Enforcement under the Drainage Act
Sections 80 & 82

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Presentation Overview

• Disclaimer & Rationale for presentation
• Drainage Act
  – Section 80: obstruction of drainage works
  – Section 82: damage to drainage works
• Thoughts for:
  – drainage superintendents
  – municipalities
  – drainage engineers
Hello I am an engineer! Not a lawyer

Thoughts from my experiences as:
- OMAFRA’s Water Management Engineering Specialist
- Provincial Officer with MOECC

Input from:
- several drainage superintendents
- decisions of the Ontario Agriculture, Food & Rural Affairs Appeal Tribunal and the Ontario Court of the Drainage Referee
Rationale for Presentation

- Enforcement under the Drainage Act is not well understood or consistently applied.
- Effective procedures and tools are fundamental to protecting the overall system.
- Important as the drainage community incorporates more environmental features (e.g. riparian buffers, wetlands, etc.) into communal drains.
It is enabling legislation – not enforcement!!!

- Provides a process to be followed for the construction, improvement, maintenance and repair of drains
- Some enforcement provisions but not truly enforcement legislation since it is does not:
  - assign powers and duties of the Minister
  - designate or assign powers of Provincial Officers or by-law officers
  - prescribe inspections or orders by province or municipality
  - have strongly worded contravention sections
Section 80 – obstruction

...when a drain becomes obstructed by a dam, low bridge, fence, washing out of a private drain, or other obstruction, for which the owner or occupant of the land adjoining the drainage works is responsible, so that the free flow of water is impeded...

Obstructed by what?
Section 80 – obstruction

...when a drain becomes obstructed by a dam, low bridge, fence, washing out of a private drain, or other obstruction, for which the owner or occupant of the land adjoining the drainage works is responsible, so that the free flow of water is impeded...

- specific examples
- **other obstruction**
  - garbage
  - filling in a ditch drain
  - installing an undersized crossing
  - material dumped into a drain
  - trees planted over pipe drain or in working space
Section 80 – obstruction

...when a drain becomes obstructed by a dam, low bridge, fence, washing out of a private drain, or other obstruction, for which the owner or occupant of the land adjoining the drainage works is responsible, so that the free flow of water is impeded...

What defines an obstruction?
Section 80 – obstruction

…when a drain becomes **obstructed** by a dam, low bridge, fence, washing out of a private drain, or other obstruction, for which the owner or occupant of the land adjoining the drainage works is responsible, so that the free flow of water is **impeded**…

- **obstructed** means prevent or hinder movement (Oxford Dictionary)
- **impeded** comes 16th century Latin word: impedire meaning to ‘shackle the feet of’ something

“Section 80 of the Act is operative only if the free flow of water is impeded by the alleged obstruction”

(Blandford-Blenhiem (Township) v. Krift, 1997 ONDR, which was an appeal from a 1995 Ontario Drainage Tribunal decision)
Section 80 – obstruction

...when a drain becomes **obstructed** by a dam, low bridge, fence, washing out of a private drain, or other obstruction, for which the owner or occupant of the land adjoining the drainage works is responsible, so that the free flow of water is **impeded**...

**Suggestions:**

- drain is not flowing or is not capable of flowing at the design capacity due to the obstruction
- ensure that you have proof
- if not sure, seek professional advice

**Paraphrase from:**
Blandford-Blenhiem (Township) v. Krift, 1997 Ontario Drainage Referee, which was an appeal from a 1995 Ontario Drainage Tribunal decision)
...when a drain becomes obstructed by a dam, low bridge, fence, washing out of a private drain, or other obstruction, for which the owner or occupant of the land adjoining the drainage works is responsible, so that the free flow of water is impeded...
Section 80 – obstruction

...when a drain becomes obstructed by a dam, low bridge, fence, washing out of a private drain, or other obstruction, for which the owner or occupant of the land adjoining the drainage works is responsible, so that the free flow of water is impeded...

Who did it?

- Burden of proof - municipality
- Not always possible to know who is responsible
- If unknown, charge the cost to the whole drain (Section 81)
Section 80 – obstruction

...when a drain becomes obstructed by a dam, low bridge, fence, washing out of a private drain, or other obstruction, for which the owner or occupant of the land adjoining the drainage works is responsible, so that the free flow of water is impeded...

You have an:

• **Obstruction**
• Alleged **responsible owner or occupant**

**What’s next?**
Section 80 – obstruction

...the person owning or occupying the land shall, upon reasonable notice sent by council...or the drainage superintendent...remove such obstruction... if not so removed with the time specified in the notice... the [municipality] shall forthwith cause it to be removed, and the cost... is payable to the municipality by the owner...
Section 80 – obstruction

…the person owning or occupying the land **shall**, upon **reasonable notice** sent by council…or the drainage superintendent…**remove** such obstruction… if not so removed with the time specified in the notice…the **[municipality]** shall forthwith cause it to be removed, and the cost… is payable to the municipality by the owner…

• How should notice be given?
  – verbal
  – written notice or letter

• Timeframe for removal?
  – immediately, 5, 10, 30 days?
  – reasonable based on nature and scope of work required
  – dependent on level of risk of flooding upstream properties
Section 80 – obstruction

…the person owning or occupying the land shall, upon reasonable notice sent by council…or the drainage superintendent…remove such obstruction… if not so removed with the time specified in the notice… the [municipality] shall forthwith cause it to be removed, and the cost… is payable to the municipality by the owner…

• **forthwith** means immediately; without delay (Oxford Dictionary)
• must act immediately after the time specified expires to be diligent.
• If not, municipality could be liable for damages to other properties
Section 80 – obstruction

...the person owning or occupying the land shall, upon reasonable notice sent by council...or the drainage superintendent...remove such obstruction... if not so removed with the time specified in the notice... the [municipality] shall forthwith cause it to be removed, and the cost... is payable to the municipality by the owner...

