# "SPINNIN' THE 78"
# 20 QUESTIONS ON THE USE OF S.78 OF THE DRAINAGE ACT

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There are three main sections in the *Drainage Act* that authorize activities on municipal drains. The first is Section 4 which authorizes the petitioning of the local municipality to establish new municipal drains. The second is section 74 which assigns the municipality the responsibility to maintain and repair the drains constructed under the Section 4 process. The third is Section 78 and it is generally known as the section of the *Drainage Act* that authorizes improvements or modifications to existing municipal drains.

While being able to modify or improve existing municipal drains is very important, Section 78 leaves some unanswered questions. Over the years, many engineers, drainage superintendents or other municipal representatives have looked for guidance on the application of Section 78. This paper attempts to provide this guidance.

The guidance or recommendations presented in this paper have been based, as much as possible, on direction from Referee decisions, and to a lesser extent Tribunal decisions. However, there are some questions that have never been answered by an appeal body. In the absence of clear answers from the legislation or direction from appeal body decisions, the guidance recommendations have been based on a "fairness" test. What is fair to the community of landowners on the drain? What is fair to the rest of the uninvolved landowners in a municipality? If future appeal body decisions provide direction in these areas of "unanswered questions", it obviously will override the recommendations contained in this paper.

Section 78 of the *Drainage Act* reads as follows:

> ***Improving, upon examination and report of engineer***
> **78(1)** Where, for the better use, maintenance or repair of any drainage works constructed under a by-law passed under this Act or any predecessor of this Act, or of lands or roads, it is considered expedient
> - to change the course of the drainage works, or
> - to make a new outlet for the whole or any part of the drainage works, or
> - to construct a tile drain under the bed of the whole or any part of the drainage works as ancillary thereto, or
> - to construct, reconstruct or extend embankments, walls, dykes, dams, reservoirs, bridges, pumping stations and other protective works as ancillary to the drainage works, or
> - to otherwise improve, extend to an outlet or alter the drainage works or
> - to cover the whole or any part of it, or
> - to consolidate two or more drainage works,
>
> the **council** of any municipality whose duty it is to maintain and repair the drainage works or any part thereof may, without the petition required in section 4 but on the report of an **engineer** appointed by it, undertake and complete the drainage works as set forth in such report.

***Notice to conservation authority***
(2) An engineer shall not be appointed under subsection (1) until thirty days after a notice advising of the proposed drainage works has been sent by prepaid mail to the secretary-treasurer of each conservation authority that has jurisdiction over any of the lands that would be affected. R.S.O. 1990, c.D.17, s.78(2).
***Powers and duties of engineer***
(3) The engineer has all the powers and shall perform all the duties of an engineer appointed with respect to the construction of a drainage works under this Act. R.S.O. 1990, c. D.17, s. 78(3).
***Proceedings***
(4) All proceedings, including appeals, under this section shall be the same as on a report for the construction of a drainage works. R.S.O. 1990, c.D.17, s.78(4).

## 20 QUESTIONS ON THE USE OF SECTION 78 OF THE DRAINAGE ACT

### 1) What type of work is authorized by S. 78?

S. 78 is generally known as the section of the *Drainage Act* that authorizes the council to undertake drain improvement projects. S. 1 of the *Drainage Act* defines "improvement" as any modification of or addition to a drainage works intended to increase the effectiveness of the system. If this definition is consider as the list of possible improvements or modifications in S. 78(1) is read, the conclusion can be drawn that the term "increase the effectiveness" divides into two categories:

***(a) Work to improve the effectiveness of the drain.*** These works are done for the good of the drain and all the landowners involved in the drain and could include things such as:

- adding flow capacity (e.g. deepening or widening an existing open channel or adding a tile drain)
- adding buffer strips along a drain to reduce erosion and improve bank stability
- installing a tile to address bank instability problems
- modifying the design of the drain to address erosion and instability concerns (e.g. incorporating natural channel features)

It is important to note that in Kilberg et al and the Township of Wallace, Referee Turville indicated that the construction of a new tile with significant added capacity in a new location while abandoning the old existing tile is not considered an "improvement" but would be considered a new drain that should be authorized by a petition.

***(b) Work to improve the effectiveness of a landowner's use of the drain.*** These improvement projects are generally for a single landowner or a select group of landowners on the drain. Examples of these types of project include:

- installing a new crossing
- relocating a section of open channel drain to improve farming operations
- enclosing a section of open channel to improve farming operations

These types of projects don't address problems on a drain or improve flow capacity, but instead modify the drain to allow the owner(s) to make more effective use their land.

