Appeal No. CA 021-92

L. Kamerman) Thursday, the 9th day
Mining and Lands Commissioner) of September, 1993.

THE CONSERVATION AUTHORITIES ACT

IN THE MATTER OF

An appeal to the Minister under subsection 28(5) of the Conservation Authorities Act for the proposed construction of a single family dwelling and the placing of fill on Part of Lot 23, Concession XII in the Township of Otonabee in the County of Peterborough.

B E T W E E N:

SHEILA DENISE McCONKEY

Appellant

- and -

OTONABEE REGION CONSERVATION AUTHORITY

Respondent

INTERLOCUTORY ORDER

WHEREAS a motion was held on the 3rd day of June, 1993 to consider the preliminary issue of the respondent to determine whether the Mining and Lands Commissioner has jurisdiction to hear an appeal and to make a decision in respect to lands upon which a court of competent jurisdiction has already made an Order affecting

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such land, the Order of the said court being that the fill on the said lands must be removed;

1. THIS TRIBUNAL ORDERS that the motion be dismissed.

2. THIS TRIBUNAL FURTHER ORDERS that no costs shall be payable by either party to the appeal in respect of this motion.

Reasons for this interlocutory order are attached.

DATED this 9th day of September, 1993.

Original signed by L. Kamerman

L. Kamerman
MINING AND LANDS COMMISSIONER

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REASONS

This matter arises out of an appeal filed on December 18, 1993. The respondent gave notice of its intention to bring a motion through its solicitor, Mr. G.W. Coros, on March 18, 1993. An appointment for hearing of the motion was sent to the parties' representatives on April 2, 1993.

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The appellant, Mrs. McConkey, was represented by her lawyer, Mr. L.B. Poliacik. The respondent, the Otonabee Region Conservation Authority ("ORCA") was represented by Mr. Coros.

BACKGROUND FACTS

The appeal before the tribunal is from a refusal of ORCA to grant permission to place fill and construct a single family residence, having been ORCA application number 91-009 (the "91-009 Application"). The land involved in the 91-009 Application is adjacent and to the south of another property owned by the appellant which was the subject matter of an application for severance and an application dated August 11, 1988 to place fill, for which permit number 3086 ("Permit 3086") was granted on September 13, 1988. Permit 3086 provided for the placement of 7,428 cubic metres, or 9,731 cubic yards, of fill.

The appellant hired Donald Lafonte to place fill pursuant to Permit 3086. ORCA became aware that fill was placed both on the land described in permit 3086 and the land involved in what was to become the 91-009 Application. On July 30, 1990 a Violation Notice was issued indicating that fill in excess of and outside of the area described by Permit 3086 had been placed or dumped without permission. [Originally Exhibit 15 of material pre-filed and numbered prior to the motion and Exhibit 13 of same material put in chronological order at the suggestion of the parties on August 31, 1993] The appellant continued to place fill on the land involving the 91-009 Application. On November 13, 1990 an Information pursuant to section 24 of the **Provincial Offences Act**, R.S.O. 1980, c. 400 (the **Provincial Offences Act**"), was laid against the appellant regarding the placing or dumping of fill between June 4, 1990 and November 13, 1990 without permission of ORCA [Originally Exhibit 19 of material pre-filed and numbered prior to the motion and Exhibit 17 of same material put in chronological order at the suggestion of the parties on August 31, 1993]. On December 13, 1990 a further Information was laid against the appellant pursuant to section 24 of the **Provincial Offences Act** for the placing or dumping of fill between December 10, 1990 and December 13, 1990 [Originally Exhibit 26 of material pre-filed and numbered prior to the motion and Exhibit 25 of same material put in chronological order at the suggestion of the parties on August 31, 1993]. Notwithstanding the laying of the Informations, placing of fill continued and a further Notice of Violation was issued on December 17, 1990 [Originally

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Exhibit 28 of material pre-filed and numbered prior to the motion and Exhibit 27 of same material put in chronological order at the suggestion of the parties on August 31, 1993].

