



TOP 10 COMMON LAW DRAINAGE PROBLEMS BETWEEN RURAL NEIGHBOURS

H. W. Fraser, P.Eng. and S. Vander Veen, P.Eng.

INTRODUCTION

It has often been said that *good drainage makes for good neighbours*. Unfortunately, drainage of water is one of the most common areas of dispute between rural neighbours, whether they be farmers or not. Drainage disputes generally fall into the realm of *Common Law*, a system of law that Ontario inherited from Great Britain. *Common Law* forms the basis of our legal system. It always applies, unless it is specifically altered by a statute passed by our Provincial or Federal Governments. *Common Law* disputes are arguments between landowners, and if they cannot be mutually resolved, **final solutions can be determined through the courts.**

Landowners are considered to be equal under *Common Law*, whether they be private citizens, companies, road authorities, municipalities, or Provincial and Federal governments. So, if you get advice on *Common Law* drainage problems from a drainage contractor, a drainage Engineer, a lawyer, a Conservation Authority, or a Government Agency, remember that *it is not their responsibility to solve the problem*. Only the courts can make the final decision in the dispute. To obtain a ruling by a court, a civil action must be initiated by the damaged party.

Even though the courts have the ultimate decision on drainage disputes, neighbours should try to reach some common ground, and solve the problem in a neighbourly fashion without going to court. Court rulings in *Common Law* may not make either side happy. It is the intent of this Factsheet to help rural neighbours come to their own solutions and to avoid taking legal action against each other. **This Factsheet is not a substitute for good legal advice. Always consult a lawyer if a professional legal opinion is needed.**

Previous *Common Law* court decisions have established precedents in drainage disputes, and from these precedents, a

set of rules or principles have been developed that apply to water rights. These rules under *Common Law* can change as customs change and as new precedents are set. Also, the rules differ significantly between *natural watercourses* and *surface water*.

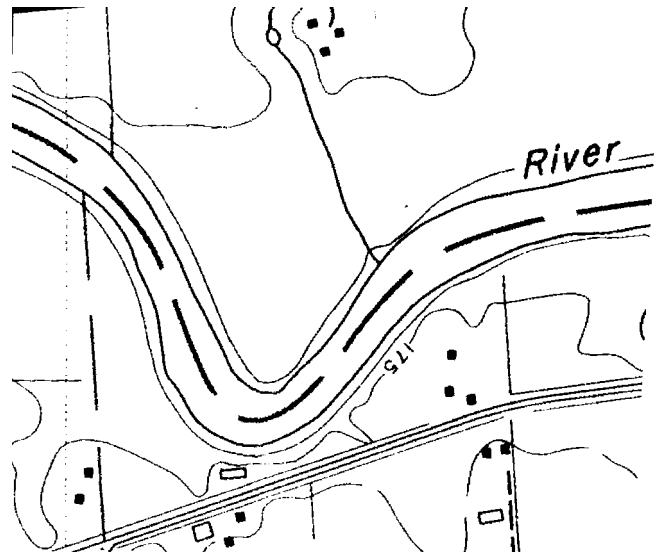
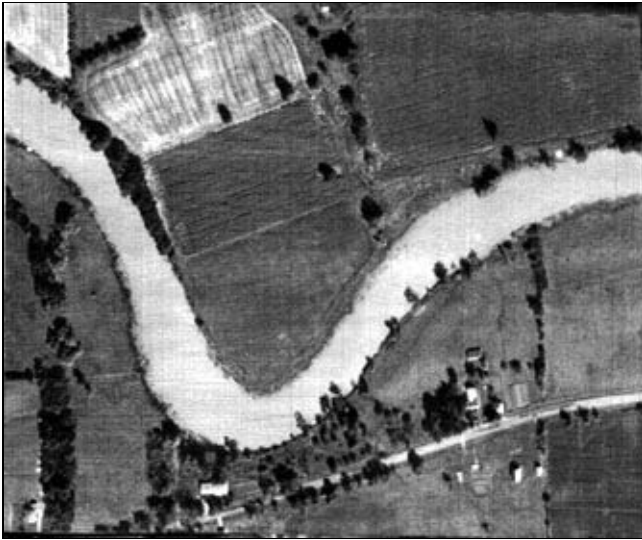
NATURAL WATERCOURSES

