

# Notice of Appeal to Tribunal by Owner of Land or Public Utility

## Re: Engineer's Report

Drainage Act, R.S.O. 1990, c. D.17, subs. 48(1)

To: The Council of the Corporation of the TOWN of INNISFIL

Re: SOUTH INNISFIL CREEK DRAIN IMPROVEMENTS  
(Name of Drain)

Take notice that I/we appeal to the Agriculture, Food and Rural Affairs Appeal Tribunal as owner(s) of land under section 48(1), because of dissatisfaction with the report of the engineer on the grounds that:

- The benefit to be derived from the drainage works are not commensurate with estimated cost thereof;
- The drainage works should be modified on grounds to be stated;
- The compensation or allowances provided by the engineer are inadequate or excessive; or
- The engineer has reported that the drainage works is not required, or is impractical, or cannot be constructed.

Details of application and relief being sought from Tribunal (attach additional pages if needed):

*The property owners who opposed the Dillon report cited that the project was excessive in scope & costs. Our property was assessed for \$7546 in the Dillon report vs \$14,746 in the Burnsides report; an increase of 100%. Compare the assessment for other property 30 AC agricultural / 30 AC bush for approx \$250/acre, yet a parcel of land (agricultural) immediately outside the benefit area is about \$0/ac. (contour 22)*

I am/we are appealing as:  Owner(s) of Land  Public utility

### Property Owners or Public Utility Appealing to Tribunal

- Your municipal property tax bill will provide the property description and parcel roll number.
- In rural areas, the property description should be in the form of (part) lot and concession and civic address.
- In urban areas, the property description should be in the form of street address and lot and plan number, if available.
- If appealing to Tribunal regarding multiple properties, attach additional page with property information.

Property Description

3194 COUNTY Rd 89 CON 1 PT LDT 9

Ward or Geographic Township

INNISFIL COOKSTOWN

Parcel Roll Number

4316-010-001-17000-0000

If property is owned in partnership, all partners must be listed. If property is owned by a corporation or public utility, list the name and the corporate position of the authorized officer. Only the owner(s) of the property may appeal to the Tribunal.

### Partnership

Partnership (Each partner in the partnership must complete this section).

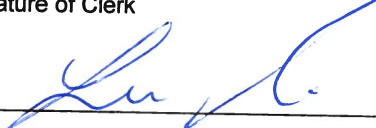
Name (Last Name, First Name)	Signature	Date (yyyy/mm/dd)
<u>KEMENY GEORGE</u>	<u>George Kemeny</u>	<u>2019/04/04</u>
<u>KEMENY MIKE</u>	<u>Mike Kemeny</u>	<u>2019/04/04</u>
<u>KEMENY BILL</u>	<u>Bill Kemeny</u>	<u>2019/04/08</u>

Enter the mailing address and primary contact information of appellant below:

Last Name <b>KEMENY</b>		First Name <b>MIKE</b>		Middle Initial
<b>Mailing Address</b>				
Unit Number	Street/Road Number <b>3194</b>	Street/Road Name <b>COUNTY RD 85</b>		PO Box
City/Town <b>COOKSTOWN</b>			Province <b>ONT</b>	Postal Code <b>L0L 1L0</b>
Telephone Number <b>705-456-5343</b>	Cell Phone Number (Optional)		Email Address (Optional) <b>M.KEMENY@bell.net</b>	

To be completed by recipient municipality:

Notice filed this 10 day of April 20 19

Name of Clerk (Last Name, First Name) <b>Parkin, Lee</b>	Signature of Clerk 
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**Appeal Commenced by Notice:** The clerk of the municipality must record the appeal and send a copy to the Tribunal and to all persons assessed for the drainage works. *Drainage Act*, R.S.O. 1990, c. D.17, s. 99.

**Timeline for Appeal:** This notice of appeal must be served within forty days after the sending of the notice under section 40 or subsection 46 (2). *Drainage Act*, R.S.O. 1990, c. D.17, subs. 48(1)(d).



