ONTARIO

SUPERIOR COURT OF JUSTICE

IN THE COURT OF THE DRAINAGE REFEREE

CITATION:	**M&M Farms v. Kingsville (Town) 2004 ONDR 1**
DATE OF DECISION:	**2004-09-29**
FILE NUMBER:	**2004-01**
STATUTE:	***Drainage Act***
HEARING:	**- -**

BETWEEN:

BETWEEN:

M & M FARMS LTD.

Plaintiff

- and -

THE CORPORATION OF THE TOWN OF KINGSVILLE and BRUCE D. CROZIER ENGINEERING INC.

Defendants

- and -

JOHN PAVAO and 658634 ONTARIO INC.

Intervenors

PAUL COUREY **TOM SERAFIMOVSKI**

Courey Law Office
Barrister and Solicitor

Solicitor for the Plaintiff

Mctague Law Firm LLP
Barristers and Solicitors

Solicitors for the Defendant, The Corporation of the Town of Kingsville

KRIS HUTTON
Stieber Berlach Gibbs
Barristers and Solicitors

Solicitors for the Defendant, Bruce D. Crozier Engineering Inc.

ANDREW C. WRIGHT
Siskind, Cromarty, Ivey & Dowler LLP
Barristers and Solicitors

Solicitors for the Intervenors, John Pavao & 658634 Ontario Inc.

D E C I S I O N

The Ontario Drainage Referee conducted a hearing of the above-mentioned matter in the Superior Court of Justice in Chatham, Ontario on the 20th day of July 2004. At the commencement of the hearing the solicitors for the various parties advised the Court that they had reached a settlement with respect to certain matters at issue and filed with the Court Minutes of Settlement executed on behalf of the respective parties. Minutes of Settlement are set forth in full herein inasmuch as they deal with a variety of important issues including the dismissal of the action brought against Bruce D. Crozier Engineering Inc. as well as the cross-claims between the Corporation of the Town of Kingsville and Bruce D. Crozier Engineering.

A Procedural Order made by the Ontario Drainage Referee previously had added John Pavao and 658634 Ontario Inc. as party intervenors.

MINUTES OF SETTLEMENT

1. The Defendants The Corporation of the Town of Kingsville (" Town of Kingsville") and Bruce D. Crozier Engineering Inc. ("Bruce Crozier") shall pay to the Plaintiff the sum of $30,000.00 all inclusive to be paid as follows:

    a) Town of Kingsville the sum of $10,000.00
    b) Bruce Crozier the sum of $20,000.00

2. The Plaintiff will provide a full and final Release in a form satisfactory to the Town of Kingsville

and Bruce Crozier, save and except an action brought by John Pavao and 658634 Ontario Inc.

3. The Town of Kingsville and Bruce Crozier will exchange full and final Releases in a form satisfactory to both parties, save and except an action brought by John Pavao and 658634 Ontario Inc.

4. The Plaintiff will abandon paragraph 7 of the originating Notice of Motion.

5. The Town of Kingsville will continue as a Defendant in this proceeding as a nominal party and the parties agree not to seek any costs against the Town of Kingsville.

6. The parties agree to produce representatives at the trial of this action, if requested without the necessity of a summons.

7. The parties agree to the use of the transcripts from the Examinations for Discovery of all parties at the trial of this action.

8. The parties agree that the joint Brief of Documents Volume I and II in this action shall be filed on consent for the trial of this action and each party reserves the right to call witnesses to authenticate any of the documents.

9. Bruce Crozier will submit no further account for engineering service to the Town of Kingsville with respect to this action.

10. Bruce Crozier is removed as Engineer of record.

11. The parties agree that the engineers who have served expert reports including N. Peralta, save and except Enis Sullo, may not be appointed if the Town of Kingsville is ordered.

12. The action brought by the Plaintiff as against Bruce Crozier is dismissed on a without costs basis.

13. The cross-claims between the Town of Kingsville and Bruce Crozier are dismissed on a without costs basis.

14. If this Court orders the construction of the drainage works to proceed as outlined in any of Bruce Croziers four drainage reports it will be only in general conformity with the new Engineer of Record certifying the actual design specifications.

Dated this 20th day of July 2004
At Chatham, Ontario

Witness

M&M Farms Ltd.
By its Counsel Paul Courey

Witness

Town of Kingsville
By its Counsel Tom Serafimovski

Witness

Bruce Crozier
By its Counsel Kris Hutton

Witness

John Pavao & 658634 Ontario Inc.
By their Counsel Andy Wright "

The Drainage Referee advised that he would make an Order to go in terms of the Minutes Settlement as filed.

