File No. CA 003-05

L. Kamerman	)	Tuesday, the 23rd day
Mining and Lands Commissioner	)	of October, 2007.

THE CONSERVATION AUTHORITIES ACT

IN THE MATTER OF

An appeal to the Minister pursuant to subsection 28(15) of the **Conservation Authorities Act** against the refusal to grant of permission for development through re-grading within the Fill Regulated Area and within a well defined valley of the Don River, municipally described as 119R Glen Road, City of Toronto;

AND IN THE MATTER OF

R.R.O. 1990, Regulation 158, Toronto and Region Conservation Authority, Application #029/03/Tor and Resolution B262/04.

B E T W E E N:

DAVID ROFFEY, KAREN WALSH, NANCY McFADYEN, JOHN McFADYEN, ELAINE TRIGGS, DONALD TRIGGS and KATHLEEN SHANAHAN

Applicants For Party Status

- and -

DEREK RUSSELL

Appellant

- and -

TORONTO AND REGION CONSERVATION AUTHORITY

Respondent

ORDER REGARDING STAY

UPON hearing from Counsel for the parties and upon reading the materials filed in support;

1. IT IS ORDERED that the hearing on the merits in this matter be and is hereby stayed pending the hearing of the judicial review application in the Superior Court of Justice bearing SCJ File 153/07 and the appeal of the tribunal's Interlocutory Order of the 9th day of May, 2007 (SCJ Court File 156/07) and until such time as all appeals from the foregoing are exhausted.

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2. IT IS FURTHER ORDERED that the issue of costs in the matter of the addition of parties in the Interlocutory Order of the tribunal, dated the 9th day of May, 2007, be and is hereby stayed pending the hearing of the judicial review application in the Superior Court of Justice bearing SCJ File 153/07 and the appeal of the aforementioned Interlocutory Order of the tribunal (SCJ Court File 156/07) and until such time as all appeals from the foregoing are exhausted

Reasons for this Order are attached.

DATED this 23rd day of October, 2007.

Original signed by L. Kamerman

L. Kamerman
MINING AND LANDS COMMISSIONER

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REASONS

Counsel Appearances

Ms. N. Jane Pepino,
Ms. Eileen Costello:

for the Applicants for Party Status, David Roffey, Karen Walsh, Nancy McFadyen, John McFadyen, Elaine Triggs, Donald Triggs and Kathleen Shanahan, (the "Neighbours")

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Ms. Amber Stewart:	for the Appellant, Derek Russell
Mr. Jonathan Wigley:	for the Respondent, Toronto Region Conservation Authority (the "TRCA")

Background

As a result of the Commissioner's motion, this matter must address whether the outstanding issue of costs on the motion to add third parties and the hearing of Mr. Russell's appeal on the merits should be stayed. On April 5, 2007 and April 10, 2007, respectively, the Neighbours filed their Notice of Application for Judicial Review and Notice of Appeal from my decision of March 9, 2007, wherein I denied the application of the Neighbours to be added as parties. Counsel for the parties made their submissions in writing.

In my Reasons for seeking further submissions of April 23, 2007, I outlined the difficulty I experienced in resolving how sections 19 of the **Statutory Powers Procedure Act,** section 132 of the **Mining Act** and subsection 6(7) of the **Ministry of Natural Resources Act** should be interpreted when read in concert. Although counsel did respond, I sought further submissions concerning whether there was a test which should be applied to the issue of whether to exercise my discretion and order a stay, making reference to **RJR MacDonald Inc. v. Canada (Attorney General)**, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385. The test was 1) whether a serious question existed and was to be tried, being a low threshold test; 2) whether there would be irreparable harm incurred by one of the parties, characterized as "harm which cannot be quantified in monetary terms or cannot be cured, usually because one party cannot collect damages from the other"; and 3) the balance of convenience on a motion for a stay which examines essentially which of the parties would suffer the greatest harm from either granting or refusing a stay pending a decision on the merits. This test was used in reference to an interlocutory injunction and in **Circuit World Corporation v. Lesperance** (1997), 33 O.R. (3d), Laskin, J. adopted the test for use when determining whether a stay should be granted.

