

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**IN THE COURT OF THE DRAINAGE REFEREE**

**CITATION:** **Pannabecker v. West Wawanosh (Town)**  
**2000 ONDR 2**  
**DATE OF DECISION:** **2000-06-12**  
**FILE NUMBER:** **2000-02**  
**STATUTE:** *Drainage Act*  
**HEARING:** **2000-05-23**

**BETWEEN:**

**RODGER PANNABECKER and KENNETH LEDDY**

**Appellants**

**-and-**

**THE TOWNSHIP OF WEST WAWANOSH**

**Respondent**

Paul Courey  
Solicitor for the Respondent

Andy McBride, P.Eng.  
Drainage Engineer

## DECISION

Kenneth Leddy and Rodger Pannabecker, appeared personally without the benefit of legal counsel.

The Ontario Drainage Referee heard the Appeal of the above mentioned parties on the 23rd day of May, 2000 in the Court House at Goderich, Ontario. The letters of appeal had been received on February 28, 2000 and March 3, 2000 signed by Mr. Leddy and Mr. Pannabecker respectively.

The Appeals were to the Ontario Drainage Referee pursuant to Section 47 of the Drainage Act requesting that the By-Law be quashed. Section 47 (l) of the Drainage Act reads as follows:

“47 (1) Any owner of land or public utility affected by a drainage works, if dissatisfied with the report of the engineer on the grounds that it does not comply with the requirements of this Act, or that the engineer has reported that the drainage works cannot be constructed under section 4, may appeal to the referee and in every case a written notice of appeal shall be served upon within forty days after the mailing of the notices under Section 40 or subsection 46 (2) as the case may be”

The Appellants requested that the By-Law be quashed on the basis that the Petition did not comply with Section 4 of the Drainage Act which reads as follows:

“Section 4 (1 (a) (b) A petition for the drainage by means of a drainage works of an area requiring drainage works of an area requiring drainage as described in the petition may be filed with the clerk of the local municipality in which the area is situate by,

- (a) the majority in number of the owners, as shown by the last revised assessment roll of lands in the area, including the owners of any roads in the area;
- (b) the owner or owners, as shown by the last revised assessment roll, of lands in the area representing at least 60 per cent of the hectarage in the area;”

The Petition for the Drainage Works which was dated the 15th day of June, 1998 had been signed by only one owner, namely Ms. Joanne Sproul. Ms. Sproul appeared to be the owner of 100 acres of land consisting of the west one half of Lot 24 Concession 5. In her Petition, Ms. Sproul stated “I am presently receiving run-off water onto my land from both farms, one west of me and one east of me. At the moment the front 50 acres of this farm has swampy areas and divided into five to six small fields. The installing of a main drain will allow me to conduct productive farm land versus waste land and inconvenience.”

It became immediately apparent that the single issue to be decided in this appeal was whether or not the Petition signed by one owner owning 21.85 hectares in the watershed was valid when, in fact, the total watershed consisted of 68.2 hectares of land.

A history of the procedures followed can be recited briefly as follows. The Petition was received June 15, 1998. Maitland Engineering was engaged and the first site meeting was held on October 7 1998. At that time the Drainage Engineer, Andy McBride, P.Eng., determined that the Petition was valid and on instructions from the Municipal Council, a Preliminary Report was completed dated the 4th day of February, 1999. After circulation the Preliminary Report was considered by Council on March 2 1999 and Mr. Leddy, the Appellant, (on whose farm the outlet was located), requested that the cost of extending the outlet around his fish pond be examined. After a design to circumvent the fish pond had been made and the cost ascertained, Mr. Leddy decided to permit the outlet to be constructed upstream of the fish pond, having received assurances that the pond was adequately protected from pollution by Section 83 of the Drainage Act. (It should be noted that Mr. Leddy who was a cattle farmer used his pond to water his herd, which herd could enter the pond from all sides without restriction).

The second meeting with Owners was held on the 29th day of November, 1999 and thereafter the Final Report was completed dated January 14, 2000 and was adopted by Council in a by-law dated the 15th day of February, 2000.

A brief description of the watershed is set out in the Drainage Report on page 3.

“The watershed is fully illustrated on Schedule “A” attached hereto being a sketch attached to the Preliminary Report.

The Township of West Wawanosh is located at the north end of the County of Huron. It is bounded by County Road No. 86 on the north, County Road No. 22 on the east, the Township of Colborne on the south, and County Road No. 1 on the west. The Village of Lucknow is located in the north west corner. The Cook-Leddy Municipal Drain is located in the south east quarter of the Township, approximately 1.5 kilometers south of the Hamlet of St. Augustine.

The area of the watershed of this Drain is approximately 68.2 hectares and consists of approximately 1.0 hectare of road allowance and approximately 67.2 hectares of agricultural land...

The Huron County Soils Map indicates that Harriston Loam, a medium textured till with good natural drainage, is the predominate soil within this drainage area. This soil has an agricultural capability rating of 80% Class 1 and 20% Class 3 with topography as the limitation...