ISSUES

All parties were in agreement as to the issue before the Drainage Referee namely the validity of the Petition. The Petition appeared to be signed on the 3rd day of June 2002 by Michael Mastronardi on behalf of M&M Farms Ltd. and William Setterington on behalf of Willor Acres Limited and it referenced Lots 11 and 12, Concession 3 ED in the Town of Kingsville.
The relevant section of the Drainage Act is Section 4(1)(a)(b):

" 4. (1) A petition for the drainage by means of a 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; "

BACKGROUND

The Drainage Engineering firm appointed by the Town of Kingsville in response to the Petition was Bruce D. Crozier Engineering Inc. which firm proceeded to prepare four reports, the first dated January 23rd, 2003, the second dated April 3rd, 2003, the third dated May 14th, 2003 and the final report dated June 27th, 2003.

In the first report the Drainage Engineer Denis A. Averill (who signed the report) described "the area requiring drainage" to consist of approximately 43.823 hectares situated to the north of King's Highway No. 3. The report further discloses that the properties listed in "the area requiring drainage" are all of the properties within the watershed including some minor properties south of Highway No. 3.

The works recommended in the first report provided for:

1. a short covered drain across the northern part of 658634 Ontario Inc.
2. an open drain along the property line between 658634 Ontario Inc. and adjacent easterly property Willor Acres Limited.
3. an open drain along the north side of Highway No. 3 extending east over the Willor Acres Limited property and property owned by the County of Essex to a sufficient outlet in the Sturgeon Creek.

As a result of representations made at the meeting to consider the report the property south of Highway No. 3 was removed from the watershed as well as the Ingratta property in Lot 10, Concession 3 along the westerly edge of the watershed.

A new report was prepared in which the "area requiring drainage" was redefined to once again represent all those parcels remaining in the watershed. The work recommended in report number 2 was similar to that assigned in report number 1.

Thus, there remained in the watershed only three properties namely the M&M Farms Ltd. property (the most westerly), the 658634 Ontario Inc. property which hereafter will be described as the Pavao property and the Willor property (the most easterly). The M&M property was all cleared and in agricultural production and the Drainage Referee was advised it was the intention of the owner to construct thereon a large greenhouse costing millions of dollars which required a sufficient drainage outlet. The Pavao property displayed several different uses namely, a residential home at the north end, buildings and construction yard for the owners (conducting an excavation business), limited cattle production and rodeo facilities (which the owner the utilized in significant local charitable projects). The Willor property had been the site of substantial gravel excavation. All three properties had been at one point significantly altered by excavation, however, the M&M property had been substantially rehabilitated for agriculture, and the Pavao property had also been significantly rehabilitated. The Willor property had not been rehabilitated. Despite the significant alterations that had taken place in the landscape it appeared that the surface flows were in general from west to east.

A further change was made by the Drainage Engineer after it became apparent that Mr. Pavao preferred the construction of a closed drainage system across the southerly part of his property. This resulted in a third report which recommended the construction of an 18 inch diameter tile drain just north of the north limit of Highway No. 3 from the M&M property across the Pavao property then continuing as an open drain across the Willor property and the County of Essex property to an outlet in the Sturgeon Creek Municipal Drain. This would change the outlet for the M&M property to the south end of that property and would continue to provide the Pavao property and the Willor property (which had now been sold to 1206782 Ontario Limited) a sufficient legal outlet.

A minor adjustment resulted in a fourth report which relocated tile across the Pavao lands somewhat further north to cross about 100 meters north of Highway No. 3 the Pavao lands. The estimated construction costs for the project in the fourth report were estimated to be $111,100.00.

At the consideration of report number 4 at a council meeting on the 14th of July 2003 by the Town of Kingsville Mr. Pavao advised that he had purchased 1206782 Ontario Limited (previously referred to as Willor) and advised that he was withdrawing his name from the original petition as owner of that property. Council adjourned for the purpose of seeking legal advice and at their meeting of August 11th, 2003 concluded that the Petition had failed because of the withdrawal of the signature for the property originally described as Willor Acres.

