

**Agriculture, Food and Rural Affairs
Appeal Tribunal**
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**Tribunal d'appel de l'agriculture, de
l'alimentation et des affaires rurales**
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FILE NO.: 009CharlesShepley21

DATE: 2021/11/09

IN THE MATTER OF THE *DRAINAGE ACT*, R.S.O. 1990, CHAPTER D.17, AS AMENDED.

AND IN THE MATTER OF an appeal to the Agriculture, Food and Rural Affairs Appeal Tribunal (the "Tribunal") by **Grondin Farms Ltd.** under section 54 of the Drainage Act with respect to the **Charles Shepley Drain** in the Town of Amherstburg.

AND IN THE MATTER OF an electronic hearing held pursuant to Rule 18 of the Tribunal's Rules of Procedure.

BETWEEN:)	
)	
Grondin Farms Ltd.)	
)	Represented by Sid Vander Veen, P.Eng.
Appellant)	
)	
– and –)	
)	
The Corporation of the Town of)	
Amherstburg)	Represented by Michael Gerrits, P.Eng.
)	
Respondent)	
)	
)	HEARD: October 20, 2021

Before: Katie DeBlock Boersma, Vice-Chair; Andrew McBride, Vice-Chair; Steve Moutsatsos, Vice-Chair

Appearances:

Michael Gerrits, Respondent Representative and Engineer who prepared the Report
Sid Vander Veen, Appellant Representative
Shane McVitty, Drainage Superintendent for the Respondent
Joe Grondin, Witness for the Appellant

DECISION OF THE TRIBUNAL

1. The Tribunal held this hearing virtually on October 20, 2021. The Engineer's Report dated January 18, 2021 for the Charles Shepley Drain (the "Report") was prepared by Michael Gerrits, P. Eng. of R. Dobbin Engineering Inc. (the "Engineer"). An appeal was filed by Grondin Farms Ltd. under section 54(1) of the *Drainage Act*, RSO 1990, c D.17 (the "Act").

Preliminary Matters

2. Prior to the hearing the Tribunal issued an order making all persons currently assessed in the Schedule of Assessment, as amended by the Court of Revision, parties to the hearing. The Respondent filed an Affidavit of Service dated September 27, 2021 as proof that all parties had been served with the notice of hearing.

Background

3. The Charles Shepley Drain consists of the Charles Shepley Main Drain and the Charles Shepley Branch Drain.
4. Two previous reports have been prepared for the Charles Shepley Main Drain. The first report was by W. Settrington dated June 1968. The second report was prepared by M. Armstrong dated July 1980.
5. The Main Drain consists of approximately 3,786 meters of open channel that outlets into the Long Marsh Drain in Lot 100, Concession 9. The drain extends approximately 1,813 meters from the outlet in a southerly direction along the west side of Smith Road to the south side of Malden Colchester South Townline, Concession Road 4. The drain then extends approximately 1,890 meters in a westerly direction to the east side of Malden Colchester Townline, Concession Road 7, where it then extends approximately 72 meters in a southerly direction to the northern limit of the lands identified with the Land Identification Number 19 in Part of Lot 1 Concession 3, Town of Essex.
6. Two previous reports have been prepared for the Charles Shepley Branch Drain. The first report was by W. Settrington dated June 1969 (the "1969 Report"). The second report was prepared by M. Armstrong dated July 1980 (the "1980 Report").
7. The Branch Drain consists of approximately 990 metres of open channel located entirely in the Town of Amherstburg and outlets into the Charles Shepley Main Drain at the easterly limit of Lot 102, Concession 9. The drain extends in a westerly direction along the north limit of the South ½ of Lot 102, Concession 9 for approximately 675 meters after which it extends southerly for 315 meters to the north limit of Lot 103, Concession 9.

