October 21, 2002

RE: SPEECH ON SECTION 65 FOR DRAINAGE ENGINEER'S CONFERENCE

My presentation today is the interpretation and application Section 65 of the Drainage Act. As an overview, the purpose of Section 65 is to ensure that the assessments, in an engineering report adopted by bylaw, are kept up to date as parcels assessed become subdivided. The intention is that the revised assessments are those assessments that are used for future maintenance of the drain.

What I propose to do is examine each subsection of Section 65 and further, to examine each component of each subsection and offer comments thereon.

**Section 65(1)**

Section 65(1) states that "Subject to Subsection 6, where a parcel of land has been assessed by an engineer and, after the final revision of the assessment, the parcel is divided by the change in ownership of any part, the clerk of the local municipality in which the parcel is situate shall instruct an engineer in writing to apportion the assessment charged against the parcel among the parts into which it is divided."

Let us look first of all at the following subcomponents:

"Subject to Subsection 6, ..."

This exclusion deals with the situation where the owners themselves agree on the reassessment affecting their parcels.

"... where a parcel of land has been assessed by an engineer and, after the final revision of the assessment, ..."

In other words, Section 65 should not be applied until a Bylaw has adopted the report, meaning that all appeals have been resolved and the assessments are final. Only then can Section 65 be applied to revise the assessments.
"... the parcel is divided by the change in ownership of any part, ..."

The parcel is normally divided through consents to sever or to plans of subdivision. It would be the Municipality's responsibility to ensure that the division is appropriate in accordance with the Planning Act.

"... the clerk of the local municipality in which the parcel is situate shall instruct an engineer in writing to apportion the assessment..."

In other words, the local Clerk has to give the Engineer a specific description of the parcel and the subdivision that has occurred. Normally the Municipality submits a copy of the consent or the plan of subdivision, and indicates the hectares retained, hectares severed and where such is known, the owner's name(s). In many cases, the application for Section 65 is at a time of consent and the new owner of the severed portion is not yet known. These Section 65 reports are quite often, in our experience, a condition of severance or subdivision.

**Section 65(2)**

Section 65(2) states that "The clerk of the local municipality shall forthwith send a copy of the instructions by prepaid mail to the owners of the parts into which the parcel is divided."

This section basically requires the Clerk of the Municipality affected to notify in writing the owners of the retained parcels and the newly created parcels of the instructions to an engineer to subdivide the assessments.

**Section 65(3)**

Section 65(3) states that "The engineer in making the apportionment shall have regard to the part of the parcel affected by the drainage works, and shall make the apportionment in writing and file it with the clerk of the local municipality who shall attach it to the original assessment and shall send, by prepaid mail, a copy thereof to each of such owners, and, subject to subsection (5), the apportionment is binding upon the lands assessed."

Let us examine these subcomponents.
"The engineer in making the apportionment shall have regard to the part of the parcel affected by the drainage works, ..."

This requires the Engineer to ensure that he is aware of any portion of the drain being on any part of the original parcel. He also has to determine what watershed in each parcel is affected. The sum of the watersheds should equal the original watershed assessed to the parcel. He has to then consider if there was a benefit assessment to the original parcel, how this benefit assessment should be split to the parts. Certainly if the drain is located fully on only one part, the majority of the benefit assessment will most likely be to that part. However, it is a judgment call of the Engineer and he does have to consider his benefit splits in the same format that he would consider a new benefit calculation. The benefit should not, in this writer's opinion, be split proportional to the acreage but should be based on a true judgment of the Engineer as to how the benefit of the drain relates to each parcel, considering however that the sum of the individual benefits has to equal the original benefit.

With respect to the watersheds, it is important for the Engineer to determine how much of each parcel is within the total watershed, and the sum of the individual watersheds must equal the original watershed.

In our opinion, the Engineer need not and indeed should not, in some instances, split the outlet assessment (we very seldom see injuring liability) strictly proportional to the acreage. Any variances in volume and rate of runoff should be considered as in any outlet liability calculation.

"... and shall make the apportionment in writing and file it with the clerk of the local municipality..."

This requires the engineer to make a small report and submit it to the Clerk. It is our practice to discuss the background and considerations given in making the Section 65 reports and then we attach the actual reapportionment as a schedule. We attempt to describe which drains affect the severed parcel and have some history of such if appropriate. The Clerk then only needs to attach the schedule to his file's bylaw or assessment schedule.
"...who shall attach it to the original assessment ..."

This would require the Clerk to find a copy of the Bylaw that he uses for maintenance of the drain that is in his file, and to ensure that the Section 65 report is attached to it.

"... and shall send, by prepaid mail, a copy thereof to each of such owners,

This requires the Clerk to send a copy of the Engineer's report to each owner affected by the Section 65 report.

"... and, subject to subsection (5), the apportionment is binding upon the lands assessed."