On January 24, 1991, the appellant filed the 91-009 Application to allow the placing of fill for which the Informations and Notices of Violation were issued.

Exhibit 1 to the motion is a Plan and Profile of the McConkey Property, Part Lot 23, Concession XII, Township of Otonabee, dated April 29, 1993, being drawing 889-01 of M.J. Davenport & Associates ("McConkey Property Map"). The area covered by Permit 3086 is outlined in yellow, with the area of fill outlined in red. The area covered by the 91-009 Application is outlined in green with the area in which illegal fill was placed outlined in red hatching. The red hatching covers the northwestern portion of the 91-009 Application property with an additional thin peninsula extending along the west boundary southward beyond the limit of the lands described.

The 91-009 Application involves an area of 300 by 350 feet and, according to the McConkey Property Map, contains the bulk of the fill which was improperly placed, that is, without the prior permission of ORCA.

A trial was held before Justice of the Peace, William Jacklin, on May 4, 1992. The appellant was found guilty of the charges and in a decision given on June 15, 1992 was ordered to remove 8,350 cubic yards of fill by September 15, 1992.

On September 9, 1991, ORCA wrote to the appellant stating that the 91-009 Application could not be heard until after the issue of placing of fill without permission had been dealt with by Provincial Court [Originally Exhibit 44 of material pre-filed and numbered prior to the motion and Exhibit 43 of same material put in chronological order at the suggestion of the parties on August 31, 1993].

On appeal before Provincial Court on September 11, 1992, Richard Batten, J., upheld Jacklin's decision. The endorsement on the record states, " Appeal allowed to the extent that time for removal of fill extended to October 15, 1992."

A hearing was held before the Executive Committee of ORCA on October 8, 1992 and a Notice of Decision refusing permission was issued on October 19, 1992. [See Exhibit 61 of material pre-filed and numbered prior to the motion which has remained the same through the renumbering of the exhibits].

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Issue

"Does the Mining and Lands Commissioner (the "Commissioner") have jurisdiction to hear an appeal under subsection 28(5) of the **Conservation Authorities Act**, R.S.O. 1990c, c. C.27, (the"**Act**") and make a decision upon which a court of competent jurisdiction has made an order that fill must be removed, when the placing of such fill is the subject matter of the appeal?"

Submissions

Mr. Coros posed the question of what the result of the appeal would be if the Commissioner agreed with the Notice of Decision, namely that there was no reason to overturn the findings of ORCA, with the fact that the order of the court refers to an area beyond that contemplated by either Permit 3086 or the 91-009 Application. Referring to the McConkey Property Map, Mr. Coros pointed out that a small portion of the hatched red area extends southward along the road beyond the limit of the area of the 91-009 Application.

Clause 28(1)(f) of the **Act** permits a conservation authority to make regulations prohibiting, regulating or requiring the permission of the authority for the placing or dumping of fill in an area over which the conservation authority has jurisdiction. Pursuant to Ontario Regulation 60/89, ORCA has authority over the land which encompasses the 91-009 Application and the land upon which the additional peninsula of red hatching is found.

Subsection 28(3) of the **Act** requires that before refusing permission, a conservation authority must hold a hearing at which the applicant is a party. Subsection 28(4) provides that if permission is refused, reasons must be given. As a pre-requisite to an appeal to the Minister, which has been assigned to the Commissioner by virtue of Ontario Regulation 364/82, the procedures under subsections 28(3) and (4) must be followed.

Mr. Coros submitted that, by not having made an application prior to the placing of fill, the appellant is precluded from exercising the right of appeal, not having met the procedural requirements of the **Act**.

Subsections 28(6) and (7) deal with the powers of a conservation authority upon contravention of the **Act**. Mr. Coros submitted that a conservation authority has

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three means of enforcing its regulations:

1. Where there is contravention of the regulations where no application has been made, there will be no permission.

2. Where an application has been made, permission granted and the terms of the permission are exceeded, the conservation authority will be able to enforce the terms of its permission.

