

Court File No.: CV-23-00001662-0000 (Kitchener)

**ONTARIO
SUPERIOR COURT OF JUSTICE**

IN THE COURT OF THE DRAINAGE REFEREE

BETWEEN:

CORY KITTEL

Applicant

-and-

THE CORPORATION OF THE TOWNSHIP OF WILMOT

Respondent

-and-

OTHERS WHO MAY BE GRANTED PARTY STATUS UPON APPLICATION

Respondents



NOTICE OF APPLICATION

TO THE RESPONDENT(S):

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicant. The claim is set out in the following pages.

THIS APPLICATION will come for a hearing at a date and time to be determined, at the Waterloo Courthouse, 85 Frederick Street, Kitchener, Ontario.

IF THE CORPORATION WISHES TO OPPOSE THIS APPLICATION, to receive notice of any step in the application, or to be served with any documents in the application, the Corporation or its Ontario lawyer acting for it must forthwith prepare a notice of appearance in Form 38A prescribed by the *Rules of Civil Procedure, infra*, serve it on the applicant, and file with it, proof of service in the court office and the Corporation or its lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, the Corporation or its lawyer must, in addition to serving the notice of appearance, serve a copy on the applicants' lawyer or, where the applicants do not have a lawyer, serve it on the applicants and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least four days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: December 20, 2023

Issued by: _____
Local Registrar

Address of Court Office:
85 Frederick Street
Kitchener ON N2H 0A7

TO: **OFFICE OF THE ONTARIO DRAINAGE REFEREE**
12 The Ridgeway
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Andrew C. Wright
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Acting Referee

AND TO: **COUREY LAW PROFESSIONAL CORPORATION**
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Paul Courey – LSO No. 32630L
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Lawyers for the Respondent,
The Corporation of the Township of Wilmot

APPLICATION

1. The Applicant, Cory Kittel (the “Applicant”) makes this Application for:
 - a. An Order setting the procedure, establishing the steps to be taken and the sequence in which they shall occur in this proceeding;
 - b. An Order setting the date or dates for the hearing and such other matter as this Application and the investigative work preceding it may make necessary;
 - c. An Order pursuant to paragraph 106(1)(b) of the *Drainage Act, infra*, setting aside the by-law, or provisional by-law, enacted by the Council of the Township of Wilmot, which implements the drainage report prepared by Headway Engineering, dated April 28, 2023 (herein “the drainage report”);
 - d. An Order declaring the drainage report to be a nullity, void and inoperative;
 - e. An Order pursuant to ss. 106(1)(b) of the *Drainage Act, infra*, declaring the drainage petition received by the Respondent on April 26, 2021 (herein “the drainage petition”) is not a valid petition that meets the requirements set out in ss. 4(1) of the *Drainage Act, infra*;
 - f. The Applicant’s costs of this proceeding on a solicitor and his own client basis, plus harmonized sales tax where required by law;
 - g. An Order pursuant to s. 113 of the *Drainage Act, infra*, extending the time for the completion any step(s) in this proceeding; and,
 - h. Such further and other relief as the Applicant may request and the Drainage Referee may deem just.

2. The grounds for the Application are:

- a. The Applicant and his family live on a 98-acre farm identified municipally as 1010 Gerber Road, St. Agatha, Ontario;
- b. The Applicant's property is situated wholly in the Township of Wilmot, approximately 6.8 kilometers east of the Town of Wellesley and approximately 1.6 kilometers south of the Village of Bamberg;
- c. The Applicant grew up working on this farm, which has been owned by his family for multiple generations;
- d. The Applicant's property consists primarily of a house, several outbuildings, and farm fields;
- e. The Bamberg Creek flows southwest across the southern part of the Applicant's property;
- f. The farm field abutting the westernmost edge of the Applicant's land is owned by Jananna Corp.;
- g. The Jananna Corp. property is identified municipally as 1184 Gerber Road. It is situated wholly within the Township of Wilmot;
- h. Jananna Corp. leases the fields at 1184 Gerber Road to cash-crop farmers;
- i. The Jananna Corp. property has extensive systematic land tillage and there is no evidence visual or otherwise that there is a significant or persistent drainage problem on this property that impacts their farmable land;

- j. The Koch-Leis Drain flows southeast across the southern portion of the Jananna Corp. property, then the drain outlets into the Bamberg Creek at a point south of the both the Jananna Corp. property and the Applicant's property;
- k. The Koch-Leis Drain does not flow across the Applicant's property;
- l. On April 26, 2021, the Respondent received a petition from Jananna Corp. for 500 metres of drainage to improve a southeast low portion of a field owned by the Jannana Corp.;
- m. The Jananna Corp. field that is the subject of the drainage petition abuts the Applicant's field;
- n. The drainage petition has been signed only by Jananna Corp.;
- o. The Council of the Township of Wilmot appointed Headway Engineering to prepare a drainage report on July 12, 2021;
- p. The drainage report was submitted to the Respondent on April 28, 2023;
- q. The drainage report recommends the establishment of a new municipal drain that would be called the Jananna Drain, which would consist of two separate branches;
- r. The proposed eastern branch of the new drain would commence at the property line between the Applicant's property and the Jananna Corp. property. It would flow southeast down the property line then veer east across the Applicant's field to outlet into the Bamberg Creek;
- s. In early 2023, a counter-petition was signed by 28 landowners who constitute the watershed community that is opposed to the construction of