The majority of the agricultural land within this watershed is undulating; however, in spite of the topographic limitation of the Harriston Loam, none of the land is too steep to restrict agricultural operations.”

A brief outline of the Project is contained on Page 1 of the Drainage Report and is summarized as follows:

“It is recommended that a new Main Drain be constructed from the outlet at the mid point of Lot 25 northerly and westerly to the line between Lots 23 and 24. It shall consist of approximately 1,110 meters of concrete drain tile, ranging in diameter from 250 mm to 450 mm and one crossing of Side Road 24-25. It is also recommended that a Branch “A” be constructed, in the West Half of Lot 24 and the East Half of Lot 23 consisting of approximately 443 meters of 200 mm diameter tile, either filtered, perforated plastic drainage tubing or concrete tile to be decided at the time of tendering. A summary of the assessment for this project is as follows:

Municipal Lands	\$4,700.00
Privately Owned Agriculture Lands	98,800.00
Total Estimated Assessments	103,500.00”

The Drainage Engineer, Mr. McBride, stated that in his professional opinion “the area requiring drainage consisted of the front 50 acres of the Sproul property” which area had been described in the Petition. He stated that although the Petition had referred to most of the acreage contained within the watershed, it had correctly referred to the area requiring drainage as the 50 front acres of the Sproul farm. He went on to explain that the remainder of the watershed was not in need of drainage for the following reasons:

- The south half of Lot 25, Concession 5 owned by Mr. Leddy was not in need of drainage inasmuch as it had an available outlet directly into the Maitland River.
- Likewise, the Thompson property, being part of the north half of Lot 25, Concession 5 was not in need of drainage inasmuch as it was an elevated property with 5 1/2 meters of fall and a gravel bottom.
- Mr. McBride further advised that the side road within the watershed was not in need of drainage and that the Leddy Home Farm, being the east half of Lot 24, Concession 5 also did not require drainage. He explained that the reason the Leddy Farm did not require drainage was not only because it had approximately 3 1/2 meters of fall, but more particularly because it was a pasture farm and Mr. Leddy did not desire to have it drained. The Drainage Engineer explained that upstream of the Leddy Home Farm was the Sproul Farm, but further upstream the land beyond the Sproul property rose abruptly.
- This land immediately to the west and upstream of the Sproul property was owned by the Appellant, Mr. Pannabecker, and was described as the east one-half of Lot 23, Concession 5. The elevation at the ground level in the depression on the Sproule farm was given as being 301.3 meters above sea level, the elevation immediately to the west over the Pannabecker property within

a distance of 400 meters rose to an elevation of 312. meters. This elevation was at the boundary of the Boyle property being the West half of Lot 23, Concession 5. Thus it was apparent that the lands upstream of the Sproul property, namely the Pannabecker and the Boyle properties were not in need of drainage because of the remarkable surface slope of the land to the east.

Mr. McBride went on to explain that not only was the Sproul property the subject of surface flows from the high lands to the west, but that drainage was further impeded by a natural ridge of land which ran north and south in the centre of the Sproul property. This ridge served to trap surface flows that would normally continue to the East. He advised that previous owners had apparently attempted to overcome this problem by excavating a cut through the ridge designed to permit surface flows to proceed eastward. However, he indicated that this trench had not been maintained and was not providing adequate drainage. The ridge on the Sproul property was clearly evident on the profile attached to the Drainage Report and showed up as a ridge rising to an elevation of 1 1/2 meters above the surrounding surface.

Because of this unique topograph, the Drainage Engineer concluded that there was no need for drainage for the elevated lands upstream of the Sproul property and likewise no need for drainage of the lands downstream of the Sproul property. However, there was a very obvious need for drainage with respect to the Sproul property. For that reason the Drainage Engineer stated that, in his professional opinion, the Petition was valid because Ms. Sproul owned 60% of the hectarage in the area "requiring drainage", pursuant to Section 41 (b) of the Drainage Act.

In conclusion, Mr. McBride noted that the issue in this hearing, namely the validity of the Petition, was never raised at any point during the previous proceedings until the final meeting of February 15, 2000 at which meeting the by-law for the drainage of the land was adopted by Council.

The Appellant, Mr. Pannabecker, in his evidence, advised the Referee that he had installed two 6 inch tiles on his property, one of which extended across to the Boyle property and both of which drained into the low depression located partially on his property, but mainly on the Sproul property. He advised that approximately one-half his land was used for cash cropping and the balance for hay production. He explained that he had some random surface drains on portions of his property outletting into the 6" drains. He further indicated that the Boyle property to the west of his property was also high, dry and utilized for cash cropping. Mr. Pannabecker expressed the belief that the opening through the ridge on the Sproul property, which permitted surface drainage to the east was natural, as opposed to an excavated opening, but agreed that it had banks of 6 - 9 feet and steep sides. Mr. Pannabecker allowed that the drain was needed and that it would drain the Sproul property, but expressed his belief that the Petition was invalid, having failed to reach the required criteria of 60% of the total acres requiring drains or 51% of the landowners requiring drainage.

