



FILE NO.: 015BruceBeach21

DATE: 2022/04/22

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

AND IN THE MATTER OF appeals to the Agriculture, Food and Rural Affairs Appeal Tribunal ("Tribunal") by **Gary and Karen Pollack** and **Mark and Samira Gancevish** under section 54 of the *Drainage Act* with respect to the **Bruce Beach Municipal Drain - Phase 1** in the Township of Huron-Kinloss.

AND IN THE MATTER OF an electronic hearing to be held pursuant to Rule 18 of the Tribunal's Rules of Procedure.

BETWEEN:

Gary and Karen Pollock

Mark and Samira Gancevich

Appellants

– and –

The Township of Huron-Kinloss

Respondent

Self-Represented

Represented by Carolina Campos

Represented by Paul Courey

Heard: March 23 and 24, 2022

Before:

Robert Fuller, Vice-Chair; Steve Moutsatsos, Vice-Chair; and, John Johnston, Vice-Chair

Appearances:

Carolina Campos, Counsel for Mark and Samira Gancevish

Paul Courey, Counsel for the Township

Stephen Brickman, Engineer who wrote the report

Mark Gancevich, Appellant

Gary Pollack, Appellant

TRIBUNAL DECISION

Preliminary Matters

- [1] A Pre-Hearing Conference was held on November 15, 2021 in part to determine whether the Tribunal should accept the Notice of Appeal filed by David and Jackie Brisbin under Section 54 of the *Drainage Act*, R.S.O. 1990, c. D.17 (“Act”). The Tribunal in a decision released on November 16, 2021 as Bruce Beach Municipal Drain 2021ONAFRAAT22 declined to accept the appeal.
- [2] A Motion was held on December 21, 2021 to determine whether the Tribunal should accept a request for extension of time to file an appeal under Section 48 of the Act pursuant to Section 100 of the Act. The Tribunal in a decision released on December 21, 2021 as Bruce Beach Municipal Drain Phase 1 2021ONAFRAAT19 declined to accept the appeal.
- [3] The Engineer’s Report for the Bruce Beach Municipal Drain (the “Report”) was prepared by Stephen Brickman (the “Engineer”) of Headway Engineering and is dated July 8, 2021.
- [4] After receiving the appeals, the Tribunal issued an order on January 18, 2022 making all landowners assessed or compensated in the Report parties to the appeal.
- [5] The Tribunal held this Section 54 appeal hearing by Zoom video conferencing on Wednesday March 23 and Thursday March 24, 2022. The Municipality filed an Affidavit of Service as proof that all parties had been served with the Notice of Electronic Hearing. This Affidavit became Exhibit 1 at the appeal.
- [6] Prior to the commencement of the appeal, the Appellants, Mark and Samaria Gancevich submitted a Supplemental Affidavit of Mark Gancevich sworn March 21, 2021, seeking to have the Supplemental Affidavit admitted before the Tribunal. The Appellants submitted that the Affidavit, provided a brief factual update relating to matters occurring after the filing of the original Affidavit of Mark Gancevich after the date for providing documentary evidence to the Tribunal. The Municipality objected to such admission. On hearing arguments by all parties, the Tribunal allowed the admission of the Supplemental Affidavit.

Background

- [7] Bruce Beach Municipal Drain - Phase 1 was initiated by a petition under Section 4(1)(c) of the *Drainage Act* signed by the Director of Public Works seeking an outlet for drainage for part of Bruce Beach Road and Lake Range Drive. At the November 19, 2018 meeting of

the Council of the Township of Huron-Kinloss, Dietrich Engineering was appointed to respond to the petition and prepare an Engineer's Report. This appointment was subsequently modified to appoint Headway Engineering.