8. There are several culverts located on the Charles Shepley Drain. The culvert at issue in this appeal is identified as Culvert #8, on the plan prepared by the Engineer, and is located at Station 4+385 on the Charles Shepley Branch Drain ("Culvert 8").
9. Grondin Farms Ltd. (the "Appellant") owns two parcels of land within the Branch Drain watershed, both of which are upstream of Culvert 8. They are located on part of the South half of Lot 102, Concession 9 and part of Lot 103, Concession 9 (the "Grondin Lands").
10. Culvert 8 provides access over the Charles Shepley Branch Drain between two parcels of land owned by Bonnefield Farmland Ontario. These properties are located on part of the North half of Lot 102, Concession 9, and part of the South half of Lot 102, Concession 9 (the "Bonnefield Lands"). The Charles Shepley Branch Drain runs along the property line between the Bonnefield Lands.
11. Culvert 8 was installed privately sometime before the year 2000. It does not front onto a municipal road. Culvert 8 is not scheduled to be replaced in this Report, but the replacement will happen at some point in the future. When the replacement occurs, 100% of the removal costs will be paid by the lands currently owned by Bonnefield Farmland Ontario. The Report assesses 78% of the replacement and maintenance costs for Culvert 8 to the lands currently owned by Bonnefield Farmland Ontario, and the remaining 22% to the upstream lands currently owned by Grondin Farms Ltd.

Issue

12. Should the assessment applied to Grondin Farms Ltd. for construction and future maintenance costs of Culvert 8 in the Report be eliminated and assessed solely to Bonnefield Farmland Ontario as a special benefit?

Evidence of the Parties

Mr. Gerrits, Engineer

13. Mr. Gerrits was appointed as the Engineer pursuant to the provisions of section 78 of the Act. He testified that, during the process of preparing the Report, Bonnefield Farmland Ontario was contacted and advised that they wished Culvert 8 to remain as it has been there for many years and is used as access between the Bonnefield Lands.
14. Mr. Gerrits advised that Culvert 8 is in poor condition. As it was installed privately, it does not go down to the native soil and grade line of the drain. However, Mr. Gerrits stated that even culverts in poor condition remain a vital part of the drain.
15. Mr. Gerrits stated that he contacted OMAFRA to ask if a grant will be available for Culvert 8 replacement costs, but they would not advise if a grant would be available or not. In any event, he stated that Section 11 of the Act directs that engineers not prepare reports based on whether the works will be eligible for grants.

16. He testified that changes in ownership of lands can happen, resulting in properties being severed and merged. He compared the location of the drain between the Bonnefield Lands as being similar to a drain bisecting a property. In such a case, Mr. Gerrits opined that if a landowner requested a culvert over the drain it would be a valid request.
17. Bonnefield Farmland Ontario is willing to pay 78% of the costs for construction and maintenance of Culvert 8, and 100% of the removal costs. Mr. Gerrits described this as a high assessment.
18. Mr. Gerrits stated that every farm is entitled to one access. He opined that if Culvert 8 was not there to provide access between the Bonnefield Lands, they would have to travel 2.6 km around the block to use the access off of Concession Road 9. He indicated that the roads are narrow and there can be safety concerns with bringing large farm machinery down such roads.
19. Relying on Section 23 of the Act, Mr. Gerrits argued that Bonnefield Farmland Ontario would not need Culvert 8 if it were not for the upstream water from the Grondin Lands being carried down the drain. As every landowner is responsible for the waters from their lands as it is conveyed downstream, he concluded that the Appellant has been properly assessed some of the costs for Culvert 8.
20. On this basis Mr. Gerrits disagreed with the Appellant that Culvert 8 is a culvert of convenience.
21. On cross examination Mr. Gerrits admitted that if Culvert 8 was removed, Bonnefield Farmland Ontario can access the Bonnefield Lands by road.

Mr. Vander Veen

22. Mr. Vander Veen stated that Grondin Farms Ltd. has no issue with Culvert 8 remaining. Rather, they take issue with the assessment of Culvert 8 in the Report as it is not a culvert rendered necessary by the drainage works.
23. Relying on Section 18 of the Act, he testified that Culvert 8 is not rendered necessary because it provides access between two separate parcels of land. The Bonnefield Lands are not bisected by the Charles Shepley Branch Drain and, therefore, a crossing is not required. The Bonnefield Lands have road access from Smith Road and Concession Road 9. He stated that if that road access is inadequate, that is not an issue to do with the drain itself.
24. Mr. Vander Veen pointed to the fact that when the 1969 Report and the 1980 Report were prepared, no need for a crossing was identified between the Bonnefield Lands. He stated that nothing has changed as far as the location of the drain since those reports were completed and entered aerial photographs into evidence supporting this. He stated that if either of the Bonnefield Lands were to be sold in the future, then the crossing at Culvert 8 would become redundant.

