

# INCREASED COSTS DUE TO ROADS AND PUBLIC UTILITIES

## SECTION 26 OF THE DRAINAGE ACT

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### *INTRODUCTION*

Jeff and I appreciate the opportunity to make this presentation today.

Briefly, what we propose to do this morning is to provide you with our best understanding and ideas regarding:

- (1) what exactly is Section 26, what is its theory and what are the applicable definitions;
- (2) where is it that this Section applies;
- (3) when is it that a practitioner applies this Section;
- (4) to whom does this Section apply;
- (5) why does this Section exist;
- (6) how does the practitioner properly apply this Section; and
- (7) some conclusions and recommendations.

### *WHAT IS SECTION 26?*

What exactly is this Section of the Act? What does say? What does it mean? Do any of the Drainage Act definitions apply to it?

*SECTION 26 OVERHEAD 26. In addition to all other sums lawfully assessed against the property of a public utility or road authority under this Act, and despite the fact that the public utility or road authority is not otherwise assessable under this Act, the public utility or road authority shall be assessed for and shall pay **all the increase of cost** of such drainage works caused by the existence of the works of the public utility or road authority. R.S.O. 1980, c. 126, s. 26.*

Now let us try to analyze it.

Firstly, it is found in the portion of the Act entitled “assessments”, so it must have to do with the fair and equitable distribution of the cost of a drainage works.

Secondly, it contains two phrases that are defined in Section 1 of the Act, namely **public utility and road authority**.

*READ AND ANALYZE THEM FROM THE OVERHEADS.*

“public utility” means a person having jurisdiction over any water works, gas works, electric heat, light and power works, telegraph and telephone lines, railways how-ever operated, street railways and works for the transmission of gas, oil, water or electrical power or energy, or any similar works supplying the general public with necessities or conveniences; (“services publics”)

“road authority” means a body having jurisdiction and control of a common and public highway or road, or any part thereof, including a street, bridge and any other structure incidental thereto and any part thereof; (“office de la voirie”)

Thirdly, we think the only clause that is not readily understandable is “ and despite the fact that... under the act”, which we believe means “and even though the public utility or road authority would not be assessed for ‘benefit’ or ‘outlet liability’ in the normal situation.

Fourthly, we suggest that the key phrase in this Section is “shall be assessed for and pay all the increase of cost ... caused by the existence of the works of the public utility or road authority”. We suggest that what this phrase means is that the practitioner has no option but to determine what the extra or additional costs are to the drain due to that road or that watermain or that underground hydro line being there in the way of the drain on that road allowance or easement, and to charge or assess **all** of those additional costs to that road or that utility and, of course subject to appeal, they have to pay those assessments.

So then, to summarize, what does this Section actually mean in layman’s terms? We suggest the following;

*“as well as any and all other assessments that can correctly be charged against a public utility or road authority (such as normal benefit &/or outlet), and in spite of the fact that the public utility or road authority would not normally be assessed under this act (that is for benefit &/or outlet in the usual case), it is the drainage practitioner’s duty to calculate and charge all of the extra or additional costs that result to the drain due to that utility or road being there in the way of the drain to the utility or the road, and they have to pay that assessment, in addition to any others, of course, subject to appeal.”*

#### **WHERE DO WE APPLY SECTION 26?**

Now, lets move on to **where** we apply this Section of the Act, or in what circumstances should the Section 26 “alarm bell” ring in our thick heads?

From our experiences there are very few municipal drains where this Section would **not** apply, as there are very few drains that do not cross roads or do not somehow encounter a public utility somewhere along the route. So we suggest that it would be in the normal or the usual drainage report situation that Section 26 would apply and would have to be correctly used by the drainage practitioner.

Section 26 would apply in most cases where a drain is going to, or already does, cross a road of any kind or a subsurface utility of any kind. Even in a situation where the drain and the road or utility run parallel, there is a strong possibility that this section should be applied.

