CORPORATION OF THE MUNICIPALITY OF MORRIS-TURNBERRY

BY-LAW NO. 57-2016

Engineer’s Report
Bird Municipal Drain 2016

A By-law to provide for a drainage works in the Municipality of Morris-Turnberry in the County of Huron.

Whereas, the requisite numbers of owners have petitioned the council of the Municipality of Morris-Turnberry, in the County of Huron in accordance with the provisions of Section 78 of the Drainage Act, R.S.O. 1990, requesting that the following lands and roads be drained by a drainage works:

Lands and Roads in Morris of the Municipality of Morris-Turnberry, as follows:
- Concession 6, Spt Lots 10 and 11 and Concession 7, Npt Lots 10, 11, 12 and 13

And Whereas, the council of the Municipality of Morris-Turnberry, in the County of Huron has procured a report made by GM Blueplan Engineering, 235 North Centre Road, Suite 103, London, ON. N5X 4E7; and the report is attached hereto and forms part of this by-law.

And Whereas, the estimated total cost of constructing the drainage works was $215,500.00, being amended to $277,983.56.

And Whereas, $277,983.56 is the amount to be contributed by the municipality for construction of the drainage works.

And Whereas, the council is of the opinion that the drainage of the area is desirable;

Therefore, the council of the Municipality of Morris-Turnberry under the Drainage Act, enacts as follows:

1/ The report dated May, 2016 and attached hereto is hereby adopted and the drainage works as therein indicated and set forth is hereby authorized and shall be completed in accordance therewith, except as amended by paragraph 1.1, below.
1.1/ The Report herein was revised by the Decision and order of the Agriculture, Food and Rural Affairs Appeal Tribunal, dated March 8, 2017. The Decision and revised report are attached hereto. The Revised report dated March, 2017, is hereby adopted and the drainage works described therein, is hereby authorized. The works shall be constructed in accordance with the Revised Report and paragraphs 2 and 4 hereof, of By-law No. 57-2016, amended accordingly.

2/ (1) The Corporation of the Municipality of Morris-Turnberry may borrow on the credit of the Corporation the amount of $277,983.56.00 being the amount necessary for the construction of the Drainage Works;

(2) The corporation may issue debentures for the amount borrowed less the total amount of:
   (a) grants received under Section 85 of the Act;
   (b) commuted payments made in respect of lands and roads assessed within the municipality;
   (c) money paid under subsection 61 (3) of the Act; and
   (d) money assessed in and payable by another municipality,

And such debentures shall be made payable within three (3) years from the date of the debenture and shall bear interest at a rate not higher than the rate charged by the Ontario Municipal Improvement Corporation on the date of sale of such debenture.

3/ A special equal annual rate sufficient to redeem the principal and interest on the debentures shall be levied upon the lands and roads as set forth in the Schedule to be collected in the same manner and at the same time as other taxes are collected in each year for three (3) years after the passing of this by-law.

<table>
<thead>
<tr>
<th>Schedule</th>
</tr>
</thead>
<tbody>
<tr>
<td>Concession</td>
</tr>
<tr>
<td>Roads and Lands of Municipality</td>
</tr>
<tr>
<td>Total</td>
</tr>
</tbody>
</table>

4/ For paying the amount of $277,983.56 being the amount assessed upon the lands and roads, belonging to or controlled by the municipality, a special rate sufficient to pay the amount assessed, plus interest thereon, shall be levied upon the whole rateable property in the Municipality of Morris-Turnberry.
5/ All assessments of $1,000.00 or less are payable in the first year in which the assessment is imposed. Under special arrangement, assessments may be paid over a three year period and will be collected in the same manner and at the same time as other taxes are collected.

6/ This By-law comes into force on the final passing thereof, and may be cited as the “Bird Municipal Drain 2016 By-law- Revised Report.”

FIRST READING this 7th day of June, 2016
SECOND READING this 7th day of June, 2016

Provisionally adopted this 7th day of June, 2016

Mayor - Paul Gowing

Mayor - Paul Gowing

Clerk - Nancy Michie

Clerk - Nancy Michie

Enacted this 6th day of June, 2017

Enacted this 6th day of June, 2017

I, Nancy Michie, Clerk of the Municipality of Morris-Turnberry do hereby certify this as a true copy of the By-law No. 57-2016 of the Municipality of Morris-Turnberry.
### Schedule of Estimated Assessments