3. Where an application is made and refused, is appealed to the Commissioner who grants permission and the terms of the permission are exceeded, the conservation authority will be able to enforce the terms of the permission.

Mr. Coros submitted that there is nothing in the **Act**, the **Ministry of Natural Resources Act**, R.S.O. 1990, c. M.31 (the "**Natural Resources Act**") under which the Commissioner is appointed or Part VI of the **Mining Act**, R.S.O. 1990, c. M.14 (the "**Mining Act**"), which is imported into appeals under the **Act** by virtue of subsection 6(7) of the **Natural Resources Act** which allows the Commissioner to override a decision of the Courts.

Relevant portions of the **Natural Resources Act** are set out:

> **6.** - (1) The Lieutenant Governor in Council may appoint an officer to be known as the Mining and Lands Commissioner and one or more officers to be known as deputy mining and lands commissioners.
>
> (6) The Lieutenant Governor in Council may make regulations,
>
> (b) assigning to the Commissioner authorities, powers and duties of the Minister.
>
> (7) Part VI of the **Mining Act** applies with necessary modifications to the exercise of authorities, powers and duties assigned to the Commissioner under clause 6(b).

Part VI of the **Mining Act** contains procedural and substantive provisions,

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the latter of which give the Commissioner very broad powers. In particular, section 105 gives rise to judicial powers and states:

> **105.** Except as provided by section 171, no action lies and no other proceeding shall be taken in any court as to any matter or thing concerning any right, privilege or interest conferred by or under the authority of this Act, but, except as in this Act otherwise provided, every claim, question and dispute in respect of the matter or thing shall be determined by the Commissioner, and in the exercise of the power conferred by this section the Commissioner may make such order or give such directions as he or she considers necessary to make effectual and enforce compliance with his or her decision.

Referring to **Drover et al. and Grand River Conservation Authority**, (1988) 62 O.R. (2d) 141, at page 144, the second line in the last paragraph reads,

> The sections of the **Mining Act** which are made applicable to proceedings before the Commissioner pursuant to the **Conservation Authorities Act** are largely procedural in content.

Mr. Coros submitted that the right of appeal is under the **Act** and that the only appeals to the Commissioner are those stipulated by the **Act**. The relevance of Part VI of the **Mining Act** is only in connection with procedural sections. Following this argument, an appeal under subsection 28(5) is only relevant to procedural prerequisites under subsections 28(3) and (4) of the **Act**. It is not the intent of the legislature or the Minister to overrule the courts. The only decision which the Commissioner is empowered to hear and overrule is a refusal to give permission by the conservation authority or its executive committee.

Properly constituted appeals within the jurisdiction of the Commissioner, in Mr. Coros' submission, could allow interference with the decision of a conservation authority or executive committee if proper procedures were not followed in reaching a decision, if they failed to give valid reasons with the Notice of Refusal, or if there was evidence of bias, inconsistency or arbitrariness, by way of example.

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Mr. Coros submitted that if the legislature had intended that the Minister, or by assignment the Commissioner, power to overrule a determination of a court of competent jurisdiction, the placing of subsection 28(5) would have occurred after subsections 28(6) and (7). In the absence of such drafting, it should be clear that the legislature did not intend that the Commissioner be given power to overrule a court decision such as the one which lies behind this motion.

Mr. Coros submitted that the Commissioner is not empowered to determine questions of law. In the current situation, there is an order of a court which pertains to a portion of the lands involved in the 91-009 Application. The issue of statutory interpretation is beyond the Commissioner.