Almost the whole definition of a *natural watercourse* is founded on the saying *aqua currit et debet currere*, or “water flows naturally and should be permitted thus to flow”. A *natural watercourse* is defined generally as “a stream of water which flows along a defined channel, with a bed and banks, for a sufficient time to give it substantial existence”. See Figure 1. It must, on casual examination, “present the unmistakable evidence of the frequent action of running water”. It is not essential that the supply be continuous, or form a perennial living source for flora or fauna. It is enough if “the water rises periodically from natural causes and reaches a plainly defined channel of a permanent character”. One can usually identify a *natural watercourse* on an aerial photo or a topographic map. See Figure 2. A *natural watercourse* “does not cease to be such if at a certain point it spreads out over a level area and flows for a distance without defined banks before flowing again in a defined channel”. Often, it is “the valley through which the stream runs, and not its low level or low water channel, which is the water course”. If water is in a *natural watercourse*, it must be permitted to flow.

Figure 1 – A Natural Watercourse With A Defined Bed, Banks and Sufficient Flow



Figure 2 – A Natural Watercourse Shows Up On An Aerial Photo (Left) And Topographical Map (Right)



Farmers, and others, often have their own ideas about what is or isn't a *natural watercourse*. Obvious examples of *natural watercourses* in Ontario include: the St. Lawrence River, the Niagara River, and the Grand River. Many creeks and streams might also be considered to be *natural watercourses*. However, private ditches and channels across low areas on one's own property are not usually considered to be *natural watercourses*. See Figure 3. The courts have the final say on whether a channel is a *natural watercourse* or not. Everyone else can only offer an opinion.

Figure 3 – A Private Ditch Or Channel Across A Low Area Is Not Usually Considered To Be A Natural Watercourse



SURFACE WATER

Surface water has no defined course. See Figure 4. It is "the water that falls as precipitation, but which finds its way to a *natural watercourse* by percolation or flow". *Common Law* can be confusing when it comes to *surface water* because, under most circumstances, it has no right of drainage and the law appears to deny the right of water to flow downhill. This is described further in this Factsheet.

Figure 4 – Surface Water Has No Defined Course And No Right Of Drainage



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The following questions are commonly asked by rural landowners.

My neighbour's land is higher than mine, but can he simply dump his water on my land?

If "his water" is *surface water*, then it has no right of drainage. Neighbours can either choose to keep their water on their property, or allow it to pass along onto property at a lower elevation. Similarly, property owners at a lower elevation can either accept the water from neighbours above them or reject it. However, once the water reaches a *natural watercourse* it **must** be allowed to continue to flow through all properties.

Suppose there are two owners of adjacent parcels of land, **A** and **B**, where **A** is at a higher elevation than **B**. Obviously, precipitation that falls on the lands of **A** will flow towards the lands of **B**. If **B** objects to the flow of the *surface water* onto his lands, and **A** has done nothing to collect or

concentrate the flow of water from his land, the courts are unlikely to rule against *A*, since they recognize that water flows downhill naturally. However, if *B* does not want the water from *A*, he can reject the water by building an impervious wall, berm or dyke along the boundary of his land, and in effect dam the water back upon the higher lands of *A*. Even though this may cause damage to *A*'s property, *B* would not likely be liable, since *surface water* has no right of drainage, and *A* must accept the flooding. *B* may even fill his land until it exceeds the height of the higher ground of *A*. This apparent paradoxical circumstance would not make good neighbourly sense, does not solve anything, and simply would cause hard feelings between the neighbours.

Can my neighbour outlet his tile over the fence onto my land, end it a few metres away from the property line on his side, or outlet it into my private ditch?

Water from tile drainage systems is considered to be *surface water*, so it has no right of drainage. Therefore, the situation is similar to the previous question, and the owner of the lower land, *B*, could again dam the water at the property line to protect his property. However, because water is being collected and deposited on *B*, *B* could **also** take legal action against *A*, the owner of the tile. *B* would have to prove that *A* is collecting water, dumping it on him, and causing damage that can be assessed a dollar value.