### *WHEN DO WE APPLY SECTION 26?*

Now our next question is **when** – when do we apply this Section?

We should all be familiar with the long municipal drain process, which OMAFRA has illustrated for us in the form of a flow chart.

The question is “when in this rather long process should the practitioner apply section 26?”

Do we wait until we are preparing our final assessments and then say “oh yes, this is the type of situation that those two blokes from Maitland Engineering were describing at the ’99 conference when I should be applying that Section 26 from the Act”.

Of course, the answer is a very loud **no!** To wait until we are doing our final assessments is very much too late in the process to first apply the hypothesis of Section 26!

If we agree that the normal drainage project does encounter a road &/or a utility along its course, then we should have that Section 26 alarm ringing in our thick head as soon as we get out our Township drainage map to determine the general site of the drainage project that we have been instructed to work on.

Whatever road authorities &/or public utilities that might be affected by the proposed project should be notified as soon as possible!

As is mentioned in all of these reference documents that we have recently reviewed in preparing this presentation, early contact with such agencies is essential. This early contact allows all parties to better understand the complete situation and the desires and concerns of the other stakeholders.

Especially in a case where the road authority or the utility is not familiar with Section 26 (which should be rare in this day and age), early contact gives the practitioner a good chance to explain the section to them and provide supporting documentation as may be necessary.

This early contact also allows the road authority or public utility more time to research and understand both the Act and the particular drainage situation.

In a case when there is potential for a serious unavoidable conflict between the drain and the utility or road, early contact provides all parties, including the petitioning landowners, with a greater opportunity to comprehend the entire situation and to realize that some serious or abnormal design considerations will have to be made. Usually special design considerations will result in higher costs for some party.

So, suffice it to say that the practitioner should set the Section 26 gears in motion as early as possible in this long municipal drain process. We suggest that the best time to do so is at the on-site meeting to which, hopefully, you have invited all possible affected parties and they attend. At this meeting all parties can be properly advised regarding Section 26 and what the ramifications of it might be in that particular situation.

Thank you Andy for the introduction. I would also like to thank the organizing committee for the invitation and the opportunity to be part of this year's Conference.

**TO WHOM** does Section 26 apply?

- Municipal Roads
- County Roads
- Regional Roads
- Provincial Roads
- Private Roads (Section 24)
- Railways
- Telephone
- Gas Pipelines
- Cable T.V.
- Electric Utility
- Water Utility
- Sewer Utility (storm or sanitary)

The list before you is self-explanatory; however, I would like to expand on several items.

Municipal, County, and Regional roads are quite similar under the Act and fairly straightforward.

It is our understanding that Provincial roads are potentially different. Ministry of Transportation Ontario has adopted the position that since their lands are "crown lands", they are not bound by the Drainage Act; however, they are willing to co-operate with municipalities in support of any reasonable works under the Act. Also, they will continue to make use of the Act for the purpose of procuring drainage of provincial highways. In fact, to our knowledge, no public utility or road authority has said "NO" to drainage in the interest of being good corporate citizens.

You will notice that Section 24 "special benefit" has been added with respect to private roads. It is our opinion that they are neither a public utility nor a road authority; accordingly, Section 26 does not apply to them. However, we feel that they could be treated in the same manner under Section 24 of the Act. "Special benefit" means any additional work or feature included in the construction, repair or improvement of a drainage works that has no effect on the functioning of the drainage works; (avantage particulier"). In fact all of the methods used to determine assessments under Section 26 could be used under Section 24; we will show some examples shortly.

Some railways, telephone companies, and gas companies are Federally chartered and some are provincially chartered. If they are federal, the Act may not apply to them, as it is a Provincial Statute. Therefore, the Drainage Practitioner must determine whether or not the utility is bound by Section 26 and if not, what their policy is. We have no experience with gas pipelines; however, we have had with railways, and to date they have complied with the Act. It is also important to remember that not all utilities are necessarily the same.