**Prepared by GM BluePlan Engineering Limited March 2017**

**Bird Municipal Drain Revised Report**

<table>
<thead>
<tr>
<th>Conc.</th>
<th>Lot</th>
<th>Owner</th>
<th>Roll No.</th>
<th>Actual Area</th>
<th>Adjusted Area</th>
<th>Benefit (sect. 22)</th>
<th>Outlet (sect. 23)</th>
<th>TOTAL</th>
<th>Estimated Allowances</th>
<th>NET</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>ac.</td>
<td>ha.</td>
<td>ac.</td>
<td>ha.</td>
<td>Direct</td>
<td>Normal</td>
<td></td>
</tr>
<tr>
<td><strong>Lands</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>6 N Pt. 9&amp;10</td>
<td>William &amp; Jennifer Rapson</td>
<td>6-042</td>
<td>35.68</td>
<td>14.44</td>
<td>24.41</td>
<td>9.88</td>
<td>$3,251.81</td>
<td>$77,900.00</td>
<td>$1,857.99</td>
<td>$83,019.80</td>
</tr>
<tr>
<td>6 S Pt. 11&amp;12</td>
<td>Fear Family Farms Ltd.</td>
<td>6-044</td>
<td>42.72</td>
<td>17.29</td>
<td>42.72</td>
<td>17.29</td>
<td>$12,455.43</td>
<td>-</td>
<td>$1,637.79</td>
<td>$21,304.99</td>
</tr>
<tr>
<td>7 N Pt. 10</td>
<td>Schilder Farms Inc.</td>
<td>7-008</td>
<td>15.81</td>
<td>6.59</td>
<td>6.91</td>
<td>2.80</td>
<td>$ -</td>
<td>$ -</td>
<td>$2,491.09</td>
<td>$2,491.09</td>
</tr>
<tr>
<td>7 N Pt. 11</td>
<td>Paul Fear</td>
<td>7-010</td>
<td>50.31</td>
<td>20.36</td>
<td>50.31</td>
<td>20.36</td>
<td>$38,164.54</td>
<td>-</td>
<td>$10,556.15</td>
<td>$66,879.96</td>
</tr>
<tr>
<td>7 N Pt. 11&amp;12</td>
<td>Roma Nicholson Estate</td>
<td>7-012</td>
<td>74.97</td>
<td>30.34</td>
<td>32.09</td>
<td>12.99</td>
<td>$ -</td>
<td>$31,190.00</td>
<td>-</td>
<td>$25,062.25</td>
</tr>
<tr>
<td>7 N Pt. 13</td>
<td>Robert Stute</td>
<td>7-013</td>
<td>19.79</td>
<td>8.01</td>
<td>17.64</td>
<td>7.14</td>
<td>$ -</td>
<td>$ -</td>
<td>$13,776.67</td>
<td>$13,776.67</td>
</tr>
<tr>
<td><strong>Total Estimated Assessment - Lands</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>237.29</td>
</tr>
<tr>
<td><strong>Roads</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Martin Line</td>
<td>Municipality of Morris-Turnberry</td>
<td></td>
<td>2.52</td>
<td>1.02</td>
<td>7.56</td>
<td>3.06</td>
<td>$ -</td>
<td>$13,230.00</td>
<td>$1,403.82</td>
<td>$2,463.56</td>
</tr>
<tr>
<td>Cranbrook Road</td>
<td>Municipality of Morris-Turnberry</td>
<td></td>
<td>4.87</td>
<td>1.97</td>
<td>14.60</td>
<td>5.91</td>
<td>$ -</td>
<td>$14,580.00</td>
<td>$1,307.48</td>
<td>$1,279.95</td>
</tr>
<tr>
<td><strong>Total Estimated Assessment - Roads</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>7.39</td>
</tr>
<tr>
<td><strong>TOTAL ESTIMATED ASSESSMENTS</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>244.58</td>
</tr>
</tbody>
</table>

**Note:**
- Agricultural lands may be eligible for a one third provincial grant. Neither the availability nor the amount of the grant can be determined in advance.
BIRD MUNICIPAL DRAIN
Municipality of Morris-Turnberry

IN THE MATTER OF THE DRAINAGE ACT, R.S.O. 1990, CHAPTER D.17, AS AMENDED.

AND IN THE MATTER OF: An Appeal to the Agriculture, Food and Rural Affairs Appeal Tribunal by Nelson Nicholson for the Estate of Roma Leona Nicholson under sections 48(1) and 54(1) of the Drainage Act with respect to the Bird Municipal Drain, Municipality of Morris-Turnberry.


Before:
Jeffrey Hewitt, Vice-Chair; Edward Dries, Member; Richard Smelski, Member

Appearances:
Nelson Nicholson, Appellant
Donna Nicholson, Appellant Representative
Brad Bunke, P. Eng., Engineer who prepared the report
Valerie M’Garry, Counsel for the Municipality
Nancy Michie, Summons Witness for the Appellant
Sharon Zinn, Summons Witness for the Appellant
Ron McCallum, Summons Witness for the Appellant
Darrell Randell, Summons Witness for the Appellant
Paul Fear, Summons Witness for the Respondent
Erin Guthro, Summons Witness for the Respondent
Gary Pipe, Summons Witness for the Respondent
Jacquie Empson-Laporte, Summons Witness for the Respondent

AMENDED DECISION OF THE TRIBUNAL

Background

Nelson Nicholson for the Estate of Roma Leona Nicholson filed appeals under sections 48(1) and 54(1) of the Drainage Act (“Act”) with respect to the Bird Municipal Drain (the “Drain”). The Agriculture, Food and Rural Affairs Appeal Tribunal (“Tribunal”) held a
hearing in the Municipality of Morris-Turnberry on November 24, 2016, which was adjourned and subsequently continued on December 19, 2016. The initial engineer's report, ("Report") dated May 27, 2016 for the Bird Municipal Drain was prepared by GM BluePlan Engineering ("BluePlan") and submitted by Mr. Brad Bunke, P.Eng. ("Engineer"). The Tribunal issued an Order dated November 24, 2016 arising from the hearing adjournment and other preliminary matters as discussed below.

Nancy Michie, Clerk of the Municipality of Morris-Turnberry performed the duties of Clerk of the Tribunal.

**Preliminary Matters**

Prior to the hearing, the Tribunal issued an order making all landowners assessed or compensated in the Report parties to the hearing. The Municipality filed an Affidavits of Service, dated November 22 and December 16, 2016 as proof that all parties had been served with the notice of hearing.