When someone tile drains their property, they are obliged to take this collected water to a *sufficient outlet*. When trying to find a *sufficient outlet*, they should follow the path the tile water would follow. Then, they should ask themselves if a reasonable person would think that water could flow down this path and not cause any harm to any land or road. If so, this is probably a *sufficient outlet*, and many potential disputes can be avoided.

If one has a private ditch on his property (not constructed under any legislation, such as a *Municipal Drain*), he is not obliged to clean it out for his neighbour's benefit. That is, one does not have to clean out a private ditch to accommodate the tile drains from a neighbour on higher ground. Also, a neighbour is not permitted to trespass on another property to clean the private ditch out, or to dig a new ditch without the owner's permission, unless there was some previously arranged, **written Mutual Agreement Drain**.

Can my neighbour dump the eavestroughs from his greenhouses onto my land?

Again, the water collected off a roof in an eavestrough (Figure 5) is considered to be *surface water*, and it has no right of drainage. It must be taken to a *sufficient outlet*. Since this water has been collected, the greenhouse owner could be liable for the damage that this water causes on the downstream land. Other examples of collecting water include: private ditches that are **not natural watercourses**, swimming pool water, road ditches, irrigation water, water

collected in catch basins, or runoff from parking lots and yard areas. The same answer applies as previously indicated.

Figure 5 – Surface Water Drained Off Greenhouse Roofs Has Been Collected Into Eavestroughs, So It Must Be Taken To A Sufficient Outlet



Can I plug up the tile I found outletting onto my property, or into my private ditch?

Sometimes a new rural owner, say *B*, finds a tile draining out onto their land, or into their private ditch from higher neighbouring ground, say *A*. Normally, this would not be permitted under *Common Law* as outlined previously, since this tile water would be considered to be simply *surface water*. The only **exception** to this is if *A*'s tile outlet into *B*'s private ditch has existed for more than 20 years, and if during that time *B* never disputed or opposed the tile outlet. In this case, *A* acquires the *right* to outlet into the private ditch owned by *B*. This is called *Prescriptive Rights*, which is similar to *Squatter's Rights*, established through the *Statute of Limitations*. However, even if one has the right to plug the tile outlet, it certainly would not make for good neighbourly relations. The best option would be to discuss the matter with the owner of the tile system upstream, *A*, and come to some agreement on how to proceed.

Do I have to let my neighbour run his tile into my tile drainage system?

No. Drainage tile is privately owned, and landowners are under no obligation to let a neighbour tile into it, as long as the tile is not part of a *Municipal Drain*. However, it would be neighbourly to come to some *Mutual Agreement*. A neighbour on higher land might pay for the privilege of using someone else's tile, or pay to install a larger one beside it that might be of some benefit in the future to either party. Landowners should be careful that they do not put their own tiled land at jeopardy, because they have allowed too much water into their main tiles. The main collector tile might not be designed to handle the extra water. Once a tile connection is made at the property line, it is very difficult for a landowner to know what other connections are being made further upstream for other owners or catch basins. Water from land at higher elevations above will always drain out first, while land at the lower elevation will drain more slowly if the main collector tiles are already full. It is strongly

recommended that a written *Mutual Agreement Drain* be drawn up to keep these potential problems in mind. This agreement should be registered against both deeds for future reference and future owners. Unfortunately, landowners and their lawyers are often reluctant to sign *Mutual Agreement Drain Documents* because it adds something to the property deed that could make a future property sale less attractive to buyers.

Do I have to let my neighbour run his tile across my place to a sufficient outlet, and do I have to help pay the costs?

Again, there is no requirement for a neighbour of lower land to let an owner of higher land run a tile through their property. However, it would be neighbourly to come to some agreement that benefits both parties. Perhaps, if the tile was increased in size at the time of construction, then both owners could use it. However, as in the previous questions, both parties should draw up a *Mutual Agreement Drain* that is registered against both deeds for future reference and owners. This avoids misunderstandings about who pays what, and who is responsible for what. Even if an owner of lower land agrees to let the neighbour run a tile across their farm, he is under no obligation to help pay the costs. He may, however, receive some benefit from the tile and, if so, it would be neighbourly to help share the costs in that case.