There is no issue that the Commissioner has jurisdiction to order a stay in these circumstances. There was no issue between the parties that the proper test for considering a stay is that established by **RJR MacDonald Inc.**

On the issue of the appeal on the merits, I find that the issue of who should be parties to the Russell appeal is one which is not frivolous but rather, fundamental to the nature and scope of the issues to be tried and therefore serious in nature. Should my decision to not add the Neighbours as parties be overturned on appeal or judicial review, this would likely have a substantial effect on the conduct of the hearing on the merits. If overturned, I may be directed by the Court to consider some or all of those issues which were raised by the Neighbours in their application which I had rejected on the basis that they were irrelevant to the issues before me. The irreparable harm which may occur is not monetary or that which can be compensated by damages. Rather, there is potential irreparable harm which may be suffered by those lands, both Russell's and otherwise, which are protected under the auspices of the **Conservation Authorities Act** from certain kinds of interfer-

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ence without permission if it should come to pass that the hearing on the merits would result in the granting of the requested permission. Such harm cannot be reversed or undone; it may merely be mitigated. This goes to the very heart of the jurisdiction of the TRCA and on appeal, of the Commissioner. Finally, I find that the balance of convenience favours the TRCA which supports the staying of the hearing on the merits on the basis that it would be costly to that publicly funded institution to have this matter heard before me twice.

On the matter of costs flowing from the application for standing, I find that the matter will not be concluded until such time as it has been finally determined by the Ontario Superior Court of Justice on appeal and judicial review. As such, the Court's findings may affect my own determinations.

Jurisdiction

The Commissioner's jurisdiction to order a stay is not contentious. What is contentious, however, is the law as it applies to the circumstances of this case.

Section 25 of the **Statutory Powers Procedure Act** provides that an appeal from a decision of a tribunal to a court or other appellate body operates as a stay unless provided to the contrary in the constituent legislation or if the tribunal or court orders otherwise. A judicial review application is not considered to be an appeal for purposes of the automatic stay. The question which arises is whether the operation of the **Mining Act** and the **Statutory Powers Procedure Act** indicate a contrary intention or whether all further proceedings (the hearing on the merits, the costs application in connection with the motion for party status) are automatically stayed.

Counsel for the Neighbours and Russell raise the issue of whether my Order denying standing is or is not a final order from which an appeal may be brought. Section 117 of the **Mining Act** specifically provides that a decision of the Commissioner which does not involve the final determination of the proceeding is final and is not subject to appeal, notwithstanding provisions of the **Statutory Powers Procedure Act**. There can be two perspectives on this type of decision. One is that it is merely an administrative and not a final order. The other is that, having finally disposed of the Neighbours' rights, its character is essentially that of a final decision.

Neither of these arguments is particularly helpful to me in determining whether to exercise my jurisdiction and stay proceeding with the hearing on the merits in this matter, particularly as the question of whether my decision is or is not a final order which may be appealed is going to be heard shortly by the Ontario Superior Court of Justice.

I did raise a similar question with respect to section 132 of the **Mining Act,** which provides that where an order has been filed with the Superior Court of Justice, the Commissioner or Court may order a stay. Section 19 of the **Statutory Powers Procedure Act** provides for the filing and enforcement of tribunal orders. When that provision is considered along with subsection 6(7) of the **Ministry of Natural Resources Act** (which imports procedural aspects of Part VI of the **Mining Act**, with necessary modifications) and **Drover v. Grand River Conservation Authority** (1983), 62 O.R. (2d) 141, it raises the question of whether Part VI of the **Mining Act** is meant to apply to section 132 in cases involving the **Conservation Authorities Act.**

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In **Drover,** the appellant sought to judicially review the Commissioner's decision some six months after it was given, notwithstanding that what was then section 156 of the **Mining Act** provided that no judicial review could be brought more than 30 days after the filing of the Commissioner's order with the Provinical Mining Recorder under section 150. Legislative changes in the interim now render this a two pronged process, whereby the Commissioner directly sends a copy of the Order to the Provincial Mining Recorder directly for filing [s. 129] and also sends copies to the parties in what constitutes notice to them [s. 130]. Otherwise, what is now section 135, concerning judicial review, remains substantively unchanged.