This Hearing was originally scheduled to occur on November 24, 2016. At that time, the Appellant raised an issue about late disclosure of witnesses by the Municipality, such that he was unable to properly respond to these surprise witnesses. The Hearing was adjourned to avoid any prejudice to the Appellant created by this late disclosure and due to the then obvious illness of Ms. M’Garry (counsel for the Municipality). The Tribunal issued an order with specific deadlines in advance of the new hearing date by which statements had to be provided for all witnesses of the Municipality. At the commencement of the re-scheduled Hearing on December 19, 2016, the Appellant advised that the Municipality had failed to provide the required witness statements by the deadline ordered by the Tribunal. He indicated that, on the day of the deadline, he had travelled over two hours (from Dresden to Goderich) to pick up the materials at the address he had provided, only to discover that the materials were not there. Given that he has limited internet capabilities, physically picking up materials of any size was his preferred method of receiving documents. Ms. M’Garry admitted that the Municipality was late in delivering the required witness statements. As the Appellant received these statements a day or two later, he admitted to the Tribunal that he had been able to summons witnesses in response and was therefore prepared to proceed. While the Tribunal was prepared to once again adjourn the Hearing, given that the Appellant by his own admission had suffered no prejudice, the Hearing went forward as planned.

The Tribunal wishes to take this opportunity to address not just the parties to this Hearing but all parties that appear before it. The Tribunal has Rules of Procedure that are in place to ensure an open, transparent and fair process. Our orders are made to both implement and enforce those Rules. Failure to follow both the Rules and our orders, at any step, often results in additional time and increased costs to the parties. But more importantly, such failures can lead to unfairness or even the perception that a party may feel he or she has been treated unfairly. Accordingly, no one should treat the Tribunal’s Rules or orders as only guidelines or trivial procedural bumps in the road. They are to be respected and followed with the greatest of diligence. Failure to do so
may result in otherwise avoidable adjournments and cost orders against the offending party.

Overview

The Drain is located in the Municipality of Morris-Turnberry, near Brussels, Ontario. The Drain was originally constructed in 1912 and consisted of approximately 2,200 metres (m) of 150 mm, 200 mm and 250 mm diameter tile. The downstream portion of the Drain was improved under a report in 1977. The reach of the tile drain between the outlet into the Cole Drain and Martin Line was removed and replaced with an open drain. The tile drain between Martin Line and Cranbrook Road was replaced by 300 mm and 350 mm diameter tile and the tile drain upstream of Cranbrook Road remained as constructed in 1912.

The Municipality received written requests for repair and improvement of the Drain from Paul Fear and William and Jennifer Rapson. BluePlan was appointed to prepare a report for the repair and improvement of the Drain under Section 78 of the Act. It was identified from the outset that there were two wetlands within the watershed that were regulated by the Maitland Valley Conservation Authority ("MVCA"). It was also recognized that all necessary approvals from the Department of Fisheries and Oceans ("DFO") would be required for the works recommended in this report. Further, during the design stage of this project, BluePlan also consulted with Ducks Unlimited ("DU") in order to develop components of the works on the Nicholson property satisfactory to the Nicholson's objectives.

It appeared that extensive consultation regarding the nature, extent, and design standards applied to the proposed works occurred between BluePlan, all the property owners, the Municipality, the regulatory agencies and DU during the development of the final report.

The final report was signed by Mr. Bunke and dated May 27, 2016 (the "Report"). Subsequent to the filing of the Report, the Municipality also received a request for maintenance of the existing Drain under Section 79(1) from Mr. Nicholson.

The Report was considered by the Municipality at a regularly scheduled meeting on June 7, 2016. No appeals against the Report were raised at this meeting and it was consequently given first and second reading and provisionally adopted. The Court of Revision was held on July 5, 2016. Mr. Nicholson filed an appeal to the Court of Revision. The appeals generally questioned the runoff coefficients applied by Mr. Bunke to the Nicholson, Stute, and Schilder properties. He also questioned the design approach applied on the earth berm recommended on the downstream limit of his property. Mr. Bunke responded to the appeals at the Court of Revision and the appeals were denied.

Consequently, Mr. Nicholson filed appeals to this Tribunal under Section 48(1) and Section 54(1) dated July 14, 2016.
**Issues**

Based on the evidence and submissions presented to the Tribunal, the issues raised by the Appellant to be determined are as follows:

1. With respect to the Section 48(1) appeal in this matter:
   - The Appellant claimed that the wrong drainage coefficient was applied to the design of the drain and subsequently the entire project was over-designed and too expensive.
   - The earth berm on the Nicholson property was improperly designed.
   - The cofferdams recommended as part of the culvert installation on the Rapson property are unnecessary and too expensive.
   - The private Hickenbottom drain on the Fear property, although not described in this report, is illegal and must be removed.
   - The Appellant argued that the appropriate permits or approvals were not sought nor received from the MRCA.
   - The Appellant claimed that they were never given an opportunity to raise their issues with Council at the meeting to consider the report.

2. With respect to the Section 54(1) appeal in this matter:
   - The Court of Revision did not acknowledge the impact to runoff from the Nicholson property resulting from the berm and the Schilder property is over assessed.

**Evidence**

*Mr. Brad Bunke, P. Eng., Engineer who prepared the report*

Mr. Bunke confirmed that BluePlan was appointed by the Municipality to prepare a report for the repair and improvement of the Drain and that he had been designated under Section 8(2) of the Act as being responsible for the Report. He confirmed that the project commenced with a site meeting held on June 10, 2014. The meeting was well attended by landowners, municipal staff and MVCA, and the issues raised by each were described in the Report. Following the site meeting, Mr. Bunke proceeded with the gathering of field data and continuing consultation with Mr. Nicholson and the MVCA.