Subsection (5) gives the owners a right of appeal which will be discussed in a following section. However, if there is no appeal, this apportionment is then binding and would apply for any future maintenance on the drain and is considered to be the revised assessment schedule as it relates to these parcels until such time as the assessment is further revised in accordance with a further report of assessments as provided for by the Act.

**Section 65(4)**

Section 65(4) states that "The costs, including the fees of the engineer, shall be borne and paid by the parties in the manner fixed or apportioned by the engineer or, on appeal, by the Tribunal."

Let us examine each component:

"The costs, including the fees of the engineer, ...

In our practice, the only costs are the fees of the Engineer. We are not aware that any administration costs can be added to this Section 65 report and we are not aware of such being done. If anyone knows of other costs that are eligible, we should discuss such. Reference could be made to Section 73 of the Act that states that costs of council meetings and costs of the Clerk cannot be included. The only possible other costs would be those in my opinion that are levied by the Tribunal on an appeal."
Speech Re Section 65

"... shall be borne and paid by the parties in the manner fixed or apportioned by the engineer ..."

In the report of the Engineer, he has to indicate who should pay his fees. Normally there would be a separate paragraph in the report that deals with this.

"... or, on appeal, by the Tribunal."

This would indicate that the Engineer's fees, being generally the only fees, are eligible to be reapportioned on appeal by the Tribunal. The question we have is whether a party could appeal the engineering fees separately to the Tribunal. Section 65(5) indicates that if the individual is assessed for a sum greater than $500 he may appeal to the Tribunal. There could be some question as to whether the levy of the Engineer's fees are considered an assessed cost to the owner or not and if he would then be eligible to appeal any fee levied to him in excess of $500. My interpretation of this section is that an owner could not appeal the fees to the Tribunal unless he is assessed a share of the maintenance costs in excess of $500 in which case he could appeal the reassessment, and at that time, appeal the fees of the Engineer. It is possible however that others, including the Tribunal, may determine that Subsections 4 and 5 are broad enough to provide that, if the individual has an engineering fee to pay greater than $500, he can appeal such separately to the Tribunal. We are not aware of any appeals on Section 65 to the Tribunal and there does not appear to be any case decisions on this topic.

Section 65(5)

Section 65(5) states that "Any such owner who is dissatisfied with such apportionment and who is assessed for a sum greater than $500 may appeal to the Tribunal within forty days after the date a copy of the apportionment is sent to the owner by the clerk."

"Any such owner who is dissatisfied with such apportionment ..."

This could be interpreted to mean that an owner could appeal just the apportionment.

"... and who is assessed for a sum greater than $500..."

This would appear to indicate that an owner can only appeal to the Tribunal if his apportionment of the original assessment is greater than $500. As I indicated above, it could also be interpreted to mean that if the owner's share of the engineering fee in making the apportionment is greater..."
Speech Re Section 65

than $500 he can appeal. There is some question in this particular section but it in practice it would probably be determined to be an acceptable appeal if either the owner has an apportionment of assessment greater than $500 or has a fee of greater than $500 to pay. * In reality the fees for a Section 65 report in our practice are very seldom greater than $300 or $400.

"...may appeal to the Tribunal within forty days after the date a copy of the apportionment is sent to the owner by the clerk."

This requires the owner then to lodge his appeal within 40 days after the Section 65 report is sent to him. Although it isn't spelled out, it is suggested that any appeal to the Tribunal would be done in a similar fashion to the provisions of Section 54 and Sections 98 to 101 inclusive of the Drainage Act. This would mean that the original appeal is to the Clerk of the Municipality who is considered the Clerk of the Tribunal and the Clerk would then forward it on to the Tribunal. It should be noted that in any appeal under Section 65 to the Tribunal, the decision of the Tribunal is final.

Section 65(6)
Section 65(6) states that "When the owners of the subdivided land mutually agree on the share of the drainage assessment that each should pay, they may enter into a written agreement and file it with the clerk of the local municipality and, if the agreement is approved by the council by resolution, no engineer need be instructed under subsection (1)."

This section basically gives the owners the right to mutually agree on what their reapportionment of assessments should be. Theoretically they do not have to follow any engineering judgment in making this reassessment. It theoretically could be very politically motivated. The intention is that the owner would prepare a written agreement and then file it with the Clerk. The intention is that the Clerk would then have this agreement approved by his Council by resolution. If this happens, there is no need for an Engineer to be instructed under Subsection 1. It stands to be interpreted that if the Council disagrees with the reapportionment, they could refuse it and either ask the owners to prepare a new agreement, or they could then instruct an Engineer to do such.

I have two typical Section 65 reports that have been prepared by our firm and I propose to put these on the overhead.

* The Municipal World Form 116, used for appeal to the Tribunal, only talks of apportionments of assessment being applicable.
Speech Re Section 65

The first Section 65 report is for a property in the Township of Blandford-Blenheim. It was for property owner known as Ju-al Farms and the parcel was affected by three drains. The first page as I indicated gives a bit of the background of where the parcel is located, what was happening to the parcel, the obligation of the Township to keep their maintenance schedules up to date. The second page talks a bit more about the history of the drains and the location of the severance within the watershed of the drains. It also talks about the attachment being the actual reassessment and also the cost of the report and who it is to be paid by.