The importance of the difference between these two types of "improvement" work becomes more evident in some of the questions addressed later in this paper.

**2) Is there any guidance in distinguishing between maintenance and repair work and improvement work?**

Again, "improvement" means any modification of or addition to a drainage works intended to increase the effectiveness of the system. The *Drainage Act* defines "maintenance" as the preservation of a drainage works and "repair" as the restoration of a drainage works to its original condition. Usually the difference between these types of activities is quite clear, but occasionally, the lines get blurred.

The difference between "maintenance and repair" and "improvement" was examined in the 1996 case of Authier et al and the Township of Romney on the Tunnel Drain. This drain, originally constructed in 1908, was dug through a clay ridge and was lined with two rings of mortar brick supported by a formed concrete entrance and outlet. In 1994, the Township hired a contractor to line a 350 foot length of the tunnel with plaster at a cost of $38,000. A number of the ratepayers appealed to the Referee. Referee O'Brien determined that this work, as defined by the Drainage Act, was an "improvement" project, not "maintenance" and "repair". The Referee acknowledged that this was a marginal determination, but concluded that this was an improvement because:

- evidence was presented that the tunnel's smoother surface would improve the flow capacity of the tunnel
- the evidence at the hearing spoke to the complexity of the project
- the significant cost and controversy of the project

Based on this decision, if a municipality is undertaking a controversial maintenance or repair project and an owner can make a reasonable argument that the work goes beyond the definition of "maintenance" or "repair", then it is recommended that the proposed work be undertaken through a new S. 78 report.

**3) Can an existing drain be extended downstream using S. 78?**

One of the activities clearly identified in S. 78(1) is "to otherwise improve, <u>extend to an outlet</u> or alter the drainage works..." This is further supported by the 1999 decision of Referee O'Brien in the case of the Town of Bosanquet vs Eizenga et al. The Coultis Drain in the Town of Bosaquet outlets into a natural watercourse and flows a significant length before discharging into Lake Huron. A storm had washed out a culvert and had destabilized the banks along the natural watercourse downstream of this drain. The municipality appointed an engineer under S. 78 of the *Drainage Act* to extend the Coultis Drain downstream to address these problems. The authority to do the work under S. 78 was challenged by some of the involved landowners. The Referee concluded that:

> *"S. 78 of the Drainage Act very clearly, concisely and explicitly empowers a municipality to extend an existing drain to a sufficient outlet without a petition and upon the report of an engineer. The Section could hardly be more explicit and is strengthened by the proposition that the Drainage Act is remedial legislation and requires a liberal interpretation."*

**4) Can an existing drain be extended upstream using S. 78?**

No, extending a drain upstream would be considered a new drain and would require a petition of landowners. The 1966 decision of Referee Clunis in McKeen and the Township of East Williams deals with a project where the engineer, in his report, resolved drainage problems beyond the limit of the area requiring drainage. Although this decision deals with a petition drain, there are still lessons to be taken from it for work under S. 78. The Referee stated, "If a sufficiently signed petition which describes a drainage area is filed, it is not to be taken as authority to proceed with any drainage work that may seem desirable in the general area of which the petitioning area is only a part." This is also sage advice for improvement projects authorized under S. 78.

**5) Can a new branch be added or incorporated into an existing municipal drain with S. 78?**

If council appoints an engineer to undertake an "improvement" project on an existing municipal drain, the work is restricted to improving the existing drain. If a branch drain is added or incorporated, this needs to be initiated with a new petition. If a landowner identifies a need to incorporate or add a new branch drain, they should be advised to submit a petition to council as soon as possible. It this is done in a timely fashion, it may be possible to achieve savings by performing both projects under the same engineer's report. In processing grant payments, drainage projects that have been jointly authorized by S. 78 and S. 4 are quite common.

**6) Is a petition required to initiate a S. 78 report?**

No, a petition is not required. The last part of S. 78(1) states "...the council **...** may, without the petition required in section 4 but on the report of an engineer appointed by it, undertake and complete the drainage works as set forth in such report." Whether or not an drain improvement project proceeds is completely at council's discretion.

**7) How then, can a landowner initiate improvements to an existing municipal drain?**

The *Drainage Act* does not give a landowner the right to demand that council make modifications to a municipal drain. However, a landowner or a group of landowners can request council to make use of their S. 78 authority to appoint an engineer to prepare an improvement report. In fact, a few years ago, a "Petition Supplement and Improvement Request Form" was developed for this purpose. This form can be found on the drainage page of our Ministry website: www.omafra.gov.on.ca/english/landuse/drainage.htm

**8) If council decides to proceed with a S. 78 project, what process is used?**

S. 78(4) states "All proceedings, including appeals, under this section shall be the same as on a report for the construction of a drainage works." So the process used is the same as that for a new petition drain. However, there is a problem. Considering that S. 78 projects are not initiated by petition, this makes it impossible to use the exact same process as for a new drain. This will be dealt with in greater detail in later questions.