Mr. Bunke stated that, based on the initial data gathered, a design review meeting was held at the municipal offices on November 12, 2015. All potentially assessed landowners were in attendance and a draft report, which described the proposed design standards, was distributed for review and discussion. Many issues related to design, assessment, watershed limits, land uses and potential grants was reviewed and discussed. The issue of the drainage patterns on the Schilder property was identified at that time and it was recognized that additional investigation into that matter was required. It was at this meeting that Mr. Bunke confirmed the design standard selected for the new tile drain as having the capacity to remove 38 mm of water from the watershed per day. He argued that this is the standard that must be considered when surface water is discharged.
directly into a covered drain. It was his opinion that this standard meets the guidelines as set out in the “Drainage Guide for Ontario, Publication 29”, and is appropriately applied in this circumstance.

He advised that this draft report was submitted for review to MVCA at this stage and that the MVCA confirmed in writing that it was in general agreement with the recommendations found in the report and that it would be in a position to issue the necessary approvals when the final report was published.

It was also at this meeting that Mr. Nicholson requested that the watershed boundary and land use considerations on his property be reviewed again in the field. This request was followed by correspondence from Mr. Nicholson dated November 27 and 30, 2015 which identified additional concerns. Mr. Bunke confirmed that he undertook additional field work and technical analysis to address the issues raised by Mr. Nicholson and others at the initial meeting. All of these issues were reviewed and discussed in detail at a second meeting held in the municipal offices on December 3, 2016.

This meeting was well attended by all potentially assessed landowners and the Municipality and all contributed to the discussions, as was detailed in the minutes of this meeting which were reference by Mr. Bunke. There was some discussion regarding consideration for a berm at the Fear/Nicholson property line but this was prior to DU’s involvement. It was Mr. Bunke’s opinion that all issues at that point had been investigated and discussed and the final report could be completed.

Mr. Bunke stated that he was then contacted by representative of DU in April, 2016 to consider the inclusion of an earth berm along the property line between the Nicholson and Fear property in Pt. Lots 11 & 12, Concession 7. He understood the purpose of the earth berm was to enhance ponding within the designated wetland on the Nicholson property. Mr. Bunke testified that the actual flooded area that will be created by the earth berm is very limited in surface area and depth as a result of the topographical contours at this particular site. He also stated that the design of the berm was such that excess surface water flows from the wetland would continue to flow from the Nicholson property onto the Fear property via a controlled spillway over the berm at its lowest point. These excess surface flows would be discharged into a catch basin at the upstream point in the Bird Drain improved under this report.

In cross-examination, Bunke confirmed that, as the runoff from the Stute and Nicholson property would continue to be artificially collected and discharged onto the lower lands via the spillway, these lands would be eligible for assessment under the Act.

He confirmed that the design parameters of the berm (i.e. location, elevation, top width, side slopes, etc.) were suggested by DU. He admitted that he had no recollection of any discussion with DU regarding the necessity to construct the berm with a compacted clay ‘key’ or core to control seepage through the berm and potentially reduce its stability. In his opinion, he was satisfied with the design of the berm as shown in the Report.
When questioned on this issue, he stated that he was not averse to including additional supplementary construction specifications for the inclusion of a compacted clay key within this earth berm. He took the position that he would not support the request by Nicholson to plug the tile in the upstream wall of the proposed catch basin at the head of the drain which would provide outlet to the original Bird Drain tile on the Nicholson property.

Mr. Bunke confirmed that he investigated and received specific information related to the current private drainage facilities on the Schilder property and adjusted the Report to reflect the area affected and drainage coefficients applied to this property.

Mr. Bunke testified that the cofferdams referenced on the plans at the site of the new farm culvert construction on the Rapson property were intended to be temporary. They would be installed in order to block flow in the drain and isolate the site during the culvert installation and removed upon completion of the culvert installation. He confirmed that this is a construction technique require by DFO. Upon questioning, he admitted that neither the plans nor the specifications referenced the cofferdams as temporary or contained clear direction as to the installation or removal of the cofferdams.

With regard to the Hickenbottom drain on the Fear property, Mr. Bunke expressed the opinion that it was never installed as part of the drainage works and the Municipality has no authority to remove it under the provisions of the Drainage Act. Despite that, he confirmed that the earth berm recommended for installation along the Fear/Nicholson property line immediately upstream of the Hickenbottom drain will effectively isolate that drain and block any surface water flows to it from the upstream lands. Further, he consulted with the MVCA on the matter and received confirmation that they had no issue with the existence of the Hickenbottom drain.

Regarding environmental issues and approvals, Mr. Bunke confirmed that he worked closely with MVCA and DFO representatives throughout the development of the works recommended in the Report. He confirmed that he did investigate for Species at Risk and did receive confirmation from MVCA and DFO that all necessary approvals would be granted.

Mr. Bunke strongly disagreed with Mr. Nicholson’s claim that they were not permitted to raise their concerns to council at the meeting to consider the Report. He confirmed that Nicholson was directly and frequently involved in discussion related to this drain from its initiation at the on-site meeting to the publication of the final report. He confirmed that he and his staff did their best to keep the Nicholsons fully informed and provide all of the information requested during the process.

Mr. Bunke offered a detailed description of the assessment methodology applied in this case. He recognized that several different types of land use occurred within this watershed. Each land use was identified and the runoff factor for each land use type was adjusted to reflect the rate and volume of potential flow from those lands. The normal agricultural lands were assessed using a standard runoff factor of 1.0 while the
designated wetlands on the Nicholson property were assessed using a factor of 0.20. This reduced factor was generated from his investigation of the land use, soil type, and topography and also suited the guidance offered in the Ministry of Transportation Drainage Design Manual for Rural Applications.

Although not a specific issue of this appeal, Mr. Bunke outlined the development of the Special Benefit assessments levied in this Report. He provided detailed calculations as to the development of the Benefit/Outlet split, the distribution of the Benefit and Outlet components of the cost, and the calculation of potential grants.