## History - Before Hwy 400

There was only a small community along Concession 1 (County Rd. 89), in the marsh area. The farms varied in size from 3-5 acres to 60 acres. The remainder of the marsh was all bush.

There was no Sideroad 10 or Concession 2 or 3 through the marsh.

Ditches ran along either side of Concession 1 from the easterly point of the marsh directly to Innisfil Creek. Branch 'A' which is located approximately 400 feet north of County Road 89, commenced approximately 2000 feet east of what is now Hwy 400 and then ran north to Innisfil Creek. These ditches drained this area adequately.

## After Hwy 400

Three culverts were constructed near the overpass at Hwy 400 when it was completed in the early 1950's. One was on the south side of the overpass; the other two north of the overpass intended to serve Branch 'A' and Innisfil Creek.

Our understanding is that these culverts as constructed are not deep enough, and remain basically the same now as originally constructed.

## Since 1960 - land use changes

Sideroad 10 and Concession Roads 2 and 3 were constructed at about this time. The bush along Concession 2 and 3 has been extensively cleared. The land has been tile drained. Water from the area is pumped directly into Innisfil Creek or into ditches that outlet directly into Innisfil Creek.

Residential and commercial buildings have been constructed; berms have been constructed by landowners to protect their property. Furthermore, enormous amounts of fill (we believe from Toronto subway and condominium construction) have been trucked into this area.

This, along with urbanization and subsequent loss of soil infiltration area, has increased the water table in the marsh while pumping tiled fields has augmented rapid flow of water.

## Benefit Area

The Burnside report has identified on contour 228 most of the area described in paragraph 1. (see History)

Our position is that we did not significantly affect the capacity of Innisfil Creek compared to the aforementioned development and construction activities. In fact, our impact is negligible. Yet, we are assessed at a higher rate than property owners outside the contour area.

The Burnside report, under "Description of Watershed", contains various references to "flat topography" (reference A).

Yet the report can still identify a benefit area within the entire marsh which is described as flat.

In conversation with Mr. J. Dickson, Burnside engineer on April 4, 2019, he advised that he could only provide findings on actual fact at this time, "not what happened in the past, nor in the future".

We believe that development of the wetland and surrounding area has contributed significantly to the over capacity of Innisfil Creek and, therefore do not agree with liability assessment as outlined in the Burnside report.

Furthermore, certain landowners petitioned for action to clean out the Innisfil Creek after they had suffered significant damage in 2000. Our opinion is that it is only reasonable that these landowners would benefit the most.

Mr. Kerry Yamamoto confirmed that he lost his carrot crop on his marsh property located on the south side of Concession Road 3 east of Sideroad 10 in a 2004 flood event. This area is in the northeast part of the marsh.

We believe that all the flat land as identified should be assessed equally. The identified Benefit area should be disregarded for assessment purposes.

#### Drainage Act

Section 22 of the Drainage Act provides in part "drainage work may be assessed for benefit..."

The Drainage Act does not require that the engineer assess for benefit.

Furthermore, the land value would not increase in value as this is classed as Class 1 wetland with local and legislated provincial restrictions.

We ask for a fair and equal assessment of the entire market garden area. If not, then the downstream landowners would always have a greater financial burden related to damages that have occurred upstream. Downstream flooding occurs first and is the last to recover.

#### Summary

In our opinion, SICD improvements have been made necessary because of Town of Innisfil lack of creek maintenance over the years and because of permitted development in an environmentally sensitive wetland area. Commercial developments, eg. outlet mall, trailer home sales yard, campground, golf course), severances for residential construction, large deposits of imported fill to create berms along creek banks and allowing importation of large amounts of dense soil material and rubble to infill various properties within the drainage contour area.

Clearing of the majority of the wetland and resultant loss of riparian forest buffers has caused creek bank erosion and sediment infiltration into the creek. Extensive tile drainage of surrounding farmland with direct pumping into watercourses has further augmented huge amounts of water discharge into the creek.