Referring to an earlier decision of the Commissioner, **Gordon Junker and Jeannette Junker v. Grand River Conservation Authority**, CA 014-92, December 14, 1992 (unreported), at page 11,

> ...Whether the granting of the judicial powers contemplated by section 105 [of the **Mining Act**] should include the **Conservation Authorities Act** is one of statutory interpretation. The Tribunal finds that, in the absence of very clear statutory (sic) to the contrary, the words, "in this Act" cannot be found to be applicable to its jurisdiction to determine all matters which arise in connection with an appeal pursuant to subsection 28(5) of the **Conservation Authorities Act**. The Tribunal finds that the matters arising in this motion to determine its jurisdiction to hear an appeal from a refusal to extend time of conditions of a permit are outside of the powers granted by Part VI of the **Mining Act**.

Mr. Coros submitted that the same principles should apply in the current motion.

Mr. Poliacik submitted that ensuring the procedural requirements of subsections 28(3) and (4) are all that is relevant for purposes of an appeal to the Commissioner pursuant to subsection 28(5) of the **Act**. The **Act** sets up procedures to be followed for an appeal from a refusal to give permission for the placing or dumping of fill. There is nothing in the contents of subsections 28(3) and (4) which suggest that illegal

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placing of fill would undermine and negate the appeal process.

Should Mr. Coros' position be accepted, it was submitted that no one who owns land which is subject to a Notice of Violation could ever make an application to a conservation authority.

Referring to the 91-009 Application, Mr. Poliacik points out that there is no referral to the decision of the court or mention of the court's order. He submitted that the application does not seek permission to overturn the order, which is irrelevant to the appeal before the Commissioner.

Referring to the plain meaning of the language used in the drafting of section 28 of the **Act**, Mr. Poliacik submitted that it would not serve public policy to refuse to hear the appeal on the basis that there is an outstanding order of the court.

Mr. Poliacik submitted that the cases referred to are not applicable in this case; the facts and sections of the **Act** involved are different. **Junker** refers to an extension of time for a valid permit. The decision on appeal was that the Commissioner did not have jurisdiction to determine whether a refusal to extend time for conditions imposed on permission granted amounted to a refusal to give permission. In **Drover**, the issue was the applicability of the provisions of the limitation period for judicial review in the **Mining Act** to **Conservation Authorities Act** appeals.

Mr. Poliacik submitted that the **Act** does not place limitations on the rights of an applicant. There is no evidence or suggestion that proper procedures have not been followed.

The tribunal asked how the decision of the Court should be regarded. Mr. Coros stated that the order states that the fill must be removed and only when there is removal can there be compliance. He suggested that, once the fill has been removed, ORCA could hear the application. He suggested that there would be no appeal had the fill been removed. As long as the fill remains, the order stands.

It was submitted that if the Commissioner should find that the placing of fill should be permitted while the order of the court to remove the fill is outstanding, it would create a quandry. How could the executive grant permission while there is an outstanding order to remove the fill. Mr. Coros submitted that they could not. He suggested that

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unless and until Mrs. McConkey puts her house in order, the respondent cannot proceed.

Mr. Poliacik submitted that there is no statutory provision which states that the Commissioner must enforce and order of the Court. He stated that he relies on the absence of statutory provision connecting the placement of illegal fill to the inability to proceed with an application.

Asked by the tribunal why ORCA had not proceeded to remove the fill, Mr. Coros indicated that the respondent finds itself in a dilemma. Through timing, the 91-009 application had been filed one month after the Information had been laid. The question was whether the matter should be heard with the possibility of making a finding, that is granting permission, which is contrary to the order. At the time of the appeal of the court order the respondent applied for mandamus requiring ORCA to proceed to hear the application. It was the respondent's position that it would be unfair to remove the fill and then proceed with the application. ORCA proceeded with hearing the application, taking the position that the **Act** does not allow it to refuse to hear any application.

Mr. Poliacik submitted ORCA was attempting to intertwine two separate issues. The issue before the Provincial Court was whether fill had been placed illegally. The issue before ORCA was whether a permit could be granted. If ORCA felt that it had the duty to hear the application, there being nothing in the **Act** to prevent the hearing of the application, it would follow that there is a right to appeal the resulting refusal pursuant to subsection 28(5) of the **Act**. At the hearing of the appeal of the Informations, ORCA abandoned its original position and the sentence to remove the fill was changed so that a hearing before ORCA could take place prior to date for compliance with the order.