- [8] The watershed includes the westerly portions of Lots 41 through 48 Concession Lake Range east of Lake Range Drive and Lot 703 through Lot 770 west of Lake Range Drive and west from there to Lake Huron for a total area of approximately 208 acres.
- [9] There is a ravine commencing at approximately the lot line between Lot 42 and lot 43 just East of Lake Range Drive running westerly under Lake Range Drive, which then flows under Bruce Beach Road through a pipe, through an unnumbered Lot, being a portion of and affixed to the lands identified as Lots 97 and 98, to outlet into Lake Huron. The evidence is unclear as to whether the ravine is entirely located on the unnumbered lot, or on Lot 98 or partly on both lots. The elevation difference between the ravine at Lake Range Drive and the beach at Lake Huron is approximately 23 meters with close to 20 meters in elevation change occurring between Lake Range Drive and Bruce Beach Road. The approximate distance between the crossing on Lake Range Drive and Bruce Beach Road is 270 meters.
- [10] The existing drainage system east of Lake Range Drive consists of an open ditch and field tiles on Lot 43, Concession Lake Range with outlets.
- [11] The ravine has been experiencing high levels of erosion.
- [12] All of the land in the watershed in Lot 48, most of the land in Lot 47, approximately three quarters of the land in the watershed in lot 46, and approximately one quarter of the land in the watershed in Lot 45 is tile drained flowing in an easterly direction outletting into the Ralph Pollock Drain. This removes the subsurface water from this area out of the watershed and takes it to the east away from the ravine.
- [13] At some time in the past, the owner of Lot 98 installed a corrugated pipe to pass the water from the ravine through to the lake underground. This pipe did not extend as far upstream as Bruce Beach Road at the time of installation.
- [14] During the past few years, the watershed has experienced significant and heavy storm events, during which the flow in the Ravine has caused the Bruce Beach Road culvert to overflow and wash out the road bed. In February 2018 a storm event caused significant damages to Lot 98. In August of 2020 a storm overwhelmed the ravine, washed out the Bruce Beach Road culvert and the privately installed culvert on Lot 98, causing considerable damage to both private and public property.
- [15] After the 2018 storm the owner of Lot 98, S. Gancevich, extended the pipe set forth in

Paragraph [13] to approximately Bruce Beach Road.

The Issues

- [16] Should the assessment applied to Gary and Karen Pollock for construction and future maintenance costs of Bruce Beach Municipal Drain Phase 1 be reduced to equal that of other typical residential landowners in the drainage area?
- [17] Should the assessment applied to Mark and Samira Gancevich for construction and future maintenance costs of Bruce Beach Municipal Drain Phase 1 be eliminated based on history and conduct of the Municipality?

Evidence of the Parties

Engineer's Report

- [18] Mr. Brickman, the Engineer authoring the Engineer's Report, summarized the work proposed in the report as the construction of a detention pond of approximately 1.6 hectares on the east side of Lake Range Drive at the head of the ravine, and installation of a pipe drain from the detention pond down the ravine to the upstream side of Bruce Beach Road to a temporary outlet into the privately installed culvert on Lot 98. The ravine will then be filled in for approximately 199 metres using the material from the detention pond. A rip-rap lined swale in the ravine will convey any surface water down the ravine. The detention pond is designed to temporarily contain flows generated by a 100-year rainfall event. The objective is to provide a drainage system under the Act to increase safety to the public and protect private and public property.
- [19] Phase 2 of the project, not presently before the Tribunal, proposes to create a new outlet for the piped water south on Bruce Beach Road to the 8th Concession Road then westerly down the road allowance to outlet into Lake Huron.
- [20] For assessment purposes, the Engineer divided the project into two sections – the work on the detention pond just east of Lake Range Drive and the work on the ravine. The estimated construction cost of the detention pond is \$201,700. The detention pond receives uncontrolled runoff from the watershed east of Lake Range Drive and releases it at a controlled rate downstream. The estimated cost of the work on Lake Range Drive is \$133,560. The estimated cost of the ravine work is \$208,620. There is also \$54,400 (10% of the estimated cost) included in the construction cost as a contingency fund. Allowances for damages and right of way total \$79,390. Engineering and contract administration is \$281,100. Surveys, consulting other technical specialists cost \$15,000 and interest and net HST is \$41,230. The total estimated cost of the work is \$1,015,000. This is assessed to the affected lands and roads as:

- a. A special assessment to the roads under Section 26 (“...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.”);
- b. Outlet liability under Section 23(1) (“Lands and roads that use a drainage works as an outlet, or for which, when the drainage works is constructed or improved, an improved outlet is provided either directly or indirectly through the medium of any other drainage works or of a swale, ravine, creek or watercourse, may be assessed for outlet liability.”) and,
- c. Benefit under Section 22 (“Lands, roads, buildings, utilities or other structures that are increased in value or are more easily maintained as a result of the construction, improvement, maintenance or repair of a drainage works may be assessed for benefit.”).