The Court in **Drover** held that the operation of [then] section 156 made particular reference to filing which takes place "under this Act". The requirement to file with the Provinical Mining Recorder reflects the total administration of unpatented mining claims whose abstracts are housed in the provincial recording office. A decision of the Commissioner involving a conservation authority was not required to be filed with the recorder. Also, the Court indicated that much clearer language would be necessary to import a limitation period which restricts the rights of parties into a totally different statute.

According to Counsel for Mr. Russell, section 132 specifically applies to filing a certified copy of a final order of a Provincial Mining Recorder with the Superior Court of Justice pursuant to section 19 of the **Statutory Powers Procedure Act** for purposes of enforcement. In those cases, either the Court or the Commissioner may stay proceedings. Counsel submitted that not only is my March 9, 2007 decision not a recorder's decision, but it is not one which would be filed with the Superior Court of Justice for purposes of enforcement. According to this argument, it can have no bearing on my jurisdiction to order a stay.

According to Counsel for the Neighbours, when read together, section 132 of the **Mining Act** and section 19 of the **Statutory Powers Procedure Act,** it is intended that the former is meant to provide an override provision to ensure that the filing of an order of the Commissioner does not work to oust the statutory appeal rights of a party. It was submitted that when read together, these two sections are cautioning deference on the part of the Commissioner to the rights of individuals to appeal decisions and to have those decisions heard prior to a hearing on the merits by the Commissioner.

As I indicated in my Reasons of April 23, 2007 and aside from the issues of which provisions of Part VI of the **Mining Act** should apply to conservation authority appeals, I have encountered difficulties in understanding and interpreting the 1971 amendments to the **Mining Act.** Various statutory changes were made pursuant to the **1971 Civil Rights Statute Amendment Act**, S.O. 1971 S. 50, not the least of which was the introduction of the **Statutory Powers Procedure Act**. But the imposition of that legislation in addition to the pre-existing processes under what is now Part VI of the **Mining Act** has confused matters in many cases, not clarified them.

In Chapter 118, page 1903 of the **Royal Commission Inquiry into Civil Rights**, Report No. 3, Volume 5, dealing with the Mining Commissioner, the predecessor to section 132 was addressed in discussions with Commissioner McFarland, who was the first Commissioner who was not a member of the bar. It is reproduced:

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FILING ORDERS WITH THE SUPREME COURT

> A duplicate of any order made by the Commissioner or by a recorder may be filed in the office of the Registrar of the Supreme Court or in the office of any local registrar or in the office of the clerk of the county or district court where the land lies and "upon being so filed it becomes an order of the court in which it is filed and is enforceable as an order of such court, but the court or a judge thereof may stay proceedings thereon if an appeal from the order is brought."
>
> We have criticized statutory provisions of this sort repeatedly. Under the statute the order of the Commissioner or a recorder upon being filed becomes an order of the Supreme Court or county or district court, which in reality it is not.
>
> Mr. McFarland was asked, "Now [to] what sort of cases would an "order of the recorder" be referring?" His answer was, "I don't know." Orders are filed with the Mining Recorder and if there is no recorder, with the Minister of Mines. They are not filed with the Registrar of the Supreme Court or a local registrar or the clerk of the county or district court.
>
> The administration of the Mining Commissioner's office should not be confused with the Supreme Court of the county courts. Provision should be made for a central place for filing all orders where they may be found and examined. There should be a provision in the Act that when orders are so filed they may be enforced in the same way as orders of the Supreme Court or county or district court are enforced. If, for instance, an order is to pay money, it should be enforceable by filing a copy of the order with the sheriff.