Completing our list are Cable TV companies and Electric, Water, and Sewer utilities.

Perhaps this would be a good time to show a few slides.

- County Road No. 4, north of Wingham (#1).
- King's Highway No. 9, near Kincardine. No. 9 and No. 21 are the last remaining King's Highways in our area (#2).
- Abandoned railway line in Wingham (#3).
- Bell Canada marker (#4).
- Union gas marker and sub-station (#5 & #6).
- Paving of a municipal street allowance in Wingham (#7).
- Boring under a then provincial (now county) road between Teeswater and Wingham (#8, #9, & #10)

We also have a few overheads showing today's "trenchless" technology. Most County, Regional, and Provincial road authorities will not allow open cuts across their roads. Accordingly, their Section 26 assessments tend to reflect this by the magnitude of the increased cost; however, it almost the norm when a drainage works crosses such a road.

#### **WHY** does Section 26 exist?

We believe that this Section was written to provide the Practitioner with a method whereby he could equitably and fairly distribute the costs incurred by a drainage works due to the existence of a public utility or road authority. By applying this Section in the way we feel it is meant to be, the agricultural lands within the watershed of a drainage works are not unfairly affected by excessive costs due to the existence of a utility or road. We believe the Act was written to primarily serve the owners of agricultural land with an effective method of obtaining drainage.

To have a better understanding of the origin of Section 26, a brief History lesson is in order. As most of you are well aware, the act has been in existence and developing for well over 100 years.

- R.S.O. 1897, c. 226, s. 9 (1) – refers to bridges and culverts on highways and the assessment apportion
- R.S.O. 1927, c. 241, s. 1 (j) – definition of a "public utility" as in *The Railway and Municipal Board Act*  
 c. 241, s. 8 (1) – refers to bridges and culverts on highways and the assessment apportion  
 c. 241, s. 8 (17) – refers to excess of cost and how borne (similar to today Section 26)
- R.S.O. 1970, c. 136, s. 1 (p) – public utility is defined  
 c. 136, s. 8 (2) – refers to bridges and culverts on roads  
 c. 136, s. 21 (3) – refers to increased costs and how borne
- R.S.O. 1975, c. 79, s. 1.23. – public utility is defined  
 c. 79, s. 1.27. – road authority is defined  
 c. 79, s. 26. – refers to increased cost and how borne by a utility *or* road authority

As you will see from the above list, as early as 1897, Section 9(1) referred to bridges and culverts on “highways” as well as the assessment apportion to those highways.

In 1927 a “public utility” was defined as it was in *The Railway and Municipal Board Act*, Section 9(1) became Section 8(1), and Section 8(17) referring to excess costs appeared. Jumping over forty years to 1970, we find the definition of “public utility” Andy discussed earlier, Section 8(1) became 8(2) with the word highway changed to road, and Section 8(17) became Section 21(3).

In June of 1974, the Select Committee on Land Drainage, chaired by Lorne C. Henderson, M.P.P., tabled its final Report in the Legislative Assembly. The Committee recommended that the whole of Section 8 be redrafted since was “presently somewhat confusing and illogical in sequence”. They also recommended that road authorities be treated the same as utilities. It is largely due to the efforts of this Committee that the Act was revised in 1975 to include the current definitions of “public utility” and “road authority”, as Andy discussed earlier, and a new Section 26 referring to increased costs and how they are to be borne by a public utility OR road authority.

**HOW** should Section 26 be applied and how should assessments under this Section be determined or calculated?

Before we give some hypothetical examples, there are a few key points to remember. This information has been extracted from the Proceedings of the 20<sup>th</sup> Drainage Engineers’ Conference (1988); Herb Todgham and Ed Dries presented it.

- Basic test – is it fair to all concerned?
- Some provision must be made in the Report to permit the calculation of the increase in the actual cost of the project caused by the public utility or road so that the increase may be charged to the appropriate authority.
- “All the increase of cost” is believed to mean the *actual* increase of cost, not the increase in the *estimated* cost.