**9) If requested, is the municipal council obligated to initiate an S. 78 project?**

With the inclusion of the word "may", S. 78(1) clearly gives the municipal council the discretion to undertake an improvement project. Once a drain exists, the *Drainage Act* assigns council with the responsibility to manage drains on behalf of the community of landowners involved in that drain. Therefore, when council receives a request to make an improvement to a drain, council needs to determine if the improvement is warranted. In making this determination, it would be wise for the council to listen to the advice of their drainage superintendent who is charged with the responsibility of inspecting the drain and performing necessary maintenance and repair work on the drain. There may be occasions that a landowner's request for improvements to a drain may not be in the best interest of the rest of the community of landowners. For example, a landowner in the Township of Osgoode asked his council to relocate a drain off of his property and onto a road right-of-way and also indicated that he was not prepared to pay any of the associated costs. The council refused the request and the Tribunal upheld the council's decision.

Although council needs to be convinced that the improvement is warranted, the improvement project does not have to benefit everyone in the watershed of the drain. For example, a landowner may request under S. 78 a project to increase the effectiveness of a landowner's use of a drain (see Question 1). The improvement may be warranted, even though it only benefits a single owner.

**10) What can a landowner do if a council refuses to initiate an improvement project?**

When a group of landowners petition their municipal council for a new drain, they have the right to appeal to the Tribunal if council decides not to accept the petition. Does a landowner who has requested council to undertake an improvement project have that same authority? The *Drainage Act* does not give a clear answer to this question. There have been a few instances in the past where the Tribunal has heard appeals of landowners where council has refused to appoint an engineer for the improvement of a drain.

However, Tribunal decisions are not precedent setting, so the current Tribunal could rule that they don't have the authority to hear this type of appeal. If that occurs, then the landowner still has the right to apply to the Referee for an order. S. 106 of the *Drainage Act* states that "The referee has original jurisdiction... (d) to entertain applications for orders directing to be done anything required to be done under this Act" If a landowner is of the opinion that an improvement project is required, they can bring the issue to the Referee. There have been several cases in the past where the Referee has heard this type of dispute and has ordered the municipality to proceed with a Section 78 report.

**11) Since there are no petitioners and no "area requiring drainage" in a S. 78 project, does the on-site meeting need to be held?**

Yes, for two reasons. First, S. 78(4) makes it clear that the same process used is the same as for the construction of a new drain. One of the first steps in the process to construct a new drain is the invitation to attend an on-site meeting [S.9(1)].

Second, in any drainage project, it is important to remember that the municipality is responsible for managing the drain on behalf of a community of landowners. Since it is this community of landowners who are paying for this work, they deserve to know what work is being proposed and what costs could ultimately be assessed to them. So, err on the side of caution and invite too many people to the meeting rather than too few. This approach could help to avoid greater public opposition to the drain in the future.

**12) Since there are no petitioners and no "area requiring drainage" in a S. 78 project, who should be invited to the on-site meeting?**

On this point, the *Drainage Act* is not clear. S. 9(1) indicates that each owner of land in the area requiring drainage and each public utility that may be affected must be invited. Since there is no "area requiring drainage" in a S. 78 project, this approach won't work. In the absence of clear direction, what is fair to the community of paying landowners? It is recommended that, as a minimum, the following should be invited to the on-site meeting:

- All landowners assessed for benefit in the last report;
- All public utilities and road authorities that may be affected by the project;
- All environmental agencies that may be involved, e.g. Fisheries and Oceans Canada, Conservation Authority, Ministry of Natural Resources, etc.

**13) Can a new assessment schedule be included as part of a S. 78 report?**

New assessment schedules are included in most S. 78 report that I've seen. But just because they are being included in S. 78 reports doesn't mean that S. 78 authorizes them. In the case of Kilberg et al and the Township of Wallace, the appellants argued that, among other things, the engineer exceeded his authority by including a new assessment schedule in the S. 78 report. They were of the opinion that a new assessment schedule could only be authorized by S. 76. The Referee did not deal with this particular issue because he had set aside the engineer's report on other grounds. So there isn't any clear direction on this issue.