Removal of forests and replacing them with paved roads that are continually being widened, large paved parking lots, driveways, homes, and other impervious surfaces has an immediate effect on receiving streams since more volume is discharged at a faster rate.

Forests are the most beneficial land use for protecting water quality due to their ability to capture, filter and retain water and pollutants from the air. Forests also sequester carbon.

Since the remaining forests in the wetland are so critical to this environmentally sensitive area, we feel that as landowners with a large forested area, we should not be penalized by being assessed to pay for the benefit of other interests that have contributed to the degradation of the wetlands. Instead, we feel that we should receive a credit for preserving part of the forest and thereby contributing to the benefit of and quality of the environment.

Before the Hnydzak drain was constructed, we had no adverse drainage impact from the south side of County Rd. 89 lands. Since the "improvement" which directed water across County Rd. 89 towards Branch 'B', we have endured annual flooding because of increased water volume and flow which encouraged beavers to regularly construct dams. When we notified the Town of Innisfil to clean out the dams, permission to proceed with the work was always delayed by the NVCA approvals department. These delays always led to extended standing of flood water and subsequent loss of crops.

We maintain that the assessment levy to our property is unfair.

A copy of correspondence from the landowners drainage committee is enclosed for your review. The committee noted Town of Innisfil's mismanagement of this project.

The Town of Innisfil supported the development of the marsh through construction of access roads and permitted activities such as extensive land clearing, approvals of severances, new home construction, construction of large berms and commercial establishments.

Since these activities significantly contributed to the flooding problems and since the Town of Innisfil failed to properly maintain the creek, this improvement project should be funded by the Town of Innisfil.

encl. — Drainage Committee report

References to Report (Ref. 'A')

Chapter 5.1 "flooding widespread because of flat topography of Market Garden"

Chapter 5.7 "glacial lake bottom— - very little overall relief in elevation"

Chapter 8.2.1 "lacking capacity"

Chapter 11.2.2 reference to very flat topography



**September 3, 2014**—Pre-hearing—Referee Waters requests written statements of concerns from landowners.

**October 14, 2014**—Landowners meeting held to provide update on the status of the drain. Candidates-elect were invited. Some candidates spoke frankly that the town had dropped the ball. Others supported reductions in the Dillon proposed project. Landowners gave a clear mandate to hire a lawyer for the upcoming Drainage Hearing.

**November 4, 2014**—Court hearing in Barre. Drainage Referee orders a Peer Review to suggest alternatives to the Dillon Report. Referee's concerns; passage of time (7 years to produce a report) and differences in cost estimates between Preliminary and Final Reports, also further anticipated costs. Removal of Options 1 and 3 in the Final Report open the door to consider a different project.

The committee strongly feels we need only to address the specific section of the drain identified as the cause of flooding. Fifteen years have passed with little to no maintenance done on this area, despite a court ruling in 2005 ordering twice yearly maintenance pending completion of the Final Report.

The Peer Review Report will be presented at a Council meeting on January 6, 2016. We encourage all of you to attend this meeting. Please see the town's website for more information.

Our position remains the same; focus on the source of the flooding, as it still remains the trouble spot. No major work is required in our view. Firstly, maintenance should be completed on the drain that would equate to twice yearly maintenance from 2005 to 2015. Secondly, a new engineer should reevaluate the remaining work required on the area and ensure

that the outstanding work is completed as soon as possible.

All costs for the work on the drain to be paid by the municipality, minus the \$50,000 last approved by Council in 2004 as this cost was justified at that time. (Had the ongoing management been competent, efficient and transparent, the drain works very likely would have been completed in 2005 and the issue would not have proceeded to the Drainage Referee). Allocation of Dillon's cost to the Town can be budgeted for 20 years if necessary, so as not to heavily burden the corporation. Funding can be obtained from a variety of sources, such as the OIG, new budget allocations, funding resources and fundraising.

The Drainage Act allows for several choices in dealing with an Engineer's report. There are specific rules to follow for appeals, time limits, etc., within the Drainage Act that are too numerous to elaborate on in this flyer.