EVIDENCE OF THE PARTIES

Michael Mastronardi the owner of M&M Farms Ltd. advised that he intended to build a large greenhouse complex on the property for which he needed an agricultural drainage outlet. He stated that Mr. Setterington the owner of Willor Acres Ltd. signed the Petition, but Mr. Pavao refused. Mr. Mastronardi advised he supported all of the changes made in the several reports, although the southerly outlet would require him to redesign his greenhouse project. He advised that Mr. Pavao requested that he use the existing private small tile pipe, but he advised that he was not only concerned about sufficient capacity, but also required a legal outlet for his project. Mr. Mastronardi advised that he did not have legal access to any of the surrounding municipal drains directly from his property. He advised that Mr. Pavao had constructed a berm some distance along the border which was holding back water and flooding his property.

Mr. Mastronardi advised that although the first stage of his greenhouse project would cost approximately $7,400,000.00 eventually the project would cost as much as $14,000,000.00.

Mr. Courey then called upon Ed Dries P. Eng. for the purpose of providing expert testimony. Mr. Dries advised that he had reviewed the reports and visited the area making a visual examination. Mr. Dries stated the following on Page 4 of his Report paragraph 3:
"It is my view that all of the reports have incorrectly identified the area requiring drainage. From the

outset the actual area requiring drainage should have included only portions of the M&M Farms Ltd. (Mastronardi property) and the 658634 Ontario Inc. (Pavao property). The 1206782 Ontario Limited lands are at a much lower elevation and do not exhibit similar topographical features or drainage requirements when compared to the two westerly properties. The engineer failed to recognize that the area requiring drainage is very different from the area drained."

Mr. Dries went on to advise that in his opinion the "area requiring drainage" included portions of land only on the Mastronardi and Pavao property and therefore only signatures from those two properties were relevant. In his opinion the Petition would still be valid if only signed by Mastronardi under Section 4(1)(b) as the Mastronardi lands represented more than 60% of the "area requiring drainage". He went on to state that the council of the Town of Kingsville had authority to accept any of the four reports presented.

Mr. Dries reviewed the various legal authorities and defined what he believed to be the "area requiring drainage." He said the M&M Farms Ltd. land was in agricultural use and the Pavao farm was largely a hobby farm while the Willor property was a gravel pit. He noted further that only part of the M&M Farms Ltd. land required drainage because a portion in the northwest sector exhibited a ridge of land which separated that area from the watershed and from the "area requiring drainage". He noted that previous cases had considered the physical differences in land as well as land use and he pointed out that only a portion of the Pavao land was similar to the M&M Farms land and both were radically different from the Willor land including a different land use. He noted that only 29 acres of the 36.2 acres of the M&M land require drainage. Of the Pavao property he advised that in his opinion 7 acres require drainage while none of the Willor property require drainage. He stated that because 29 acres of the "area requiring drainage" was owned by Mastronardi representing approximately 80% of the land requiring drainage it made the Petition valid.

Mr. Dries concluded by stating that in his opinion the appointed engineer in this matter did not correctly identify the "area requiring drainage" for two reasons. Firstly when he was examined on discovery he stated "that normally the "area requiring drainage" was what was normally spelled out in the Petition." Mr. Dries said only in rare circumstances would the Petition correctly identify the "area requiring drainage". Secondly, in this case the engineer described the "area requiring drainage" as being the entire watershed which would rarely be the case and certainly was not correct in the circumstances of this drain.

Mr. Wright called as his first witness E. Paul Elston P.Eng. for the purpose of giving expert testimony. Mr. Elston reviewed the physical characteristics of the land in the watershed noting that the lands at the south end of the M&M property appeared to be rehabilitated after extraction of gravel. He also noted that the south part of the Pavao land had been filled when Highway 3 was reconstructed. He noted that toward the center of both properties the land on the M&M Farm and the Pavao farm were roughly of similar elevation.

In defining the "area requiring drainage" Mr. Elston searched for the "irregular saucer" described by Referee Henderson and quoted in the Westendorf v. Township of Elizabethville 1986 Decision. It was marked by the ridge of the original extraction on the M&M property. He included in that the residential properties on the Pavao lands because the flows from the residential property was directed towards the "area requiring drainage". He excluded the County property which was similar to the Setterington property in physical characteristics, but was not in the "area requiring drainage" because it had direct access to a municipal drain. He appeared to find the irregular saucer on the basis of gravel extraction.

Mr. Elston also argued on a different basis namely that the M&M, the residential, the Pavao properties, as well as the Setterington properties ought to be in the "area requiring drainage" because all required a legal outlet being at present dependent on private drains.