The next page is the actual reassessments for two of those drains. One item of note is that with respect to the Martin Drain, it is evident that the original parcel had been split prior to the severance. We felt that it was in order to subdivide the assessment to recognize the previous split that had occurred as well. The other alternative would have been to prepare a Section 76 report but we did not feel it was appropriate and we feel that the instructions were sufficient to allow the Engineer to apportion the assessment charge against the parcel among the parts into which it is divided. Perhaps if it were a different owner for all three parts, we may have suggested use of Section 76.

Next the separate pages after the reassessment of the Duncan Drain. As is the fashion on many drains now, maintenance schedules are prepared for components of the drain. This usually involves creation of subcategories of the drain and the amounts to be assessed when that particular category is maintained. This particular schedule shows how the assessment to Ju-al Farms was reapportioned. The original assessment schedule for the Duncan Drain is included as well.

I also have attached the instructions from the Municipality and a copy of the Duncan Drain plan with the parcel plotted on it.

I have also have included a second report to show an example of where the applicable maintenance schedule uses percentages rather than dollars.
Speech Re Section 65

The next overlay that I have is an example of one of our clients' application of Section 65(6). This particular municipality has an agreement form prepared. It is filled out and prepared by the Drainage Superintendent. They then require the owners of the retained and severed parcels to sign the agreement and then the Municipality signs. This is not 100% as per the Act. I would suggest that the correct procedure would be to have the agreement prepared and signed by the owners and then there should be a separate resolution of Council indicating that they have seen this agreement and they have approved it.

An alternate approach in the document before you would be to have words ahead of the Corporation of the Township … to say "Approved by Resolution of the Council of the Township …". Regardless, it shows the intent of an agreement prepared by a Municipality.

Overall, Section 65 is a fairly straight-forward section of the Drainage Act and in our experience, it is successfully applied. We made an attempt to determine if there were any appeals to the Tribunal on this section. We spoke to Sid Vanderveen and Sue Gillespie, and I understand Sid also contacted John Johnson. No one recalls any appeals under this section. The closest we came is an appeal where an owner checked off every possible block on his appeal form (Form 116), including Section 65(5), but the decision indicated that it was deemed not to be an appeal pursuant to Section 65(5).

Therefore, we must surmise that Section 65 is being applied appropriately and/or at least to the owners' satisfaction since there are no appeals to it.

The one comment we have is that Section 74 at some point in time should be modified to recognize that a maintenance schedule in the applicable bylaw is to be used for maintenance as modified not only by an engineer in a report (which presumably includes Section 65), but as modified by an agreement of owners pursuant to a Section 65(6) report.

This then completes my presentation of Section 65 of the Drainage Act.
TABLE 1
JU-AL FARMS LTD.
Section 65 Report

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* Denotes lands classified as non-agricultural.
## SCHEDULE B - SCHEDULE OF ASSESSMENT FOR MAINTENANCE

**DUNCAN DRAIN 1997 - Twp of Blandford-Blenheim**

### MAIN DRAIN

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Total Assessments on Lands: 4,515,642,2,339,8,450,6,628,2,673

Highway 401 Ministry of Transportation 1,013,2,000,1,463,0,0,0

County Road 29 Ministry of Transportation 242,359,218,489,1,154,107

Total Assessments on Roads: 1,265,2,368,1,881,870,1,614,107

**TOTAL ASSESSMENTS ON DUNCAN DRAIN 1997:** 5,770,7,780,4,020,9,120,8,140,2,780

**Notes:**

1. All of the above properties are classified as agricultural, except for the ones so noted with an asterisk (*).
2. Section 21 of the Drainage Act, RSO 1990 requires that assessments be shown opposite each parcel of land and road affected.

The affected parcels of land have been identified using the roll number from the last revised assessment roll for the Township.

For convenience only, the owners' names as shown by the last revised assessment roll has also been included.
February 26, 1999.

Mr. John Kuntze, P.Eng.,
K. Smart Associates Limited,
85 McIntyre Drive,
Kitchener, Ontario,
N2R 1G2

Dear John:

Re: Drainage Assessment Re-apportionment (JuAl Farms Ltd.)

We have been instructed by Mr. Alphonse Demarest, applicant, to have the drainage assessment re-apportionment completed in conjunction with Application for Consent #B-103/98. The property in question lies in the watershed of the Duncan Drain. We have enclosed the maps that were submitted with the application for severance, as well as a copy of the Preliminary Survey Plan.

If you have any questions regarding the above, do not hesitate to contact the undersigned.

Yours truly,

[Signature]

Ann Hoard,
Clerk-Typist.

encls.

COPY