Mr. Coros submitted that his client was prepared to proceed with the appeal concerning the area as outlined in the McConkey Property Map not covered in green, as the court order only dealt with the land covered in green. This is because the court ordered that Mrs. McConkey did place fill without a permit and that the fill must be removed pursuant to subsection 28(7) of the **Act**.

FINDINGS

As stated verbally at the hearing, the tribunal regards and finds the 91-009 Application to be for the **legal** placing of fill. The question addressed by the court, and

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clearly within its exclusive jurisdiction, is whether fill had been placed illegally, that is in contravention of the regulation which requires permission for placing or dumping of fill within the area within the jurisdiction of the respondent.

The result of such a finding is that, for purposes of the area outlined in green on the McConkey Property Map, being the land contemplated by the 91-009 Application, including that portion of the red hatched area which is contained within the area outlined in green, the appeal before the tribunal is for placement of fill as permitted by Ontario Regulation 60/89, clause 28(1)(f), and subsections 28(3), (4) and (5) of the **Act**.

Mr. Coros asked the tribunal to apply the same principles to this matter as were applied in the **Junker** case. For purposes of clarity, the tribunal relies on a decision of the Divisional Court in **Re Mascan Corp. and Ponzi et al**, (1987) 56 O.R. (2d) which in turn refers at page 766 to a decision of the Ontario Court of Appeal in **Rae et al. v. Rank City Wall Canada Ltd,** (unreported, September 4, 1985 [summarized 33 A.C.W.S. (2d) 373]. At page 766,

> ... In that case, the plaintiff tenants brought civil action against the defendant landlord, claiming, among other things, declarations for, (1) overpayment of rent, and (2) that the plaintiffs were not indebted to the landlord. The case brought into issue the validity of the notices of rent increase given by the landlord pursuant to s. 60 of the **Residential Tenancies Act** and what rent "may lawfully be charged" to the plaintiffs. The motion court judge stayed the claim on the basis that the [Residential Tenancy] commission should first determine the validity of the notices of rent increase. The Court of Appeal affirmed the decision of the motion court judge. Cory H.A. delivering the reasons of the court said at p. 2:
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> > In light of the history of the proceedings of this particular and unique action, it would be an abuse of the court's process to allow yet another action to proceed until determination of the validity of the notice has been made by the commission. The very foundation of the plaintiffs' claim is that they did not receive notice of the rental increases from the defendant. The issue of the validity of the notice was only recently raised by the plaintiffs. It would seem

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> that the commission does have jurisdiction to consider the question of whether proper notice has been given of a rental increase by the landlord as required by s. 60 of the **Residential Tenancies Act**.
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> Section 84(1) of that Act provides:
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> > 84(1) Subject to subsections (3) to (8), the Commission has exclusive jurisdiction to examine into, hear and determine **all matters and questions arising under this Act** and as to any matter or thing in respect of which any power, authority or discretion is conferred upon the Commission.
>
> (Emphasis added.) Section 60 of the same Act concerns notice. Therefore, the validity of a notice given pursuant to s. 60 of the Act is, indeed, a matter or a question arising under the Act. The commission thus has jurisdiction to determine that very question, the validity of notice. The jurisdiction of the Commission to decide the issue arises by necessary implication from the provisions of ss. 60 and 84(1) of the Act.

Section 105 of the **Mining Act** gives the tribunal, if not similar, even wider powers to determine matters arising under that **Act**. This is confirmed by the decision of the Supreme Court of Canada in **Dupont v. Inglis** [1958] S.C.R. 535 where the appointment of the Commissioner by the Lieutenant Governor in Council for Ontario was held to be **vires** notwithstanding the jurisdiction of matters given to the Commissioner for consideration. At pages 542 to 543 Rand J. states:

> ...Since the Province can create and appoint justices of inferior Courts, there is no reason in the nature of things why it cannot establish an inferior Court of review or appeal; it is the subject-matter rather than the apparatus of adjudication that is determinative. ...