- the Bamberg Creek, Jananna, and Koch-Leis Drains. The counter-petition demonstrates that most of the landowners within the watershed community do not recognize any need or benefit of the proposed work;
- t. To date, the numerous concerns with the proposed work held by the counter-petitioner landowners have gone largely unanswered by the Respondent;
 - u. Despite Headway Engineering's assertion that the drainage petition signed by only Jananna Corp. amounts to a valid petition, the Applicant respectfully submits that it is not a valid petition under the *Drainage Act, infra*, as it does not meet the requirements set out in ss. 4(1), the particulars of which deficiency include:
 - i. The drainage petition was not signed by a majority in number of the owners of lands in the area;
 - ii. The drainage petition was not signed by the owners of lands in the area representing at least 60 per cent of the hectarage in the area; and,
 - iii. The drainage petition was not signed by the Director.
 - v. There is a defined drainage basin requiring drainage that extends onto both the Jananna Corp. property and onto the Applicant's property. The majority of this area requiring drainage lies on the Applicant's property.
 - w. Even the original drainage petition visually shows the drainage area spans across part of the Jananna Corp. property and across part of the Applicant's property;

- x. All mapping applications show a consistent and defined drainage area, currently and historically, that spans from the Applicant's property onto the Jananna Corp. property;
- y. Despite this, the drainage engineer stated that the area requiring drainage was only on the Jananna Corp. property. This does not excuse or save the petition from being deficient according to ss. 4(1) of the *Drainage Act, infra*;
- z. The Court of the Drainage Referee has jurisdiction to determine the validity of, or to set aside any petition pursuant to s. 106(1)(b) of the *Drainage Act*;
- aa. Property boundaries should not be preferred over topographical contour features delimiting areas where water lies as a basis for establishing an area requiring drainage pursuant to s. 4 of the *Drainage Act*;
- bb. An engineer's opinion as to the area requiring drainage cannot stand, is not beyond review by the Court of the Drainage Referee, and the opinion must be set aside if it is patently wrong;
- cc. The Applicant did not sign the drainage petition so the sole signature on it by Jananna Corp. did not constitute a majority of the of owners of the area requiring drainage;
- dd. Should the Drainage Referee find that the drainage report is not founded upon a valid petition, then it is respectfully submitted that the drainage works proposed in that report ought not to be constructed;
- ee. Another reason for the application is that a separate new branch of the drain was added to the project exclusively by the Township Drainage

Superintendent and Engineer without due authority. The new branch of the proposed drain is called the Jananna West Branch. It is located in a separate dissimilar drainage area that is far from the original petitioned drain, on the opposite side of the farm;

- ff. The Jananna West Branch was created to deal with a road drain. This added drain was not contemplated on the original petition and does not have its own petition;
- gg. The engineer failed to call a second site meeting when the areas requiring drainage had changed;
- hh. It is respectfully submitted that the *Drainage Act, infra*, does not authorize a municipality to pass a by-law for the construction of a drainage system, such as the proposed Bamberg Creek, Jananna Drain, and Koch-Leis Drains which differs substantially in size and cost from the drain petitioned for;
- ii. Both the issue of petition validity and the issue of the improper expansion of the drainage project were expressed to the Council of the Township of Wilmot at the Meeting to Consider, however, the councillors and the drainage engineer did not address these issues at said meeting;
- jj. The Applicant pleads and relies upon on sections 4, 9, 32, 33, 44, 47, 58, 106, 111, 113, 114, 117, 118, 119 and 120 of the *Drainage Act*, R.S.O. 1990, c. D. 17, as amended, and the regulations thereto;
- kk. Rules 1.04, 10.5, 2.01, 3.02, 14.05, 38, 39, 53, and 57 of the *Rules of Civil Procedure*, as amended;

- ll. Rule 131 of the *Courts of Justice Act*, R.S.O. 1990, c. 43; and,
- mm. Such further and other grounds as counsel may advise and the Drainage Referee may permit.

- 3. The following documentary evidence will be used at the hearing of the Application:
 - a. The Affidavit of Cory Kittel, to be sworn, and Exhibits attached thereto;
 - b. The drainage petition received by the Respondent on April 26, 2021;
 - c. The drainage report of Headway Engineering, dated April 28, 2023;
 - d. The Notice of Application;
 - e. A Guide for Engineers working under the Drainage Act in Ontario Publication 852 OMAFRA; and,
 - f. Such further and other evidence as counsel may advise and the Drainage Referee permit.

Dated: December 20, 2023

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Cory Kittel

CORY KITTEL
Applicant

-and- THE CORPORATION OF THE TOWNSHIP OF WILMOT
Respondent

Court File No. CV-23-00001662-0000 (Kitchener)

ONTARIO
COURT OF THE DRAINAGE REFEREE

PROCEEDING COMMENCED AT
WATERLOO

NOTICE OF APPLICATION

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