_Nancy Michie, Administrator Clerk-Treasurer Municipality of Morris-Turnberry, Witness_

Ms. Michie was questioned as to the forms requesting the works provided by the Municipality to be signed by the property owners to commence the project. She admitted that the forms used at the time were more appropriate to commence works under Section 4 of the Act but they were also used by the Municipality to commence works under Section 78 at that time. She confirmed that the Motion of Council that accepted the forms and appointed BluePlan to carry out the works clearly identified the report to be done under Section 78. She also commented that these forms have since been replaced and the new forms are far more specific.

Ms. Michie was asked about the application of a soil runoff coefficient of 0.20 as it related to the development of the assessment. She confirmed that she recalled a general discussion of this factor but was unable to accurately identify the parties to the discussion or the context.

Ms. Michie testified that she did receive the request for drain maintenance and repair from Mr. Nicholson relating to the removal of the Hickenbottom drain and forwarded this request to Mr. Bunke as he was in the process of preparing a report for the repair and improvement of the drain. She could not confirm how, or if, Mr. Bunke responded directly to the Nicholsons on this issue.

When asked about the meeting to consider the Report, she denied that the landowners were not given the opportunity to speak to Council. She confirmed that the procedural bylaw of the Municipality requires that landowners must request permission to speak to Council but also pointed out that this permission could have been granted at the Council meeting in question. It was her recollection that no requests were made to speak to Council and no-one asked any questions at the meeting to consider the Report.

_Sharon Zinn, Councillor, Municipality of Morris-Turnberry, Witness_

Ms. Zinn was questioned on the procedure for the Court of Revision on this Drain. She confirmed that the Bird Drain was the first Court of Revision in which she was involved.
Ms. Zinn confirmed that she forwarded the Nicholson request for maintenance works relating to the removal of the Hickenbottom drain on the Fear property to the Clerk. Her testimony was that she understood that this request was for a work under Section 79 and that the Act referenced a 45 day time frame to take action on the request. It was her understanding that the request had been forwarded to Mr. Bunke to address, potentially as part of the report, and that Council had therefore fulfilled the requirements of the Act.

**Ron McCallum, Drainage Contractor, Witness**

Mr. McCallum has been a Drainage Contractor since 1970. He confirmed that he installed the Hickenbottom drain on the Fear property in May of 2005. The Hickenbottom drain is connected to the Bird Drain with an approximate 200 foot length of tile. He confirmed that localized flooding on the Fear property was evident from uncontrolled surface runoff from the Nicholson lands. He stated that he told Mr. Fear that the Hickenbottom drain would not be effective in controlling the surface water discharge from the Nicholson property as the poor condition of the Bird Drain was such that a sufficient outlet for the Hickenbottom drain would not be provided.

It was Mr. McCallum’s clear opinion that Fear had every right to install this private Hickenbottom drain on his land and connect it to the Bird Drain. Landowners within the watershed of a Municipal Drain are not restricted from connecting private drainage systems to a Municipal Drain under the Act and approval from Council is not required. However, he admitted that he was unaware of any potential restriction on the installation of a drainage system within a buffer area around a designated wetland as defined and managed by the MVCA.

**Darrell Randell, Ducks Unlimited Canada, Witness**

Mr. Randell confirmed that he represents Ducks Unlimited Canada with respect to an agreement DU had entered into with the Nicholsons on the property within the Bird Drain watershed. Mr. Randell stated that he has decades of experience as a farmer and as a Municipal Councillor in Southwestern Ontario.

Mr. Randell stated that he had been contacted by Mr. Nicholson with regard to the potential to develop habitat on the Nicholson property in December of 2015. He confirmed that he had meetings with MVCA and representatives from BluePlan in the early months of 2016 with the purpose of developing an earth dam and spillway structure on the Nicholson property as part of the drainage works. He explained that the initial focus of the discussions regarding the design was on the spillway which was the most critical operational feature of this component of the works. He stated that after his discussions with BluePlan about the design, he did not have sufficient time or opportunity to review the final design of the entire feature as shown in the Report before the Report was published. However, he was satisfied that the berm was to be constructed using on-site clay materials that he believed would produce a sound and stable structure. Given that, he did acknowledge that a compacted clay key or core
within the berm is a typical design standard and it would further enhance the stability and resistance to seepage through the berm in this instance.

Mr. Randell confirmed that DU had agreed to pay the Special Benefit assessment as shown in the report against the Nicholson property for the construction of the berm and spillway. He pointed out that if the design was altered to include the clay key and the costs increased, it would have no impact on the Nicholson assessment as it would be assumed by DU. He expressed no concern on the part of DU should that cost increase occur.

Mr. Randell also pointed out that he had received correspondence from Mr. Nicholson in April of 2016 wherein Mr. Nicholson agreed to the construction of the berm and spillway.

**Nelson Nicholson, Appellant**

Nelson Nicholson presented evidence on behalf of the Roma Nicholson Estate. He confirmed that his parents originally acquired two parcels of land impacted by the Bird Drain in 1951 and approximately 1953. A portion of the property was licensed as a gravel pit in the mid 1970s. He was aware that the Bird Drain that traversed the property was an existing Municipal Drain that had been built sometime in about 1912. He was also aware that the repair and improvements carried out on the Bird Drain in the 1977 report did not extend upstream across what is now the Fear property or the Nicholson property.

Mr. Nicholson stated that up until the onsite meeting for the Bird Drain in 2014, he was totally unaware that the MVCA considered part of the Nicholson property as a significant wetland. He claimed that he was told at that meeting by the representative of MVCA that he could not increase the drainage from his property nor repair the Municipal Drain that runs through it. It was on this understanding that the Nicholson family decided to develop the property as a permanent wetland.