Regardless of all of the changes to the Act, including those in 1975, the basic test for all drainage assessments remains unaltered...”is it fair to all concerned”? We should perhaps remember Section 11, which contains the phrase “to the best of the engineer’s skill, knowledge, judgement and ability, honestly and faithfully, and without fear of, favor to or prejudice against any person, perform the duty assigned”.

The Practitioner must make some provision in the Report to permit the calculation of the increase in actual cost of the project caused by the existence of the works of the public utility or road authority so that the increase in actual cost may be charged to the appropriate authority.

It is also very important to understand that “all the increase of cost” is believed to mean the actual increase of cost and not simply the increase in the estimated cost contained within the Report.

Since it is said that a picture is worth a thousand words, we will look a several examples of how “*all the increase of cost*” might be calculated.

Insert the attached four Excel Spreadsheets - Slides Twelve through Fifteen.

Bear in mind that the actual Engineering and Administration fees will not normally be the same as those estimate; however, for simplicity, they are in these examples. The Section 26 Assessment is calculated for both the Estimated Costs and the Actual Costs by deducting the equivalent from the sum of the construction and engineering/administration.

### **RECOMMENDATIONS AND CONCLUSION**

In closing, we would like to briefly review the five W’s and the How of our presentation.

#### **RECOMMENDATIONS**

1. That the Drainage Practitioner must have a full and complete understanding of **WHAT** Section 26 means.
2. That the Drainage Practitioner must be able to readily recognize any and all situations **WHERE** Section 26 may apply.
3. That the Drainage Practitioner must realize very early in the Municipal Drain process **WHEN** a Section 26 situation is likely to exist and act on it as soon as possible.
4. That the Drainage Practitioner must know to **WHOM** Section 26 applies, all road authorities and all types of public utilities.
5. That the Drainage Practitioner must have a good understanding as to **WHY** this Section exists.
6. That the Drainage Practitioner must know **HOW** to apply the Section to make full and complete cost estimates and allow for actual cost calculations after construction.

#### **CONCLUSION**

That Section 26 of the Drainage Act is intended to be used wherever and whenever extra or additional costs occur on a drainage works due to a utility or road and the Drainage Practitioner is duty bound to assess those extra or additional costs to the public utility or road authority and prepare the Drain Report in a manner such that the actual costs can be calculated and assessed after construction.

At the risk of turning this presentation into a “Mutt & Jeff” routine, he’s Mutt and I’m Jeff, we have one last pearl of wisdom to impart.

ARGUING WITH AN ENGINEER IS A LOT LIKE WRESTLING IN THE MUD WITH A PIG; AFTER A COUPLE OF HOURS YOU REALIZE THE PIG LIKES IT.

Finally, on behalf of Andy and myself, we would like to once again thank the Professional Engineers Ontario - Land Drainage Committee for inviting us to make this presentation at this Conference. Chairman Paul, that concludes our presentation and, if time permits, we would be pleased to answer any questions.

## **REFERENCES**

1. Proceedings of the 11th Drainage Engineers Conference, 1979;  
“Ontario Ministry of Transportation and Communication Acts, Policies and Procedures Affecting Land Drainage”; pp 48-70
2. Proceedings of the 20th Drainage Engineers Conference, 1988;  
“Drainage Assessment Revisited”; pp 10-46
3. Proceedings of the 22nd Drainage Engineers Conference, 1990;  
“Bell Canada, Union Gas, and Ontario Hydro – Ontario Region Services”; pp 82-87
4. Union Gas Municipal Franchise Agreement
5. The Drainage Act, R.S.O. 1990, Chapter D.17
6. Land Drainage Course, 1980; School of Engineering, Ontario Agricultural College, University of Guelph; “Bridges, Crossings, and Culverts”