- [21] For this project the Engineer deducted the Section 26 special assessments from the total and assessed the remainder of the project 63% as benefit and 37% as outlet liability.
- [22] Mr. Brickman told the Tribunal he used the Todgham method for distributing the cost. He assessed the municipal roads \$170,440 as a special assessment under section 26. He divided the project into two sections – the detention pond and the ravine work. The cost of the detention pond was divided 65% for benefit and 35% for outlet. The ravine work was divided 57% to benefit and 43% for outlet liability. Mr. Brickman said that both of these ratios were within the industry practices. Mr. Brickman also stressed that the assessments are for the property and the potential of the property, as opposed to assessments on the current owners and their use of the property.
- [23] The Appellants, Mark and Samira Gancevich, owners of Lot 98 are assessed \$242 for benefit on the ravine portion of the work. The benefits identified were better control of water flow and improved community appearances. They were also assessed \$24,000 benefit for the detention pond portion. The benefit identified was better control of water by throttling the flow from the upper watershed into the ravine. Lot 98 is not assessed outlet liability as it has direct access to Lake Huron for any water flowing from the property.
- [24] The Appellants, Gary and Karen Pollock, owners of Lot 726 are assessed \$70,000 in benefit for the ravine section (20% of the cost of the work on their property). The benefits identified are better control of water flow, improved appearance, and easier maintenance of the property. Lot 726 is also assessed \$5000 in benefit for the detention pond. The benefit identified is better control of water due to throttling the flow into the

ravine. Lot 726 is also assessed \$532 for outlet liability for the water flowing into the Bruce Beach municipal drain from the property.

The Evidence of Mark Gancevich

- [25] Mr. Mark Gancevich testified on behalf of the Appellants Mark and Samira Gancevich. Mr. Gancevich stated that they purchased 98 Bruce Beach Road, a property that extends from Bruce Beach Road to Lake Huron, in February 2014. At the time of purchase, there existed on the property a 1200 mm steel culvert extending 150 to 200 feet. At that time there was a road culvert under Bruce Beach Road flowing into an open channel and then into the culvert conveying water from the ravine the rest of the way across their property to Lake Huron. The Appellants extended this culvert to Bruce Beach Road in response to flooding events in August 2020 without an engineer's design. Mr. Gancevich referred to this ditch and culvert combination as his private drain. Mr. Gancevich states he did not grant permission for use of his private drain for water flow.
- [26] Water flows through the watershed and drains as previously set forth, including utilizing roadside ditches.
- [27] Mr. Gancevich provided the Tribunal with a summary of a February 2018 flooding event utilizing photographs. This included showing the debris and flooding of the Appellants property, and the washing out of the road culvert which was later replaced by the Municipality. Mr. Gancevich also showed the destruction of landscape on his property.
- [28] Mr. Gancevich provided the Tribunal with a summary of the August 16, 2020 flooding event utilizing videos and photographs showing significant damage to his property. This included the loss of land and trees, as well as foundation issues. He also provided a supplementary affidavit illustrating the most recent February 22, 2022 flooding event and its consequences, which he attributed to the state the project was in at the time of the weather event, without providing any other corroborating evidence.
- [29] Mr. Gancevich provided the Tribunal with numerous pieces of correspondence between himself and the Township asking the Township to clean up and remove debris from the ravine upstream of his property. The Township response was this was private property and not the responsibility of the Township. He provided evidence of the Township considering a drain in this area in 2009.
- [30] Mr. Gancevich feels that he should not have a benefit assessed to their property as it adds no water to the system. He feels there is no benefit to their property as, but for the actions of the Township, including his allegation of negligence, there would be no flooding of their property. He admitted the assessment of benefit of their property should be similar to other beach lot properties.