Mr. Nicholson acknowledged the receipt of a draft report for the Bird Drain which was distributed at the design review meeting in November of 2015. He complained that he was not given ample time to review and discuss the content of that draft report at that meeting. He concluded from a more detailed review of this draft report after the meeting that the reach of the Bird Drain through the Nicholson property was to be abandoned. He also noted that the Hickenbottom drain on the Fear property was not identified or discussed.

Mr. Nicholson acknowledged attending the second meeting to discuss the draft report in December of 2015. He claimed to have presented information that would potentially alter the defined drainage area on the Stute and Nicholson properties. He expressed concern that the 400 mm diameter tile proposed on the Fear property would drain the proposed wetland on the Nicholson property. Also, he took the position that the proposed tile drain as set out in the preliminary report was overdesigned based on current OMAFRA standards. Based on his interpretation of the Drainage Guide for
Ontario, he suggested that the runoff coefficient applied should be in the order of 12 mm of runoff per day. It was at this meeting that Nicholson raised the option to construct and earth berm along the Fear/Nicholson property line to enhance the wetland on the Nicholson property.

In questioning, Mr. Nicholson stated that he believed the 12 mm per 24 hour standard was applied to the design of the tile in the 1977 report and this same standard should be applied to this work.

Mr. Nicholson confirmed that he consequently contacted DU and authorized them to get involved in discussions with both MVCA and BluePlan to carry the berm option forward. He expressed disappointment with DU’s involvement when he discovered that the final plans for the berm construction as shown in the report did not include a key or clay core. He was also disappointed to understand that the Bird Drain tile exiting from the Nicholson property beneath the berm would not be plugged.

The understanding that DU would pay the cost of the berm was clear to Mr. Nicholson but he would find it unacceptable if the berm was not designed and built properly. He expressed a clear willingness to pay all costs associate with the berm himself in order to get the design modified to his satisfaction.

Mr. Nicholson expressed the opinion that if a proper berm was built, no water would flow off of his property and it would all be retained in the wetland on his property; accordingly, no assessment should be put on the Nicholson lands to contribute to downstream drainage improvements. Similarly, it was his view that the upstream Stute lands should be dealt with in the same manner as the flow from these lands will be discharged and retained on the Nicholson property. He believed that all of the runoff from the Stute and Nicholson property would be retained in a reservoir on the property created by the berm.

When questioned, Mr. Nicholson admitted that not all of the property would be a designated wetland. Portions of the property are currently under agricultural production and some areas are bush lands.

Mr. Nicholson expressed the opinion that the Hickenbottom drain on the Fear property was illegal, should have been removed by the Municipality, and consumed the large majority of the potential capacity of the Bird Drain tile. As a result, he claimed to have been denied access to use the Bird Drain effectively.

In examination, Mr. Nicholson confirmed that he had had many discussions with Bunke regarding the runoff coefficient applied to the design of the tile as well as the design of the berm. He acknowledged that his contacts with MVCA were numerous to the point of being problematic to MVCA and they stopped taking his calls. He also confirmed that he believes Stute wishes to maintain an outlet for his drainage systems through the Nicholson property and the installation of the dam at the downstream limit of the Nicholson property would not negatively impact the outlet capability from the Stute lands.
Mr. Nicholson conceded that he never asked the Municipality to undertake repairs on the Bird Drain through his property despite knowing that it was in need of repair, that it was a Municipal Drain, and that the Municipality had the authority to undertake those repairs.

**Paul Fear, Assessed Landowner, Witness**

Paul Fear identified himself as the owner of the S. Pt. Lots 11 & 12, Con. 6. He confirmed that his property is systematically tiled to the Bird Drain. He stated that he has experienced drainage problems on the agricultural lands immediately adjacent to, and downstream of, the Nicholson property. He confirmed that he attempted to address the issue with the installation of a Hickenbottom drain in the lowest point on his property near the Nicholson property line but this did not provide the intended relief due to the poor condition of the Bird Drain. This was the basis for his original request to repair and improve the Bird Drain.

Mr. Fear stated that he was satisfied with the process followed by the Engineer and Council in the development and adoption of the Report. He was never prevented from offering comment on the Report to the Engineer or Council during the process. He expressed strong support for the current Report.

**Erin Guthro, Regulations Officer, Maitland Valley Conservation Authority, Witness**

Ms. Guthro confirmed that she was the primary contact with the MVCA on drainage related matters. She attended the site meeting, provided support documentation regarding regulated areas with the watershed to BluePlan, and reviewed the final Report in order to ensure compliance with current MVCA Regulations. She confirmed that there was a watercourse enclosure issue and a regulated wetland issue that had to be addressed within this watershed. Through discussions with BluePlan, both issues were resolved to the satisfaction of MVCA in the final Report.

Ms. Guthro also confirmed that she undertook a site inspection on the Nicholson property and had many discussions with Nicholson regarding the proposed drainage works. She stated that she investigated the Hickenbottom drain on the Fear property and determined that it was not a significant issue with respect to the wetland. She did not recall the Nicholsons raising any issue or questions related to the berm.

She stated that the calls received from the Nicholsons on this file became somewhat overwhelming to the point that direct contact with the Nicholsons had to be terminated.

**Gary Pipe, Drainage Superintendent, Municipality of Morris-Turnberry, Witness**

Mr. Pipe confirmed that he was the Drainage Superintendent in the Municipality of Morris-Turnberry when the original request for the repair and improvement of the Bird Drain was filed with the Municipality. He stated that he met with Mr. Nicholson at his request on several occasions to discuss issues related to the sizing of the drain and the existence of the Hickenbottom drain. He told Mr. Nicholson that the sizing of the drain
was the sole responsibility of the Engineer. Further, it was his opinion that the Hickenbottom drain was a private drain and that he had no legal authority to alter it. Under questioning, he disagreed with the premise that he had a duty under Section 79 of the Act to repair the Hickenbottom drain within 45 days of the date of notification to Council. He maintained that the Hickenbottom drain was not part of the Bird Drain as defined in the current bylaw.