The neighbour has another option, though, and that is to petition for a drain across the lower land under the *Drainage Act*. If he is successful, all neighbours would be forced to pay for their fair share of the costs based on how much water they drained into the watershed of the *Municipal Drain*, and how much benefit they received from it. However, in most cases, the *Municipal Drain* option might end up costing everyone more in the long run.

Sometimes a *Municipal Drain* does not flow through a landowner's property even if he paid toward its cost. Paying toward the cost of a *Municipal Drain* still does **not** give a landowner the right to cross anyone's property with a tile or ditch to gain access to the *Municipal Drain*. By paying towards a *Municipal Drain*, an owner acquires the "right to outlet his tile drainage system into the drain", but this same owner must still "acquire the right to cross someone else's farm, since the neighbouring farm is a private property". If a landowner wanted access to the *Municipal Drain*, he should have brought this to the attention of the Drainage Engineer who designed the *Municipal Drain* in the first place. The Drainage Engineer could have designed a branch drain from the *Municipal Drain* through the neighbour's property. Petitioning for this branch drain can be done at a later date under the *Drainage Act*, but it would be more complicated and costly after the fact.

I am putting in a 150 mm (6 inch) main tile for my farm, but my neighbour wants me to put in a 200 mm (8 inch) tile, so he can tile into it as well. Do I have to?

This question is similar to the previous one. One does not have to install a bigger tile to satisfy the neighbour's wishes, although again it would be neighbourly to come to some mutual agreement.

Why doesn't the road department make their road ditches deep enough to outlet my tile drains?

The road department is not required to dig their ditches deep enough to provide outlet for tile drains. See Figure 6. Road ditches are just another form of private ditch, and the road authorities are only obligated to dig their ditches deep enough to handle the *surface water* off their own roads. They are not even required to take *surface water* from surrounding land. There is no right of drainage of *surface water* even if it is in a road ditch, unless the ditch is part of a *Municipal Drain* and access for tile drains is permitted. That is, an owner of lower land can block the passage of ditches that are not *natural watercourses* or part of a *Municipal Drain*. For normal road ditches, permission must be obtained from the road department to outlet tile drains into them.

Figure 6 – Municipalities Are Not Obligated To Dig Their Road Ditches Deep Enough To Outlet Tile Drains, Although These Ditches Often Provide Excellent Outlets. Permission From The Municipality Is Required.



Can my neighbour force me to take down my trees on my side of our property line because he says their roots are plugging his tile drains?

No, a neighbour cannot force anyone to take down the trees. However, if the trees are not removed and the situation is ignored, the neighbour may do some serious root pruning on their side of the property line that may affect the health of the trees. Some tree roots are known to travel more than 30 metres (100 feet). Unless absolutely necessary, trees should not be planted too close to property lines, especially water loving varieties such as willows and poplars. Conversely, tile drains and especially main collector tiles should not be installed too close to property lines that are already treed, or are likely to be treed in the future.

Can I take logs and debris out of a natural watercourse adjacent to my property to get the water moving?

Anyone who interferes with the channel of a *natural watercourse* is liable for the damages that result from their actions. Before removing the obstructions, one should estimate the flow and volume of water being stored to see if the channel downstream can accommodate the sudden increase in flow without damage.

Hugh Fraser, P.Eng., is an Agricultural Engineer, Agriculture and Rural Division, OMAFRA, Vineland and **Sid Vander Veen**, P.Eng., is Drainage Co-ordinator, Agricultural and Rural Division, OMAFRA. This Factsheet was reviewed by **Jim Myslik**, P.Eng., Agriculture and Rural Division. The authors are indebted to **Ross Irwin**, P.Eng. and **John Johnston**, P.Eng. whose previous work in interpreting the *Common Law* aspects of drainage was very helpful in the preparation of this Factsheet. **Competent legal counsel should be procured for any drainage problems that may arise between rural neighbours.**

FOR YOUR NOTES

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