Funds are still needed for our legal costs for the Drainage Hearing. Please consider a donation if you have not already contributed.

## **South Innisfil Creek Drain Update on the \$8 Million Dillon Project**

**Peer Review to be presented on  
Jan 6, 2016**

The South Innisfil Creek Drain Committee, on behalf of landowners opposed to the \$8 million Dillon Project, has held several meetings and produced several updates over the past 2 years following the presentation of the Dillon Engineering Final Report to council.

We have spoken at several council meetings and attended focus groups with the town with the aim of making changes to this proposed project.

The following is a brief chronology on how an \$11,700 maintenance "clean up" morphed into an \$8 million proposed project. We are at a critical stage in this unrelenting 15-year process. Your assessment fees (your portion of this project) may increase or decrease depending upon council's decision on January 6, 2016.

Please read on and become informed on this matter as we believe that the outcome has the potential to positively or negatively impact your financial obligations under the Drainage Act.

## **Important Update from Landowners Committee (SICDC):**

**June 2000**—Heavy summer rainfall caused flooding of over 200 acres of crops.

**August 2000**—Maintenance request submitted to the town to “clean up” a specific section of the drain deemed responsible for the flooding. Town officials inspected the specified section and agreed maintenance would be done as soon as possible. A budget for maintenance just under \$12,000 was approved. (No maintenance was performed on the specified area of the drain in 2000).

**August 2001**—Burnside Engineering was retained to review and update assessment schedules—completed December 2001. (No maintenance or repair was carried out on the drain in 2001, despite the urgent nature to prevent further flooding).

**March 2002**—Conservation and Fisheries Ministries were contacted by Burnside who advised the town of needed approvals. Town took this action 5 months later. The lack of knowledge of process, poor time management, slow communication with officials, and no communication with the landowners (all responsibilities of the town Drainage Superintendent) resulted in further delays with the Fisheries Ministry until October 2002. (Flooding and crop damage occurred in 2002).

**June 2003**—Formal notice pursuant to Section 79(1) of the Drainage Act was sent to the town. Council approved a budget of \$30,000.

**May 2004**—A second legal notice was sent to the town informing them of need for the repairs and the town's duties under the Drainage Act.

**June 2004**—Burnside submits notification of municipal drain maintenance work (under Fisheries Act) on behalf of the town to the NVCA and DFO. DFO prevents any work on the drain from June 15-September 15. A letter from landowners' lawyer encourages town's lawyer to settle the issue to avoid having to take action in the court of the Drainage Referee. The town's lawyer does not reply within the time limit requested.

**July 7, 2004**—A third heavy rainfall causes heavy flooding and results in serious damage to hundreds of acres on various farms. One landowner loses all crops for which the town agrees to a settlement of \$1.5 million. Affected farmers/landowners join together to take action under the provisions of the Drainage Act and apply to the Court for an order to commence the maintenance and repair work required and agreed to by the town since the year 2000.

**2005**—Referee O'Brien rules that the town hire an engineer to prepare a report within one year for his approval. This report was presented to all stakeholders at a public meeting in 2006.

**2006**—Landowners were not pleased to learn they would have to pay huge amounts of assessments when only a small section of the drain had caused the flooding. A Resident's Advocacy group was formed to support the landowners. Referee O'Brien instructs Dillon to prepare a Final Report based on the Preliminary Report. (No work had been completed on the specified area of the drain from 2002-2006).

**2006-2013**—Dillon prepares the Final Report, does not consult with landowners as per the judge's orders; does not present project updates to council or the landowners, does not request one-year extensions to continue their work, yet was paid a sum

of \$1.32 million over this 7 years. Important note: there are exceptions in the Drainage Act for drainage works being fully paid by landowners. Notices to landowners from the town in 2009 and 2010 regarding delayed status of the report.

**August 2013**—Dillon Engineering presents their completed Final Report. The proposed price tag, \$6.7 million + \$1.32 million (report cost) plus additional legal, consultant and court fees. Reaction of the landowners at the public meeting was negative in the extreme.