- [31] On cross examination, Mr. Gancevich admitted he did not sign a petition for the drainage works, appeal under section 48 of the Act, nor take actions to change the flow of water. Mr. Gancevich had no issues with the Engineering design, nor did he question the methodology used by Mr. Brickman to calculate the assessments on his property. Mr. Gancevich did not offer any other evidence to support his request for relief of assessment for the project.

The Evidence of Gary Pollock

- [32] Mr. Gary Pollock testified on behalf of the Appellants Gary and Karen Pollock. Mr. and Mrs. Pollock are the current owners of Lot 726, having purchased the property recently but having over 50 years knowledge of the property during all seasons. He testified that most of the time the bed of the ravine was dry but during times when it was flowing water, the water was manageable, and their ravine has a long history of being relatively stable. He stated it was not until the farms began tiling and draining their land into and through their property, that significant erosion and other issues started. He acknowledged that their property would be easier to maintain and have a better appearance when the project was finished, but he also felt that the project had prevented him from severing off a building lot from the property that he had hoped to sell, or from building on certain portions of the property. He was concerned about security of the property once the work was finished because of use by uninvited visitors. He could not see the approximately \$75,000 of assessed benefit from the drainage works but did not provide any evidence in support of this position. He did not believe the \$12,160 drainage allowance was adequate. He was unaware that objections to the drainage allowance are a Section 48 appeal, which he did not avail himself of. He advised he is prepared to pay amounts similar to the other building lots along Lake Range Drive, namely \$1,000 to \$2,000.

The Evidence of Stephen Brickman

- [33] Mr. Stephen Brickman testified on behalf of the respondent Municipality. He testified that other than the Pollock drain as previously described, there are no municipal drains in the watershed. He testified there is a flooding problem in the area. Mr. Brickman testified that the Bruce Beach Municipal Drain – Phase 1 is designed to address the flooding problem. Once the design had been presented to the ratepayers and the time limit established in the Act to appeal the proposal had elapsed, a Ministerial order under Section 124 of the Act was obtained to proceed with construction of Phase 1 without a Bylaw.
- [34] Mr. Brickman testified that if there were nothing to control and direct the flow, the properties by the lake, including the property of both Appellants, would be the recipients

of the flow. Mr. Brickman explained the outlet and benefit assessment for the entire project, which was typical for the type of project and explained the assessment related to the property owners, including the Appellants.

- [35] Mr. Brickman testified that the benefit to the Pollock property includes improved long term stability, easier maintenance, improved appearance, mitigation of slipping of the side banks and improved management of surface and subsurface water which improves the marketability of the property.
- [36] Mr. Brickman testified to the benefit of downstream properties, including the properties of the Appellants, as benefit by reduced flow rates, flood mitigation and improved safety, and explained the calculation of the benefit. He then applied all Todgham factors to the assessments of the Appellants. There was no evidence produced to show that these assessments were unreasonable.
- [37] Mr. Brickman compared the assessment of the Gancevich property to the Clark property immediately next door and testified the difference in assessment resulted from the greater damage during flooding but was otherwise comparable.
- [38] On cross examination Mr. Brickman confirmed the awareness of the Township regarding the drainage issues of Bruce Beach Road for the past decade. Mr. Brickman confirmed that roadside ditches on Lake Range Drive are directed towards, and feed into the ravine, but could not venture an opinion on the drainage or flow patterns prior to development, nor could he opine as to when the private ditch on Lot 43-46 Concession Lake Range was constructed. He confirmed that continued use of the culvert on the Gancevich property was not ideal over the long term for a variety of reasons, and the Phase - 2 development of the Bruce Beach Municipal Drain was necessary. Mr. Brickman advised that the response by the Township to the 2022 flooding event was to contact the contractor who was responsible for the maintenance of the site during construction.