Jacquie Empson-Laporte, Environmental Specialist, OMAFRA, Witness

Ms. Empson-Laporte described her role with OMAFRA as a resource to the public by answering questions, supplying pertinent factsheets or documents as required, or referring the parties to experts within the Ministry. She readily admitted that she is not an expert on works under the Drainage Act and typically directs any related matters to Ministry staff in the Guelph office.

Ms. Empson-Laporte confirmed that she met with Mr. Nicholson on several occasions. She did her best to provide answers to several drainage related questions and supply documents and factsheets available through OMAFRA. She stated that she could not adequately address many of the technical questions related to the drain design, berm design or Hickenbottom drain raised by Mr. Nicholson and referred him to other resources to address those matters.

Findings

Contrary to the evidence of Mr. Nicholson who claimed to have been hampered or ‘stonewalled’ by all other parties to this appeal from gathering background data and design information related to this project, the Tribunal finds that the Engineer, Municipality, MVCA, DU and OMAFRA made themselves available and provided far more support to this owner than generally experienced on typical drainage projects. The Tribunal appreciates that Mr. Nicholson lives some distance from the site but it was made clear from the evidence of all parties involved that every practical effort was made to hear and address the concerns of Nicholson.

Dealing with the six specific issues raised in the Section 48(1) appeal on this matter, the Tribunal makes the following findings and comments:

1. The wrong drainage coefficient was applied and the project was over designed and too expensive: Mr. Nicholson was of the opinion that the design of the new covered drain should meet the same standard as was applied in the 1977 report on this drain which was in the order of 12 mm per day. Mr. Bunke claimed that the drainage coefficient of 38 mm per 24 hour that was applied meets the current design standards as set out in the Drainage Guide for Ontario. That reference confirms that a runoff coefficient of 12 mm per day could be applied for cash crops. However, it also confirms that in instances where surface water is admitted into the subsurface drain an additional runoff coefficient of 25 mm per day for a total of 37 mm per day is the recommended design standard. This is certainly the circumstance in this instance. The new subsurface drain must be
properly sized to provide capacity for surface water flows directed to the catch basin at the head of the drain at the Nicholson/Fear property line. The Tribunal finds that the drain is not overdesigned and, in fact, meets current recommended design standards.

2. The earth berm was improperly designed: Mr. Nicholson was adamant that the earth berm should be part of the project but only if it were properly designed and built. He must rely on the competency of the berm in order to develop the wetland immediately upstream of the berm. The claim that the details of the berm as shown on the plans and described in the specifications of the report are lacking has merit. The evidence of Mr. Randell also seems to support the argument that the berm should be built with clay materials and have a compacted key or core to prevent seepage under or through the berm. Mr. Bunke admitted that he did not recall any discussion with DU regarding the inclusion of this feature in the berm design but also agreed to modify the report to include additional supplementary construction specifications to address this apparent deficiency. The evidence was clear that the berm would be more impermeable and stable when constructed with a clay key that extends below the normal ground elevation. Therefore, the Report must be modified to include sufficient detail to include this feature in the design. Simply modifying construction details as a change order to the construction contract is insufficient. All aspects of the berm design must be accurately included in the Report in order that it may be maintained to the design standards and dimensions as set out in this bylaw, when adopted.

In the final submission, Mr. Nicholson referenced an ‘adjustable overflow outlet’. No evidence was provided during the hearing related to this feature. The overflow shall be fixed as set by the design of the Engineer and shall be maintained under the bylaw for this drain at that elevation until altered by a new report and bylaw.

Another aspect of the ability of the berm to effectively pond surface water upstream of the berm is the existence of the original Bird Drain tile which passes beneath the proposed berm. Nicholson claims that the tile on his lands is severely obstructed but would prefer it to be fully plugged so as not to provide a potential subsurface outlet for the wetland upstream of the berm. The specifications in the report direct that the tile be connected to the catch basin at the Nicholson/Fear property line. Mr. Bunke supports that recommendation on the basis that the tile would continue to provide service to the Stute lands. Mr. Bunke admits that the elevation difference between the Stute lands and the catch basin at the Nicholson/Fear property line exceeds 10 m and therefore plugging the tile at the catch basin will have no functional impact on the operation of the drain. Further, he confirmed that if improvements to the drainage outlet on the Stute lands is required in the future, a new report would be required which would address all issues at that time.
The Tribunal supports the Nicholson argument in this instance. Significant funds are being expended to construct an earth berm specifically to develop a wetland upstream of the berm. This tile, even if it is poor condition, is counterproductive to the objective. Therefore, this tile should be fully plugged beneath the berm and not connected to the catch basin downstream of the berm.

3. *The cofferdams recommended on the Rapson property are unnecessary and too expensive:* Mr. Nicholson offered no evidence to dispute the need or cost of the cofferdams. Mr. Bunke testified that they were part of the temporary works associated with the farm culvert construction and were part of the standard construction methodology required by DFO. He admitted that the plans and specifications in the report did not fully describe or detail the temporary nature, dimensions or features of these cofferdams. The Tribunal supports the utilization of the temporary cofferdams to minimize environmental impacts during the culvert installation recommended. However, the Engineer should have been more thorough in including more specific information regarding construction components such as this on the plans and specifications within the Report.