A recommendation along these lines was rejected; however, changes were made, so that the Commissioner's orders were no longer included and the Commissioner could order a stay in addition to the court.

Prior to the amendments, what is now section 117 read:

> **149.** (5) The Commission may hear and dispose of any application not involving the final determination of the matter or proceeding at any place he considers convenient, and his decision upon any such application is final and is not subject to appeal.

As has been suggested by counsel for Mr. Russell, section 3 of the **Statutory Powers Procedure Act** provides that the legislation applies to proceedings by tribunals in the exercise of a statutory power of decision where the tribunal is required to afford the parties the opportunity for a hearing. As section 117 contemplates some decisions which can be made without notice or hearings, it may be possible that the **Statutory Powers Procedure Act** does not apply to interim decisions of the Commissioner. [See **Rotstein v. North York**, **(City),** 1995 CarswellOnt 608 (Div. Ct.)]. If this were the case, then the automatic stay provisions in section 25 of the **Statutory Powers Procedure Act** would not operate in this instance.

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I have concluded that the operation and applicability of those portions of Part VI of the **Mining Act** referred to above are unclear with respect to conservation authority appeals before me. It was for these very reasons of lack of clarity of the state of the law in this proceeding that I sought submissions from counsel on the test which should be applied concerning whether to exercise discretion to grant a stay. All were in agreement that the test to be applied was that of the common law.

Although the question of how section 117 should be interpreted by the court in relation to a conservation authority matter before the Commissioner remains, I point out that the meaning of section 133 and its relationship with section 117 was not raised or addressed by counsel. It states:

> **133.** Where not otherwise provided, an appeal lies to the Divisional Court from any decision of the Commissioner, including an order dismissing a matter or proceeding under section 122.

The Test for Staying Proceedings

There was no dispute between the parties that the proper test to determine whether an order should be stayed pending an appeal was set out in **RJR MacDonald V. Canada (Attorney General)**, [1994] 1 S.C.R. 311 (S.C.C.), which was described at page 334:

> First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer reparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

The three tests are not separate hurdles, but interrelated considerations, where the strength in one may compensate for the weakness of another. Overall, it is whether the interests of justice require a stay. [**International Corona Resources Ltd. v. Lac Minerals Ltd.** (1986), 21 C.P.C. (2d) 252 (Ont. C.A.)].

Serious Question

The Neighbours maintain that the serious issue is a low threshold test [**Longley v. Canada (Attorney General)**, [2007] O.J. No. 929 (Ont. C.A.). In fact, this was a submission in favour of granting a stay in that case, although **Horsefield v. Ontario (Registrar of Motor Vehicles)** (1977), 35 O.R. (3d) 305 (C.A.) was cited in support.

In contrast, courts have held that the decision being appealed from is *prima facie* correct and that the successful party should enjoy its benefit. This position is relied upon on behalf of Russell.

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Neither counsel made direct reference to page 338 of **RJR MacDonald Inc.**, where exceptions to the low threshold test is discussed. There, Sopinka and Cory, JJ. state, "The first [exception] arises when the result of the interlocutory motion will in effect amount to a final determination of the action." While this case has not finally been determined, insofar as the Neighbours are concerned, my decision is a final determination of their position in the action on the merits, unless appealed or judicially reviewed.

I agree with the brief submission on behalf of the TRCA. The issue of standing is not a frivolous matter. In particular, the right to participation of third parties in what I long characterized as public interest issues in private lands is a serious issue. Moreover, if my characterization was wrong, it may follow that the actual issues themselves which I have outlined is similarly incorrect. If my decision on standing was not upheld, I believe that I would require very strong and clear direction from the court on the nature and extent of issues which I would be required to consider in relation to the Neighbours given that I have previously determined that the issues they raised would be irrelevant to a hearing on the merits.