Mr. Elston concluded as follows:
"The lands within the 'area requiring drainage' on the M&M property do not represent at least 60% of the hectarage in the area for the purposes of clause 4(1)(b) of the Drainage Act regardless of which of the two methods of determination of the "area requiring drainage' as outlined in section 2.0 and 3.0 of this report is used."

Therefore based on the withdrawal of the signature by Pavao after the purchase of the former Willor property the Petition failed and the drainage work could therefore not be legally proceeded with.

Under cross-examination Mr. Elston admitted that the eastern limit of the "area requiring drainage" as he defined it was marked not by the change in physical characteristics, but rather by the legal boundary based on the principal that the Essex County property had a legal outlet and did not require drainage. Under further cross-examination Mr. Elston also agreed that the saucer approach had difficulties in circumstances where land had been excavated and/or where rehabilitation had occurred such as the berm constructed on the Pavao property as well as the hill constructed for rodeo spectators. Mr. Elston advised that is also why he had addressed the issue from the point of view of the need for a legal outlet as opposed to the historical physical saucer. Mr. Elston further advised that the historical saucer approach encountered difficulties in where the land was fully tiled and only required a tile outlet and/or when the land was uniquely flat as a result of agricultural contouring. Mr. Elston found 9.5 acres of the M&M land to be in the "area requiring drainage" whereas Mr. Dries had found 29 acres of the M&M land to be in the "area requiring drainage."

Mr. Wright called John Pavao who is also the owner of 658634 Ontario Inc. Mr. Pavao advised that he had always made the 12 inch private drain at the south end of this property available for drainage purposes for the M&M property. Mr. Pavao advised that the first drainage report in his opinion had been signed for the purpose of picking up a 10 inch pipe containing flows from the M&M properties. He had explained that at all times he preferred a drain at the south end of his property.

Mr. Pavao testified that in a meeting between the parties and the engineer in which one legal representative was present, very strong words had been exchanged bordering, in his opinion, on threats. He advised that he purchased the adjacent property and withdrew his name as owner on the Petition when he felt he was being pushed too hard. He concluded by saying that he was community minded and had run the local rodeo on his property and donated cattle for charitable purposes particularly for use by the Kingsville Hospital.

SUBMISSIONS OF COUNSEL

Mr. Courey advised that the issue before the Drainage Referee was simply the validity of the Petition. He asked that the Petition be declared valid on the basis that the "area requiring drainage" was located substantially on the M&M land. He noted that the saucer approach to the "area requiring drainage" was still the historic benchmark, but cases had proceeded to look at other features such as physical features which Referee Johnson had referred to in the Decision R. Hodgson and the Township of Mariposa 1993.

> " I would add that in determining the area requiring drainage there should be some physical characteristic which is different where the proposed drain ends from that of the surrounding territory. This could be the extent of the grade; the kind of cropping that is taking place in the area, or other physical characteristics."

Mr. Courey noted that the above-mentioned case referred to land use as a factor as did the Pannabecker and West Wawanosh case in which Referee O'Brien is quoted as saying:

> " 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."

Mr. Courey further pointed out in this case that much of the land had been rehabilitated and was being used for a range of land uses ranging from agriculture through to hobby farming, residential and unrehabilitated gravel excavation area.

Mr. Courey argued that the saucer described by Mr. Dries was largely on the M&M property defined by the rehabilitation area to the south where the prior gravel excavation was reasonably obvious by the pronounced ridge to the west, by the residential areas to the north and by the constructed berm on the east side, which together with the rodeo burn on the south end trapped flows on the M&M property. He noted that Mr. Dries had included 29 acres of the M&M property and 7 acres of the Pavao property in the "area requiring drainage" and therefore the signature by Mr. Mastronardi constituted 80% of the land which was valid under section 4(1)(b) of the Drainage Act.

Mr. Wright also confirmed that the issue was the validity of the Petition and more particularly the definition of the "area requiring drainage". He noted that his client Mr. Pavao had been willing to permit his 12 inch private pipe to be used for the drainage of his neighbor at all stages. He noted that Mr. Pavao had been reluctant to pursue the location as defined in the first report because it would interfere with the development of his property and more particularly his landscaping and excavation business. He underlined the fact that Mr. Pavao had attempted to reach an agreement with Mr. Mastronardi in June 2003, but believed himself to be rebuffed. It was only then Mr. Wright noted that he proceeded to purchase the adjacent land and withdraw his name from the Petition. Mr. Wright suggested that inappropriate language and unduly aggressive conduct had characterized at least one meeting between the professionals in this matter and urged the Drainage Referee to give directions as to what conduct should be expected. Mr. Wright argued that the drainage process was not fundamentally adversarial in character, that it was community based and depended on the goodwill of all parties to function expeditiously.