Closing Submissions

Submissions of Gary Pollock

- [39] Mr. Pollock reiterated his position set forth in his evidence.

Submission on behalf of the Appellants Mark and Samira Gancevich

- [40] The Appellants submit that the Township performed inadequate and negligent management and maintenance of the Township's drainage infrastructure, including the original illegal construction, directing water to the Appellants' insufficient drain and a failure to clear debris. The Appellants note Mr. Gancevich's objections to the use of his

private drain by the town and expression of concerns due to insufficient drainage, major flooding events and a pattern of flooding.

- [41] The Appellants submit that the Act is a remedial statute pursuant to *Niagara Falls v Overmeyer* 1997 ONDR 1 and this remedial nature, as interpreted utilizing section 64 of the Legislation Act, 2006 and a broad construction as set forth in *Zegel v Zegel*, 1992 Carswell Ontario 270, and considering the actions of the Township, support their position that their lands have received no benefit as defined by the Act.
- [42] Alternatively, the Appellants submit that they have contributed no waterflow into the system and, utilizing the rationale in *Anderson v Thurlow (Town)* 1968 ONDR 1, the Appellants have not received a benefit despite the Todgham method of allocation.
- [43] The Appellants cite *Johnson v Dundas* 1945 CarswellOnt 55, paragraph 67 for the proposition that a party cannot collect and discharge water onto another property, and that the actions by the Township causing the damage does not justify collecting payment to fix an illegal activity.
- [44] The Appellants submit that the Tribunal should reapportion the Appellants' benefit to the Township on the basis of a dereliction of duty in accordance with *Courtney v Huron Township* 1998 ONDR 5, as they assert the Township was negligent. The Appellants submit the proof of flooding and dereliction of duty in remedying same and failure to maintain infrastructure free from debris for such proposition.

Submission on behalf of the Respondent Township

- [45] The Appellants Mr. and Mrs. Pollock have asked for an allowance due to losses from uninvited guests and loss of right to a severance of their property. The Township submits that the Appellants produced no evidence of loss and cannot properly raise a special allowance therefrom, as a Section 48 appeal pursuant to the Act is not before the Tribunal. There was no challenge of the assessment or methodology of the Engineer for the Township, so the Township submits there is no basis to lower their assessment.
- [46] The Appellants Mr. and Mrs. Gancevich submitted that the Township collected the water and put it into their property. The Township submits that the watershed is based on the topography of the area, and that the water would naturally end up on the Appellants' property regardless. The Township submits its construction of roads and ditches does not change this result. The Township submits it did not collect water from elsewhere and bring it to the watershed as in *Johnson v Dundas Township*, but rather collected water already present in the watershed which flowed to the Appellants' property anyway. The Township submits that if this conclusion is incorrect, then the Township would be liable in damages in nuisance, not pursuant to section 54 of the Act.

- [47] The Township submits that there is no drainage system to be maintained by the Township, merely a rural road with a ditch on the side, and therefore *Courtney v Huron Township* is inapplicable and there is no duty or negligence. The Township takes the position that the duration of the situation prior to the construction of Bruce Beach Municipal Drain Phase - 1 was long, and the drainage situation was acquiesced to by the Appellants and their predecessors in title. It submits the responsibility for clearance and maintenance of grate on the Ganceviches' lands was primarily the responsibility of the Appellants, and any debris that was the subject of the clearance did not originate with the Township. The Township submits that no evidence was presented by the Appellants as to why 2009 petition did not proceed, and this does not therefore establish negligence.
- [48] The Township submits that the Appellants did not take steps to remedy the situation by filing a petition. The Township notes the Appellants did not turn back water from upper lands as they were entitled and threatened to do. Furthermore, the Township submits that the Appellants bought their property knowing the pipe was there and extended the pipe but did not sign the petition.
- [49] The Ganceviches have no outlet assessment as they contribute no water, they have only been assessed a benefit as determined by the Engineer and not challenged by the Appellants. The Township submits that an outlet is not defined as a benefit and cannot be construed as such.
- [50] The Township submits that the Tribunal has no jurisdiction to change assessment if Township breached its duty and caused the Appellant harm as it has no jurisdiction to deal with damages. The Township submits that Section 51 of the Act does not apply and there was no dereliction of duty.
- [51] The Township seeks costs from the Ganceviches in the amount of \$6,000 on a partial indemnity basis as it is submitted by the Respondent that their appeal was brought forward for unrelated reasons with no evidence regarding their assessment, and so it did not advance their assessment appeal.