Clearly, the prospect of overturning my findings on standing would lead to a hearing of a very different nature from how I would be at this moment prepared to proceed. I cannot help but regard this as reflective of a serious issue, one which extends far beyond the parties involved in this appeal.

Irreparable Harm

The parties addressed irreparable harm, as to whether the harm could be compensated for in damages. Aside from the considerable potential cost to the TRCA, which is a publicly funded entity which does not take on litigation lightly, there is other potential harm for me to consider.

Although the TRCA refused Mr. Russell's application this time (the second application) and although technically experienced staff opposed both applications, the Neighbours do not have confidence that the TRCA's perspective regarding the public interest will sufficiently state their own position, which they maintain is also reflective of the public interest. The harm that they will incur would be that of seeing Mr. Russell's proposed home built, while the corresponding harm he would experience, should the stay be granted, would merely be delay.

What is currently at issue before me in a hearing on the merits is the nature of the TRCA's jurisdiction on the Russell lands, which I would characterize as below the top of the slope, along a valley wall and whether Mr. Russell's proposed construction will affect the conservation of land within that jurisdiction. If adverse economic impacts were to be ordered to be issues before me, and I am assuming if so ordered, those impacts would have to be considered on the part of both the Neighbours and Mr. Russell.

In any event, my concern is whether irreparable harm may be caused by proceeding. Without pre-judging this case in any way, one possible outcome is that I too will refuse Mr. Russell's application and dismiss his appeal. The other is that I will allow his appeal and permit

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him to build his home. The third is that I will permit the construction to go ahead with further conditions attached. [see ss. 28(15) **Conservation Authorities Act**]

If the construction is permitted to proceed, what irreparable harm may take place is the interference with the land as it now exists. In the event that construction commences or is completed and a new hearing is required where the Neighbours have standing, and that a further hearing sees a dismissal of Mr. Russell's appeal, nothing can return the land to the state in which it now exists. Soils will have been moved, pilings dug, trees and under storey cleared. The situation certainly could be mitigated. I do not consider Mr. Russell's land as currently being pristine. Clearly, from the record, it is already disturbed. However, I do not know the values to be placed on these lands and I am loathe to continue and hear a process which has even the smallest possibility of being overturned. There have been many appeals to the Commissioner in which the proposed construction has already taken place. All have settled, but I do recall time and again that complete restoration and rehabilitation has proved impossible.

For this reason, I conclude that irreparable harm to the land which cannot be compensated could potentially occur if I were to proceed with a hearing on the merits. Given the long history of ongoing proceedings in relation to this property, including exhausting all avenues of appeal, without a stay, it could be very likely that the hearing on the merits could otherwise be completed before those appeals run their course.

Balance of Convenience

I find that the balance of convenience portion of this test favours the TRCA, which has supported the granting of the stay. It would be highly costly, and perhaps even prejudicial, to the TRCA to have to mount its case in this matter twice. While Mr. Russell and the Neighbours have litigated in various forums over this property for many, many years, the TRCA has not expressed an inclination to be drawn into this particular dispute. It took no position.

Costs

The application for standing has been appealed and is subject to a judicial review application. As such, I cannot conclude that it is at an end, as the Court's findings may have an impact on my own findings with respect to costs.

Therefore, I find that I will order that the matter of costs in the application for standing will be stayed pending the appeal and judicial review application in the Ontario Superior Court of Justice and any and all further appeals therefrom.

Conclusion

I will order that the hearing on the merits be stayed, based on the three part test, where my findings favour the stay, pending the appeal and judicial review application in the Ontario Superior Court of Justice and any and all further appeals therefrom.

I will also order that the costs application be stayed pending the appeal and judicial review application in the Ontario Superior Court of Justice and any and all further appeals therefrom.