25. The Act requires engineers to assess lands and roads, not property ownership. Mr. Vander Veen indicated that in many municipalities the engineer is not even provided with the landowner's names, just roll numbers. Mr. Vander Veen opined that taking into account the fact that two different properties are owned by the same person or entity is improper under the Act.
26. Mr. Vander Veen noted that the Report states that Culvert 8 is perched, meaning elevated and probably blocking the flow of water. He advised the Tribunal that a crossing should not be considered necessary if it is not working correctly.
27. Mr. Vander Veen submitted an email between himself and Tim Brook at OMAFRA dated July 19, 2021 in which Mr. Vander Veen posed a question regarding grant eligibility. In this email Mr. Brook stated that the crossing at Culvert 8 appeared to be one of convenience.
28. He opined that the reason the drain itself exists is to carry water down from upstream lands; but that is not why Culvert 8 exists. Culvert 8 exists because it provides convenient access from one farm to another. This access is not a necessity.
29. On this basis, Mr. Vander Veen submitted that the costs of Culvert 8 should be assessed solely to Bonnefield Farmland Ontario under Section 24 of the Act as a special benefit.
30. Mr. Vander Veen admitted on cross examination that culverts in poor condition are still used on drains and poor condition does not mean it cannot be used. He also agreed that every property has a responsibility for the water flowing from the land.

Mr. Grondin

31. Mr. Grondin testified that the Bonnefield Lands have their own road access. He stated that both properties are distinct and, while he has no objection to the existence of Culvert 8, he should not be assessed for the costs of a crossing between two separate properties.
32. Mr. Grondin stated that he uses the public roads to access the Grondin Lands.

FINDINGS AND ANALYSIS

33. Section 18 of the Act reads:

18 Subject to section 33, the engineer in the report shall provide for the construction or the replacement, enlargement or other improvement of bridges, culverts, pumping stations and water gates rendered necessary by the drainage works including the cost of the construction or the replacement, enlargement or other improvement of the bridges, pumping stations, water gates and culverts, in the assessment for the construction, improvement, maintenance or repair of the drainage works, and they shall, for the purposes of maintenance or repair, be deemed part of the drainage works. R.S.O. 1990, c. D.17, s. 18.

34. The Tribunal agrees with the Appellant that Culvert 8 is not rendered necessary by the drainage works.
35. If it were not for the Bonnefield Lands sharing the same ownership, Culvert 8 would be redundant. This could occur in the future based on a sale of one or both of the properties. There is no requirement for a crossing on the boundary of a property under the Act.
36. The Bonnefield Lands do not require Culvert 8 for access. Both properties have access by road.
37. What is necessary to carry the water from the Grondin Lands upstream of the Bonnefield Lands is the drain itself, not Culvert 8.
38. The parties each made submissions as to costs. Recovery of costs is only awarded by the Tribunal in rare circumstances, typically where the conduct of one of the parties has been unreasonable, frivolous, or vexatious. The Tribunal does not find that such circumstances exist in this case.

ORDER OF THE TRIBUNAL

39. For the reasons stated above, the Tribunal orders as follows:

- a. The appeal by Grondin Farms Ltd. under Section 54(1) of the Act is granted. All costs assessed upstream in the Report for the construction, engineering and future maintenance of Culvert 8 shall be eliminated. The costs for Culvert 8 shall be fully assessed to the lands identified as 5 and 8 in the Report under Section 24 of the Act.
- b. The non-administrative costs of the Municipality incurred with respect to this appeal shall form part of the cost of the drainage works.
- c. There shall be no other Order as to costs and all parties shall be responsible for their own costs.

Dated at Mitchell, Ontario, this 9th day of November, 2021.

A handwritten signature in black ink, appearing to read 'KDB', enclosed within a hand-drawn oval.

Katie DeBlock Boersma
Vice-Chair

TO:

Grondin Farms Ltd.
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AND TO:

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AND TO:

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AND TO:

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AND TO:

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AND TO:

All other landowners assessed or compensated in the Engineer's Report.