4. *The Hickenbottom drain is illegal and must be removed:* Although Mr. Nicholson argued that the Hickenbottom drain was illegal, and negatively influenced the drainage from his property; no evidence was brought to support that argument. On the contrary, the evidence of Bunke, McCallum, Fear, Guthro, and Pipe was that the Hickenbottom did not offend any legislation and had no impact on the drainage from the Nicholson property. The Tribunal agrees. Its original installation as a private drainage feature that connected to the Bird Drain did not contravene the Drainage Act. The property owner had the right to install the Hickenbottom drain and connect it to the Bird Drain. The Municipality would have no authority to remove it. Ms. Guthro confirmed that it had no impact on the wetlands and was therefore acceptable under MVCA regulations.

5. *The appropriate permits or approvals were not sought or received from the MVCA:* Mr. Nicholson offered no evidence to support this aspect of the appeal. However, Ms. Guthro confirmed that she was consulted by Mr. Bunke from the outset, offered assistance to Mr. Nicholson to address concerns, and reviewed the Report on behalf of MVCA. It was her opinion that all necessary permits and approvals have been received or would be granted. The Tribunal accepts this witness’s testimony.

6. *The Appellant was not given an opportunity to raise issues with Council:* It was Mr. Nicholson’s submission that he was never provided enough time or information from Mr. Bunke or the Municipality, or any other party to this work, to effectively address the issues he had with the content of the report. The evidence confirms that Nicholson attended the site meeting, two meetings to discuss the draft report and the meeting to consider the final Report. Further, he was in direct and frequent contact with Ms. Michie, Mr. Bunke, Ms. Zinn, Mr. Randall, Ms. Guthro, Mr. Pipe and Ms. Empson-Laporte regarding this Report. All
of these parties to the process commented on the extent and frequency of their interactions with Mr. Nicholson on this matter. The Tribunal does not support the assertion that the Nicholsons were not given sufficient opportunity to raise issues on this drainage works with Council.

Dealing with the one issue raised in the Section 54(1) appeal on this matter, the Tribunal makes the following findings and comments. Although not well described in the appeal filed, the evidence of the Appellant was that the construction of the berm will result in a ponded area that will retain all runoff from the Nicholson and Stute properties and therefore, as they contribute nothing to the drain, their assessment should be eliminated. The evidence of Mr. Bunke was that surface and subsurface flow from both the Nicholson and Stute properties will continue to be collected and discharged to the lowest point on the Nicholson property which is at the Nicholson/Fear property line. There is significant natural gradient from the upstream reaches of the watershed to the location of the proposed berm. The berm will have no impact on the volume or nature of the runoff flowing to it from the upstream lands. Further, the topographical evidence provided by Mr. Bunke indicates that the ponded area upstream of the berm is relatively small and will not practically retain all runoff from the upstream lands under all runoff conditions. This was also recognized by DU which required a spillway constructed as part of the berm in order to control surface flows over the berm and direct them to an outlet into the catch basin at the head of the drain. The Tribunal accepts that runoff from the Nicholson and Stute properties will be discharged into the Bird Drain and these lands are therefore eligible for an assessment under the Act.

As to the value of the assessments to be levied against the Nicholson and Stute properties, Mr. Bunke proved extensive testimony on the development of these assessments. The assessment methodology was recognized as that generally applied on drainage works throughout the Province. The Appellants offered no evidence to dispute the methodology or the values presented. The Tribunal accepts the evidence of the Engineer.

With regard to the specific assessment against the Schilder property, Mr. Bunke confirmed that he undertook all available field and research work required to accurately determine the current drainage characteristics and patterns on the property. The assessment was subsequently developed based on these findings. The Appellants brought no evidence to dispute these findings or the assessment value. The Tribunal accepts the evidence of the Engineer.

**Order of the Tribunal**

The Tribunal thereby orders

1. The appeal of the Appellants under Section 48(1) be granted in part.

2. The Engineer shall revise the May 27, 2016 Report as follows:
   - The Report shall be modified to include detailed plans and specifications related to the construction of the berm to include, among other details, a
compacted clay ‘key’ or core. The engineer shall consult with Ducks Unlimited in designing the berm. The revised costs related to this work shall be shown in the report.

- The Special Benefit assessment for the berm construction shall be modified as required to address the revised cost of this component of the work.
- The plans and specifications for the work shall be expanded to include specific details of the installation and removal of the temporary cofferdams associated with the farm culvert construction on the Rapson property.
- The existing portion of the 1912 Bird Drain tile extending from the upstream limit of the new berm on the Nicholson property to the most easterly wall of the catch basin at Sta. 1+283 shall be exposed and removed. These works shall be clearly set out in the Report. The cost of this component of construction shall be include in the cost of the berm construction.
- The Report shall be modified to include all adjustments in the total project costs resulting from the orders herein.
- The Schedule of Estimated Assessments, and Schedule of Assessment for Future Maintenance shall be modified as required using the same assessment methodology as originally applied.
- The revised Report shall be dated the same date as this decision.

3. Once the revise Report has been complete, the Tribunal directs that the amended Report be circulated to all assessed owners on the Bird Drain. The revised Report shall not be brought before the Council or the Court of Revision.

4. The non-administrative costs of the Municipality incurred with respect to this appeal shall form part of the cost of the drainage works and such costs shall include the Engineer’s fees and expenses for preparing the Report, the revised Report as well as the Engineer’s fees and expenses for preparing for and attending the Tribunal hearing.

5. There shall be no other Order as to costs and all parties shall be responsible for their own costs.

Jeffrey J. Hewitt
Vice-Chair

Dated at Tecumseh, Ontario this 7th day of March, 2017.

Amended at Toronto, Ontario this 8th day of March, 2017.