Mr. Leddy, in his evidence, advised that he was the owner of the East half of Lot 24, Concession 5 as well as the South half of Lot 25, Concession 5. He advised that he had finally agreed to permit the drain to

outlet on his farm in a natural watercourse upstream of his dug fish pond. He advised that he had instructed the Engineer that he was satisfied to have the outlet on his property at the location indicated, providing he received no pollution in his fish pond and provided that he did not have to pay for the costs of extending the drain around his fish pond. He indicated that Mr. McBride had advised him that he was adequately protected by Section 83 of the Drainage Act, which provides heavy penalties for the pollution of Municipal Drains. He stated that in his opinion he believed his land, particularly the East half of Lot 24 should be included in “the lands requiring drainage” and that therefore the Petition should fail as not achieving the requirements of either (a) the signature of the owner of 60% of the land requiring drainage; or (b) the signatures of 51% of the owners of lands requiring drainage. However, under cross-examination Mr. Leddy agree that he did not want to drain his land because it was pasture land and he did not intend to install any tile drainage. Mr. Leddy did agree in answer to questions put to him by Mr. Courey “that although he had no need for drainage for his cattle farm, that he recognized that if someone else operated his farm as a cash crop farm, it would require proper drainage”. Again during the course of cross-examination, Mr. Leddy also stated that although he was concerned about pollution in his fish pond that he was not concerned about the fact that his fish pond remained unfenced and that it was regularly entered by his cattle which used it as a watering hole.

In his reply, the Drainage Engineer, Mr. McBride, repeated his opinion affirming the adequacy of the Petitioner and indicating that only the Sproul property was the “area requiring drainage”, being inundated with flows from the west and encumbered by a ridge which prevented flows to the east. As a consequence the single signature of Ms. Sproul was adequate in his opinion to meet the requirements of Section 41 (b) of the Drainage Act.

The Drainage Referee, having considered the evidence, had no difficulty in determining that this was a valid Petition. The fact situation in this case clearly illustrates that the “area requiring drainage”, as in most cases, is very different from the “area drained”. The failure of the Common Law was that it permitted sheet flows from upstream properties to inundate the downstream lands, which in many instances were owned by one party. Under the Common Law, the downstream land owner was provided with no legal relief. In this case it is questionable if the Petitioner, Ms. Sproul, could have obtained relief at Common Law from Mr. Pannabecker with respect to the two 6” tiles. These tiles found their outlet on the property of Mr. Pannabecker very close, however, to the Sproul property line. The result was flooding at the downstream end of the depression on the Sproul property as the water flowed east over the surface. It could be argued under Common Law that because the discharge was in the depression located on the Pannabecker property that the flows became sheet flows as they flowed across the surface of the depression onto the lands of Ms. Sproul. The purpose of the *Drainage Act* was to remedy the deficiencies of the Common Law and to provide the downstream owner inundated with sheet flows from upstream lands with an instrument to obtain relief.

That, put in simplest terms, is the role of the *Drainage Act* which has served this Province well for over a century. The collective wisdom contained in the *Drainage Act* is exemplified by the fact that the Act has

endured through so many decades with only minor amendments and is still able to meet the challenges of modern farming.

This case illustrates clearly how the *Drainage Act* can be utilized to give relief to a single owner such as Ms. Sproul when that landowner is the only owner in the watershed “requiring drainage”. The lands upstream were high and dry. The lands downstream were protected by a natural barrier located on the Sproul Farm and in addition the land use of Mr. Leddy was such that drainage is not required. It is equally important to note that in the current *Drainage Act* the decision as to what lands are the lands “requiring drainage” is left solely to the appointed Drainage Engineer who is available to give a professional opinion. In previous legislation that decision was left to the municipal council which no doubt gave expression to a lay opinion, possibly influenced by political considerations. The current *Drainage Act*, which imposes on the Drainage Engineer the duty to provide independent, unbiased professional opinions, represents a positive step forward and in many cases the Drainage Engineer gives expression to the needs of minority landowners.

It should be noted that “the lands requiring drainage” decision must not only evaluate the objective physical condition of the lands in question, but also must examine the land use factors, all of which together must be weighed in determining which lands require drainage. In this case Mr. Leddy conceded that another owner might wish to use his farm for cash crop purposes and in that case good drainage would be required. However, the present use, namely the pasturing of cattle did not require good drainage. Thus, Mr. Leddy's subjective views with respect to land use became a factor in determining whether his lands should be included within the lands requiring drainage. Clearly, in this case the decision of the Drainage Engineer was, in the circumstances, proper.

The Appeal is therefore dismissed without costs.

DATED: June 12, 2000

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Delbert A. O'Brien, Q.C.  
Ontario Drainage Referee