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The subject-matter referred to is the continuation of the role of officers appointed under the **Gold Mining Act** of 1864, which were continued, reading at page 541 by, "... s. 129 of the **Confederation Act** whereby all laws, Courts and all 'Legal Commissions, Powers and Authorities, and all officers, Judicial, Administrative, and Ministerial' existing in Ontario were continued..." .

The judicial nature of section 105 empowers the Commissioner to determine, with respect to mining, a very broad assortment of matters, including interpretation of his or her own statute. In making the appeals to the Minister under the **Conservation Authorities Act** subject to Part VI of the **Mining Act**, there is no clearly worded statutory provision in any of the **Acts** discussed above, to suggest that the legislature intended for the broad judicial powers, or even some portion of those powers as may be **vires** for a statute which has no pre-confederation predecessor, to apply to these appeals.

Referring to the constituent legislation of a number of tribunals, it is noted that the authority to determine matters which arise in connection with the proceeding before the tribunal is not consistently granted to all tribunals. The **Liquor Licence Act**, R.S.O. 1990, c. L. 19 does not grant power to determine all matters to the Liquor Licence Board. Although the Environmental Appeal Board may confirm, alter or revoke the action of the Director under subsection 144(1) of the **Environmental Protection Act**, R.S.O. 1990, c. E.19, broad powers to determine all matters are not given. Subsection 18(25) of the same **Act** precludes any and all types of proceedings in any court on any matter in connection with all proceedings of the Environmental Assessment Board. Section 69 of the **Workers' Compensation Act**, R.S.O. 1990, c. W.11 provides that the Workers' Compensation Board has exclusive power to hear and determine any matter and that, subject to the **Act**, cannot be reviewed by a court. All appeals and other matters conferred by the **Act** are the within the jurisdiction of the Workers' Compensation Appeals Tribunal, pursuant to subsection 86(2). Subsection (3) provides that an order or direction of the Appeals Tribunal is not open to review by any court.

Although section 105 is sufficiently general in nature and the argument could be made that subsection 6(7) of the **Ministry of Natural Resources Act** provides that, with necessary modifications, this section should be applied to conservation authority appeals, based upon the reasoning in **Drover**, the tribunal finds that use of the words, "this Act", which occur twice in section 105 are sufficiently specific so as to be confined to decisions made by the Commissioner under the **Mining Act**.

The question of whether circumstances exist which would render the Commissioner without jurisdiction to hear an appeal under subsection 28(5) of the **Act**

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rest with the courts, with the exception of determining if the requirements of subsections (3) and (4) have been met, thus giving rise to a valid appeal. Needless to say, an order under subsection 28(1) of the **Judicial Review Procedure Act**, R.S.O. 1990, c. J. 1. would be equally determinative.

This tribunal finds that the determination of the appeal of the 91-009 Application is within its jurisdiction, being an application for the legal placement of fill. The order of the court is for the removal of fill which has been illegally placed both on the 91-009 Application land and other land for which there is no application or permission. Therefore, an order of this tribunal, if permission were to be granted on appeal, would not be contrary to the order of the court in so far as the lands which are properly within the 91-009 Application are involved. The effect of the order of the court on other lands is not a factor which need be considered.

In considering the issue raised in this motion, the tribunal wishes to make clear that the possibility of refusing to consider any appeal where fill has been placed without a permit is very compelling as a means of expressing a strong deterrent to prospective applicants. In this case, this is particularly so because the placing of fill was so flagrantly in disregard of the **Act**, as evidenced by two Notices of Violation and two Informations pursuant to section 24 of the **Provincial Offences Act** issued prior to the making of the application. However, such a deterrent is only available where the Legislature states in clear terms that such power exists.