In referring to the law Mr. Wright noted that the Drainage Act was a very powerful instrument with inherent elements of expropriation, taxation and quasi judicial decision making which required studious attention to due process. He noted that the Petition was the fundamental enabling instrument and that it had certain democratic safeguards which ought to be scrupulously observed. Mr. Wright referred to the legal authorities noting that the saucer theory had historic validity by referring to Referee Henderson's comment re-quoted in the Westendorp case by Referee Turville:
"It is of course not proper to pick out just enough land to enable the majority, but there should be what I generally speak of as a regularly shaped saucer with reasonably well defined bank around it."

Mr. Wright proceeded to note that the case law had supported the view that in defining the "area requiring drainage", drainage engineers ought to also consider "similar physical features." Mr. Wright cautioned the Drainage Referee with respect to the dangers of a purely subjective test in determining the "area requiring drainage" (e.g. the intended use of the owner being the primary criteria.)

Mr. Wright observed that environmental considerations which were acquiring more attention with each passing day ought to be balanced against the needs for agricultural drainage.

Mr. Wright noted that Mr. Elston had been much more detailed in this investigation of the "area requiring drainage" and observed that Mr. Dries had not outlined in any detail the boundaries of the 7 acres which he included in the "area requiring drainage" on the Pavao property. He advised that the constructed berm was limited in dimensions and therefore the M&M and Pavao properties were not clearly physically separated.

FINDINGS OF FACTS & LAW

The Drainage Referee was assisted in this case by experienced and skilled legal counsel and highly qualified and accomplished drainage engineers. This matter raised a very significant issue namely the

interpretation and application of the words "area requiring drainage" as contained in section 4 of the *Drainage Act*. Those words are the operative key to the Petition for drainage which is the fundamental instrument required to launch a drainage scheme pursuant to the *Drainage Act*. If democracy alone were to determine whether a drainage project was to proceed we would have no need for the enabling words "area requiring drainage" in the *Drainage Act*, but rather could depend on a majority vote of owners in the watershed. The *Drainage Act* long ago removed dependence on the will of the majority. The current *Drainage Act* went further and determined that the decision as to the "area requiring drainage" should not be made by a municipal council composed of laymen subject to political pressures, but rather it specifically allocated that responsibility to a professional drainage engineer. He is charged with the responsibility without guidelines, but pursuant to the directions of Section 11 of the *Drainage Act*

"The engineer shall, to the best of the engineer's skill, knowledge, judgment and ability, honestly and faithfully, and without fear of, favor to or prejudice against any person, ..."

As Referee Turville stated on page 2550 of the Westendorp and Elizabethtown decision of June 1986:

"In the final analysis the engineer and he alone shall decide what owners and their lands fall within the definition of the area requiring drainage."

The words of the *Drainage Act* are simple and in plain language:

"The area requiring drainage"

and should not be subject to misinterpretation. The Drainage Act is an enabling legislation and we are directed by the *Interpretation Act of Ontario* R.S.O. 1990 Chapter 1.11 to interpret it liberally to accomplish the purpose for which it is enacted. Section 10 of that Act states as follows:
"Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of anything that the Legislature deems to be for the public good or to prevent or punish the doing of anything that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit. R.S.O. 1980 c. 219, s. 10."

It has been the policy of the Province of Ontario for a hundred years to encourage agricultural land drainage which has proven historically to be so cost beneficial; and grants have been made available to assist in the development of drainage schemes. Section 4 of the *Drainage Act* is fundamentally designed to permit drainage to go forward even if the land owner is outvoted by his neighbours provided that he has 60% of the acreage. Also, if a majority of the acreage is owned by one land owner a majority of owners can nonetheless force a drainage project to proceed with a minority of

acreage. The above-mentioned features are frequently described as controlling mechanisms, but they are also enabling mechanisms. A further enabling feature is also 4(1) (c) which reflects a broader community interest in a project which may be initiated by the signature of a single municipal road superintendent.

Finally, a further test is imposed even if the Drainage Engineer finds the Petition to be valid he must weigh it against his duties and responsibilities defined by Section 40 of the *Drainage Act* which again imposes an essential responsibility on the appointed Drainage Engineer and which section is not in my view sufficiently utilized by the profession.