What about appeals?
Section 80 – obstruction

Appeals

- Wait until any appeal rights and decisions have been exercised by the owner/occupant.
  - Timeframe for appeals not defined by the Drainage Act
  - If aware of an appeal or legal challenge, may want to wait until decision rendered
  - Balance with level of risk to the drain and other properties

“It would have been prudent for the Township to await the outcome of the Appeal made to the Ontario Drainage Tribunal before proceeding with the demolition of the offending dam.”

(Blandford-Blenhiem (Township) v. Krift, 1997 Ontario Drainage Referee, which was an appeal from a 1995 Ontario Drainage Tribunal decision)
Section 80 – obstruction

Thoughts for the Drainage Superintendent

• Should attend site to observe the situation directly since they may be complaint(s) based – (exercise power of entry under Section 95(3))

• Write an inspection report (similar to Provincial Officers Report) which should include:
  – Date of inspection
  – Name of person completing the inspection
  – Name of drain and location of alleged obstruction
  – Property owner information and legal property description
  – Reason for conducting the inspection (complaint based, etc.)
  – Inspection observations, findings and recommendations for removal

• Seek professional assistance (may include report) to determine if the obstruction impedes the drain
Thoughts for the Drainage Superintendent

- Issue formal notice (similar to Provincial Officers Order) to landowner about the obstruction with:
  - required actions with completion dates (e.g. DIY, hire contractor, etc.)
  - statement if municipal supervision is required during the work
  - landowner reporting requirements
  - statement about subsequent steps to be taken by the municipality if obstruction not removed
  - landowner appeal rights?
  - a copy of the inspection report
Thoughts for the Drainage Superintendent

• Complete a follow-up inspection to see if obstruction has been adequately removed within the required timeframe.
  – **If completed adequately**, close the file with correspondence back to property owner.
  – **If not completed at all**, issue formal notice that the obstruction will be removed by the municipality and the cost will be charged to the property owner.
  – **If not completed adequately**, decide whether to issue follow-up notice to have property owner complete any outstanding work with new date(s) or issue formal notice that the obstruction will be removed by the municipality, etc.
Section 82 - damage

A municipality… may bring an action for damages against any person who destroys or injures in any way a drainage works,…
Section 82 – damage

A municipality… may bring an action for damages against any person who **destroys** or **injures** in any way a drainage works,…

**How is** **destroys** and **injures** **different from obstruct?**
Section 82 – damage

A municipality… may bring an action for damages against any person who **destroys** or **injures** in any way a drainage works,…

- **destroys** means end the existence of something (Oxford Dictionary)
- **injures** means physical harm that impairs the value, usefulness or normal function of something (Oxford Dictionary)
- Examples can include:
  - removal of a buffer
  - relocating a ditch drain
  - improper outlet connection(s)
  - equipment breaking a pipe drain
Section 82 – damage

A municipality… may bring an action for damages against any person who destroys or injures in any way a drainage works,…
Section 82 – damage

A *municipality* … may **bring an action for damages** against any person who destroys or injures in any way a drainage works,…

- **Process**
  - initiated by the municipality
  - action for damages brought to the Referee

- **Concerns**
  - legal action may require a lawyer
  - time delays to initiate and carry out

- **Thoughts**
  - if the damage results in an **obstruction** to the drain, use process defined by Section 80
Section 82(2) – penalty for damage

Every person who obstructs, fills up or injures or destroys by any means a drainage works, is guilty of an offence and on conviction, in addition to liability in damages, is liable to a fine… or to imprisonment…
Section 82(2) – penalty for damage

Every person who **obstructs**, fills up or **injures** or **destroys** by any means a drainage works, **is guilty of an offence** and on conviction, in addition to liability in damages, is liable to a fine… or to imprisonment…

- Initiate court proceedings:
  - to the Referee
  - can be done concurrently while seeking damages

- Challenges
  - takes time and staff resources to complete the process
  - will not address the immediate issue – deterrent only
  - fines of up to $1,000 may not be a deterrent
  - not aware of anyone going to jail!

- Consider using for repeat offenders or serious issues
Thoughts for Municipalities

• Formalize internal process to address Section 80 and 82 situations

• Empowering by-law officers to enforce drainage issues under a municipal process:
  – Incorporate enforcement provisions into by-laws that adopt Engineer’s Reports
  – create new drainage specific by-laws with enforcement provisions
  – strengthening the provisions of existing by-laws to allow for better enforcement outcomes

• Seeking penalties for repeat or serious issues that damage and obstruct the drain under the POA by:
  – laying an information (i.e. Part III Summons)
  – filing a certificate of offence
Thoughts for Drainage Engineers

- Clearly define any special features incorporated into the drainage system (e.g. buffers, water retention, fish habitat) including detailed description, spatial limits, function, regulatory rationale, etc.

In the Engineer’s Report and at the on-site meeting:
- educate property owners about the function and rationale of any special features
- provide statements about Sections 80 & 82 of the Drainage Act and their implications
- identify and explain any municipal by-laws and internal enforcement provisions
Questions?

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