Responding Submission of the Ganceviches

- [52] The Appellants submit that the allegations of the Township regarding the motives for the appeal are baseless and not suitable for costs under Rule 34 of the Rules of Procedure for the Tribunal. The Appellants take the position that their interactions with the Respondent Township were in part responsible for the initiation of the present drainage works. The Appellants submit they took practical steps to attempt to protect their land and through their numerous protestations to the Township, and that they did not acquiesce to the use of their private drain. The Appellants submit the Township has not proven that all water

in the watershed in its natural state would flow through the Appellants' property.

Analysis and Findings

- [53] The Tribunal finds that Mr. Pollock gave honest testimony however his evidence was not substantiated by tangible or other evidence to show that the assessment against his property was inaccurate or otherwise should be reduced. He did not provide any other evidence that he had and lost the ability to sever the property, construct upon the property or that the property would be subject to unauthorized use.
- [54] Mr. Pollock admitted that he did receive benefit from the drainage works and the Tribunal finds that the infilling of the ravine and the repair of erosion benefitted his property. Mr. Pollock did not question the method of assessment or the results thereof. The Tribunal noted that although Mr. Pollock was concerned about the effects of the tiling of the agricultural lands upstream from his property, the tiling of a substantial portion of such agricultural lands resulted in the subsurface water from those agricultural lands being redirected out of the watershed.
- [55] The Act is a remedial statute as agreed by both the Ganceviches and the Respondent. Subsection 64(a) of the Legislation Act, 2006 states "An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects."
- [56] The Ganceviches submit that the actions and inactions of the Respondent Township, including in the design, construction, management, maintenance of the Township's drainage infrastructure, made matters worse than they would naturally have been. However, the Tribunal is not convinced that the actions, or inaction of the Respondent Township, is responsible for making the drainage situation on the Appellants' property worse than it would otherwise have been.
- [57] While the Tribunal recognizes its broad authority under Section 51, and considered the arguments put forward by the Ganceviches, in this case the Tribunal prefers the testimony of Mr. Brickman. Mr. Brickman employed the Todgham method and calculated the assessments in a manner that is in-line with industry practice. The Tribunal finds that the lands of the Ganceviches benefit from the drainage works, particularly from the detention pond restricting flow from the upper watershed into the ravine. As such, we find the assessments to be fair and reasonable.
- [58] The Tribunal notes that neither appellant appealed the compensation or allowances under Section 48.
- [59] The Tribunal does not find the alleged motive and conduct of the appeal by the

Ganceviches appropriate for an order for costs against them.

Orders of the Tribunal

Therefore, the Tribunal orders as follows:

1. The appeal by Gary and Karen Pollock under Section 54 of the *Drainage Act* is dismissed.
2. The appeal of Mark and Samira Gancevich under Section 54 of the *Drainage Act* is dismissed.
3. The non-administrative costs of the Municipality incurred with respect to this appeal, including the Motion prior hereto, shall form part of the cost of the drainage works.
4. There shall be no other Order as to costs and all parties are responsible for their own costs.

Dated at Simcoe, Ontario, this 22nd day of April, 2022.



Robert Fuller, Vice-Chair

Released: April 22, 2022

TO:

Mark and Samira Gancevich
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c/o Carolina Campos
Email: Carolina.Campos@gowlingwlg.com

AND TO:

Gary and Karen Pollock
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AND TO:

Emily Dance, Clerk
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AND TO:

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AND TO:

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AND TO:

All persons assessed or compensated in the engineer's report receive a copy of this Decision.