The cases have given some guidance to the Drainage Engineer in his determination of the "area requiring drainage", but as this matter has demonstrated they have been of limited use. The first guide or benchmark that has been referred to in the case law is the "saucer theory" referred to in the Westendorp decision by Referee Turville where he quoted Referee Henderson:

"It is not necessary that there should be a majority of the Petition of all those whom the engineer finds to be eventually interested in the drainage work. What you need is in the first place a reasonably defined drainage area, that is a section of land requiring drainage, and it is this territory which should be described in the area. It is of course not proper to pick out just enough lots to enable a majority, but there should be what I generally speak of as an irregularly shaped saucer with reasonably well defined banks around it. This might be all on one lot, although that is of course a rare case, but the point is that once you have that low lying section of land requiring drainage, it is a majority of the owners in that section that you need for a Petition, no matter how many others the engineer may bring in ..."

It should be noted that statement was made by the Referee in 1929 in a period when the horse was still the primary source of energy on the farm. Farms were small, tile drainage was limited and modern contouring practices (with the use of lasers and G.P.S.) were totally unknown. It becomes harder and harder to apply the saucer concept to the context of modern farming and it has no application whatsoever if the only requirement is to obtain a legal outlet when one is not available. The second guide referred to in the cases is that of the "physical characteristics" in the Jones v. Derby decision of Referee Turville made in 1986 he states:

"I am of the view that it is the intention of the present *Drainage Act* that lands not described in the petition as requiring drainage that are subsequently found to require drainage by the engineer in his report to have similar physical features so as to form one area requiring drainage within those lines described in the petition as requiring drainage ..."

Referee Johnson in 1993 in the Hodgson v. Township of Mariposa decision states:
"That I would add and determine the area requiring drainage that there should be some physical characteristics which is different where the proposed drains ends from that of the surrounding area. This

could be the extent of the grade the kind of cropping that is taking place in the area or other physical characteristics."

The concept of land use has emerged as well as a guide to drainage engineers. It was referred to by Referee Johnson in the above-mentioned Decision which refers to "the kind of cropping that is taking place." Finally, in the Pannabecker and West Wawanosh decision of my own of June 2000 the following statement was made:
"It should be noted that 'the lands requiring drainage' the 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."

Thus the drainage engineer when determining the "area requiring drainage" can take into account the saucer concept, the physical characteristics of the land and the land use considerations including cropping, etc. In every case the final decision is left to the appointed drainage engineer using his judgment and determining in accordance with the plain words of the Act what is the "area requiring drainage." He must act professional and honestly when confronted with modern farming methods that completely alter the landscape, creating circumstances that were never contemplated in previous generations and he must adjust to current needs to keep the *Drainage Act* relevant.

With the above-mentioned considerations in mind I have concluded in this matter that the "area requiring drainage" is primarily to be found on the lands of M&M Farms Ltd. That area with application of some creative thinking manages to meet the saucer test, but more particularly that area has common physical features different from other lands namely being rehabilitated for agricultural purposes. The surrounding properties were either not rehabilitated at all or rehabilitated primarily for purposes other than agricultural e.g., residential, work shop, storage areas and recreational rodeos etc. Finally, and perhaps more significantly lands are being used for a major agricultural enterprise namely a large greenhouse complex expected to involve eventually an investment of approximately $14 million dollars which type of agricultural enterprise is becoming common place in the Kingsville area.
As more and more urban dwellers move to the country to experience a country lifestyle, as more and more recreational complexes are constructed in the countryside, as more and more emphasis is placed on environmental considerations, and as the investment in high tech agriculture mounts utilizing a selected land base, consideration of land use will become more and more important. The countryside is becoming a patch work of differential uses.

I am compelled to admonish all professionals engaged in the drainage process to conduct themselves with courtesy and civility at all times being conscious that the procedure is not adversial in nature, but rather designed to ungender cooperation and acceptance.

ORDER

For the above reasons:

1. **I HEREBY ORDER THAT** the Petition is valid with the signature of the owner of M&M Farms Ltd. only and accordingly Order that the legal processes of the Act proceed on the basis of a valid Petition.

2. **I FURTHER ORDER THAT** an Order is made in accordance with the terms of the Minutes of Settlement outlined herein.

3. **I FURTHER ORDER THAT** I will reserve with respect to the issue of costs and entertain submissions from counsel with respect to the same.

Dated at Pembroke this 29th day of September 2004.

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