If a new assessment schedule is required as part of a drain improvement project, the potential issue can be eliminated by appointing the engineer under both S. 78 and S. 76. However, the appointment under S. 76 is likely not required. S. 78(4) instructs that the same proceedings be used for S. 78 projects as for the construction of a new drainage works. The development of an assessment schedule is a significant component of any report for the construction of a new drain, so this should also apply to the S. 78 project. In addition, S. 34 of the *Drainage Act* indicates that "...the engineer may take into consideration any prior assessment... on the same land or road...and make such adjustment therefore as appears just..." It appears that the legislation authorizes the engineer to examine or develop an assessment schedule for drain improvement work.

**14) If council decides to stop the process after the meeting to consider the preliminary report, who pays the costs?**

Assume this situation: A landowner identifies to council a concern with the capacity of a tile municipal drain. Council is convinced that this should be investigated and decides to appoint an engineer. The engineer is instructed to prepare a preliminary report and in the investigation, the engineer determines that improvement is not required. Perhaps the problem could be resolved with maintenance and repair. So council decides not to proceed with the improvement project and instructs the superintendent to perform the necessary work as maintenance or repair. Who pays the cost of the preliminary report?

The *Drainage Act* is silent on this. If this project had been initiated by a petition for a new drain and council decided not to proceed, it is clear that council would pay. Or if the project was stopped because petitioners withdrew their name from the petition, the original petitioners would pay. For improvement projects, there is no clear answer.

In the situation described, council is taking their drain management responsibilities seriously and has appointed an engineer to investigate the drain for the good of the community of landowners on the drain. Since the *Drainage Act* is silent on who should pay, what is fair? Since the project was initiated for the good of the community of landowners, it is recommended that the costs be assessed to the landowners on the drain in accordance with the existing assessment schedule. If any landowner is of the opinion that this charge is illegal, they can bring the issue to the Referee for a determination.

**15) If an engineer prepares a S. 78 report, is council obligated to proceed with it?**

Based on the following direction from the *Drainage Act,* the council is not obligated to proceed with the project:

- S. 78(1) states "...the council... may...undertake and complete the drainage works as set forth in such report. The word "may" demonstrates the discretion of council.
- S. 78(4) states that the process used to improve or modify a drain is the same as that used for a new drain. S. 41(1) indicates that "...council..., if it intends to proceed with the drainage works...", then they must take the next steps in the process. Again this wording demonstrates the discretion of council.
- Finally, S. 45(2) gives any petitioner the right to appeal to the Tribunal if council decides not to proceed with the work.

However, before deciding not to proceed with a project, council needs to examine their liability. If the engineer appointed by council under S. 78(1) investigates the existing drain and determines that the existing drain or components of the drain are inadequate (e.g. drain has insufficient capacity or bridge is structurally unsound), the engineer will then usually recommend improvements to address the problem. If council ignores the engineer's advice and terminates the project, they could be assuming liability should anything go wrong in the future.

A few years ago, a municipality appointed an engineer to investigate an old tile municipal drain. The engineer determined that the tile was undersized and needed to be upgraded. When the engineer's report was presented to the landowners, they were adamant that the project was too expensive and they no longer wanted to proceed. However, the municipal council, recognizing the professional recommendations in the engineer's report, decided that "Do Nothing" was no longer an acceptable alternative. They indicated to the landowners that if they did not proceed with the project, they would abandon the drain using Section 84 of the Drainage Act. Once the drain was abandoned, the municipality had no further responsibility for the drain. When faced with these alternatives, the landowners decided to proceed with the work.

**16) If a landowner requested a drain improvement project and council proceeded with the engineer's report, does the landowner have the right to demand that the project stop?**

It is important to remember that S. 78 projects are initiated by council, not by the petition or demand of landowners. So, while landowners may request council to stop a project, they cannot demand it. If council decides to deny the request of the landowner(s) and continues with the development of the report, the involved landowners will still have all the rights of appeal on the report as for a new municipal drain project.

**17) If an improvement project was initiated to improve the effectiveness of the drain and the community of landowners convinces council to stop the process, who pays the costs incurred up to that point?**

In a new drain project, if the petitioners don't want to proceed with the project, they have the right to remove their names from the petition at the meeting to consider the report (either preliminary or final) and if that happens, the *Drainage Act* indicates that the original petitioners pay the costs incurred to date. But with a S. 78 project, there are no petitioners so this part of the process really can't be applied.