**September 2013**—Landowners form a new committee to address concerns of those who oppose the proposed Dillon Report and project.

**October 30, 2013**—Landowners meeting produced petitions in opposition to the project. Financial impact statements were submitted in reaction to the excessive assessment fees.

**November 6, 2013**—Open House for landowners to interface with Dillon was attended by committee members and Council members and the Mayor.

**November 7, 2013**—Site meeting attended by committee members, Dillon, farmers, NCVA, and Council members.

**May 26, 2014**—Owing to increasing opposition council passes a motion to defer the adoption of the Dillon Report and to seek clarification and direction from the Drainage Referee.

(Minor maintenance was completed on the drain in 2014 but not to the specifications expected).

TO: Assessed Land Owners on the South Innisfil Creek Drain

FROM: South Innisfil Creek (Land Owners) Drain Committee

RE: \* Update on Land Owners Legal Counsel

\* Part One of the Drainage Hearing

\* Next Steps for Financial Recovery of Your Assessment.

Greetings,

After the Land Owners meeting last month, the Committee selected the law firm of Eric Gillespie Professional Corp. in Toronto (experienced in municipal, environmental and drainage law). This was in response to land owners who oppose the Dillon Final Report on the basis of its excessive scope and cost, as well as engineering and assessment errors. Eric Gillespie represented all opposed landowners at the hearing in the Court of the Drainage Referee on Nov. 4.

Additionally, in light of the town's mismanagement, negligence and the lack of maintenance concerning the drain over the last 8 years, Landowners want the town to assume full financial responsibility for the current Dillon report and any replacement report and project. None of these costs would be necessary at this point in time had the Town gone ahead with the \$50,000 works on the drain that had been approved by Council in 2004.

The position of the land owners was to replace the Dillon report with a smaller more cost effective project focused on the cleaning/repair of the crucial part of the drain only.

**THE FIRST PART** of our position was upheld on Nov. 4. The Judge (Referee) has ruled that we will not be bound by the provisions in the previous Referee's order that resulted in the 6.7 million dollar proposed project by Dillon Engineering.

What happens next? As per the Order, the Town must appoint (another) engineer to review the Dillon Report and suggest alternatives, and options. The committee's objective is that we have a (new) smaller report and project that the Town, not the landowners, finance.

**THE SECOND PART** of the land owners' position is the cost of the Dillon Engineering report. The Town has already paid 1.32 million for the report, and



this cost is expected to be assessed out to the landowners. However, in circumstances of negligence under the Drainage Act, the Town should be responsible for all costs.

**THE THIRD PART** of our position involves striking a drainage committee similar to those in other towns to address drainage issues in a timely, cost effective manner.

We would like you to know that the volunteers who are working for you as the South Innisfil Creek Drain Committee has 5 members, all assessed landowners who are working full time at their regular business. The work of the committee comprises studying the Drainage Act, Municipal Act, Conservation Act etc. It involves communication with drainage experts, other towns, contractors, the various Ministries, politicians, lawyers and more. It involves calling meetings, listening to the landowners, organizing landowner support and making delegations at Council meetings. We anticipate a new engineer will be appointed by the end of January 2015. We will keep you informed.

This issue is not by any means over. We still have to deal with the new (reduced) report and the new (reduced) project and their costs. We also need to resolve the cost allocation of the Dillon Final Report which may require the involvement of our lawyer.

At the recent Oct. meeting the committee presented a suggested fee schedule for donations to the legal fund. Thank you to those land owners who have already donated to the legal fund, and thank you to those land owners who have generously sent donations to the Committee for expenses (rental equipment & supplies for meetings and administrative costs).

The suggested schedule for **legal fund donations** is based on assessment amounts, as we felt this the fairest way to have all land owner contributions proportionate and equitable. Receipts will be mailed to all who have donated to the legal fund.

Cheques can be made payable to the 'South Innisfil Creek Drain Committee, and sent by post to:

**South Innisfil Creek Drain Committee, P.O. Box 268, Lefroy, On., L0L 1W0.**

