties' documentation has been provided; again, these details will be reflected in the Order issued following the September 11, 2024 case management hearing. That Order will also amend the Style of Cause to reflect the parties that will continue to the hearing on the merits.
49. After all the affidavit evidence has been filed by the parties, including any added parties, if all parties agree to cross-examinations before a court reporter outside of the hearing on the merits, a couple of months will be scheduled to allow that to occur. Transcripts of such cross-examinations will be provided to the presiding Referee promptly after the completion of such cross-examinations.

50. Further case management video conferences will be scheduled from time to time until all of the items referred to in paragraph 17 of the Order have been addressed and the case is ready to proceed to a hearing of the merits.
51. Case management hearings and the hearing on the merits will be conducted by video conference using the Zoom platform. After each video conference hearing, the presiding Referee shall provide the parties an MP3 audio-video file of the hearing and a machine-generated transcript. The hearing on the merits may be held in a courtroom in the Kitchener courthouse (1) if the parties ask that an in-person hearing be held and (2) if the parties or one of them commits to funding the presence of a court reporter during the hearing and the production of a transcript of the courtroom proceedings and the delivery of the transcript to the presiding Referee promptly after the conclusion of the hearing on the merits (because the Attorney General does not provide transcription services for Referee in-court hearings) and (3) so long as a courtroom in the Kitchener courthouse is available within a reasonable time after the case is ready for hearing.
52. In the event that the Township is disqualified from adducing any evidence, the prospect of which is contemplated by 21 of these reasons, counsel for the Township will nonetheless be entitled to be present for the hearing and to cross-examine witnesses and to make submissions.
53. Notwithstanding that there may have been examinations before a court reporter outside of the hearing on the merits as contemplated by paragraph 49 above, at the time of the hearing of the merits, parties who have delivered affidavits or Witness Statements, as contemplated by paragraph 54 below, will call as witnesses each person who has sworn an affidavit or authored the Witness Statement. Witnesses to be called during the hearing on the merits will be limited to those who have previously filed affidavits or Witness Statements. Witnesses will be asked to reaffirm or correct their affidavits or Witness Statements and then be subject to cross-examination by the other parties and questions from the presiding Referee.
54. When a party is represented by legal counsel, it is expected that that party's evidence will be filed with the court in the form of an affidavit in accordance with case management procedural orders in advance of the hearing of the merits. If an added party is a self-represented layperson, that self-represented party may provide evidence in the form of an unsworn Witness Statement. Such a Witness Statement will be provisionally received, subject to the self-represented party appearing at the hearing of the merits and, after being sworn, confirming on oath that the Witness Statement represents their evidence, subject to any corrections which the witness may bring to the court's attention at the time of the hearing on the merits.
55. When the case is ready for the hearing of the merits, there will be a procedural Order fixing the date of the hearing, its anticipated duration, establishing an issues list, the order in which the parties are to proceed and the witnesses they each will call to give evidence. The procedural Order would include the following:

- (a) In accordance with Rule 13(2), the presiding Referee may call the Engineer to give background factual evidence if the Engineer is not disqualified from giving evidence, the possibility of which is contemplated by paragraph 26 of these reasons. The Engineer's evidence at this stage would not include any opinion evidence. While the Engineer would not be open to cross-examination, questions of clarification of the facts from the parties would be allowed.
 - (b) Following the Engineer's background factual evidence, the applicant would call his evidence. Any added party aligned with the applicant's position would then call their evidence.
 - (c) The Township would then call its evidence. Any added party aligned with the Township's position would then call their evidence.
 - (d) The applicant would then have the opportunity to call reply evidence.
 - (e) Final submissions would be in the same order as the evidence.
56. As indicated in paragraph 45 of these reasons, this summary is not intended to be immutable and is open to adjustments to accommodate unanticipated circumstances as they may arise and to expedite the hearing process.
57. If there are difficulties with document exchange or anything else arising from the Order and these reasons, at the request of either party, I will convene a video conference to deal with it.

Dated at London this 22nd day of February 2024.



Andrew C. Wright
Acting Drainage Referee