The only way to obtain a concrete answer to this question is if the *Drainage Act* is clarified through an amendment or if direction is provided by an appeal body. In the absence of clear direction, what is fair? If the S. 78 project was initiated to improve the effectiveness of the drain (see Question 1), and the landowners convince council to stop the project (considering the potential liability identified in Question 15), then the costs incurred to date should be assessed to the landowners in the watershed of the drain in accordance with the existing assessment schedule. It is not fair to assess these costs to the individual landowner who may have identified that the work was required. It is also not fair to the municipal taxpayers that the municipality pay the cost out of their general funds. If the costs are assessed to all the landowners on the drain, these landowners still have the right to challenge the legality of the assessment to the Referee. Should this happen, the need clear direction will be provided.

**18) If an improvement project was initiated to improve the effectiveness of a landowner's use of the drain (e.g. a new crossing) and the landowner convinces council to stop the process, who pays the costs incurred up to that point?**

For a project initiated to improve the effectiveness of a landowner's use of a drain (see Question 1), the costs incurred to date are costs that were incurred to address a private benefit, not a community benefit. In this situation, it is not fair to assess these costs to the landowners in the watershed of the drain. There are two possible ways to address costs if a landowner wishes to stop the project:

a) If a project is no longer required, Section 40 allows the engineer to write a report stating that point and also allows the engineer to indicate the amount of the engineer's fees and by whom they should be paid. A section 40 report can be appealed to the Tribunal under S. 48(1d) of the Drainage Act.

b) The other option is to use the fact that S. 78 projects are initiated by council, not by landowners, as leverage for payment of the costs. If a landowner wishes to stop a project of this nature, the municipality could indicate that the only way the project will be stopped is if the costs incurred to date are paid. If the landowner resists, then continue on with the project. The landowner does not have the right to demand the termination of a S. 78 project and would have to pay the assessment for the project.

**19) If a S. 78 report is not implemented, will OMAFRA pay any grant towards the cost incurred?**

No grant is available towards the cost of an engineer's report that is not adopted. Our authority to pay grant comes from Section 85 of the *Drainage Act* which states:
*"Grants may be made in respect of, (a) assessments made under this Act upon lands used for agricultural purposes (i) for drainage works undertaken in accordance with section 4, 74, or 78 where a report of an engineer ...has been adopted in accordance with this Act."*
Since no work was undertaken, there is no authority for us to pay grant.

**20) If the tenders are more than 133% of the estimated cost of an adopted S. 78 report, is council required to hold a meeting in accordance with S. 59, and if so, with whom?**

Again, this gets into the "petition" issue. In a project for the construction of a new drain, if the tender price is greater than 133 % of the engineer's estimate, council is required to hold another meeting with the landowners and the petitioners have a right to add or withdraw their names from the petition. If it is no longer a valid petition, the project stops and the original petitioners pay the costs incurred to date.

There are no petitioners in a S. 78 project, so is this meeting still required and if so, who should attend? Even though the involved landowners do not have the right to remove their name from a petition, they are still part of the community of landowners that will be paying a share of the cost of the project. They deserve to know what is happening on the project and even though they may not be able to demand that the project be stopped, they may be able to convince council not to proceed with the project. Therefore, using the "fairness" principle, the meeting should still be held and the invitation should be extended to all landowners invited to attend the meeting to consider the final report.

**At the Drainage Engineers Conference, the following additional question was asked:**

**21) Can the engineer provide allowances for a S. 78 project?**

S. 78(4) clearly states that the same process is used for improvement projects as for the construction of a new drain. Since the provision of allowances under S. 29 to 33 is an integral component of any new drain project, then allowances can also be provided for S. 78 projects. For more detailed information on the provision of allowances, please refer to the paper given by Ed Dries and Dennis McCready at the 1998 Drainage Engineers Conference entitled "Allowances and Compensation under The Drainage Act".

However, the engineer needs to examine what allowances should be provided. For example, if the improvement project is undertaken to relocate a section of drain, should allowances be given for land taken? (S. 29). Since the community of landowners already shared in the cost of allowances for the land used in the original drain location, is it fair that they pay for the land taken in the new location? Probably not. So providing allowances for a S.78 project needs to be examined against the provision of allowances for the original drain and the fairness to the rest of the landowners on the drain.

**SUMMARY**:

For direction on the use of Section 78 of the Drainage Act:

- The primary direction should be taken from the wording of the Drainage Act, as clarified by decisions of the Drainage Referee or the Drainage Tribunal;
- In situations where the *Drainage Act* is silent or unclear, and the appeal bodies have not yet provided direction, chose the action that is fair to the community of landowners involved in the drain improvement project;
- When considering notification to landowners or involvement at meetings for S. 78 projects, err on the side of caution; consult too many property owners and agencies rather than too few.