File No. CA 003-05

L. Kamerman)
Mining and Lands Commissioner)

Monday, the 23rd day
of April, 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:

DEREK RUSSELL

Appellant

- and -

TORONTO AND REGION CONSERVATION AUTHORITY

Respondent

RESCISSION OF ORDER TO FILE
ADJOURNMENT OF PROCEEDINGS

1. IT IS ORDERED that the tribunal's Order To File documentation in this matter, dated the 13th day of March, 2007, be and is hereby rescinded until further notice.

2. THIS TRIBUNAL FURTHER GIVES NOTICE to Mr. Derek Russell, the appellant, through his counsel, Ms. Amber Stewart and to the Toronto and Region Conservation Authority through its counsel, Mr. Jonathan Wigley, that it will consider the issue of whether to stay the hearing of the merits pending the judicial review application and appeal proceedings in connection with the tribunal decision of a preliminary motion of the 9th day of March, 2007, upon

. . . . 2

receiving further submissions from and hearing from counsel in writing by no later than the 9th day of May, 2007. **AND FURTHER** that any determination of whether to stay the hearing on the merits in this matter will be heard in common with a proceeding to determine whether to stay the determination on costs in connection with the aforementioned motion to add parties.

Reasons for this Order are attached.

DATED this 23rd day of April, 2007.

Original signed by L. Kamerman

L. Kamerman
MINING AND LANDS COMMISSIONER

File No. CA 003-05

L. Kamerman)
Mining and Lands Commissioner)

Monday, the 23rd day
of April, 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:

DEREK RUSSELL

Appellant

- and -

TORONTO AND REGION CONSERVATION AUTHORITY

Respondent

REASONS

Background

Mr. Russell's appeal from the refusal of the Toronto and Region Conservation Authority (the "TRCA") to grant permission to build a residential dwelling was received on the 14th day of February, 2005. A number of neighbours brought a motion for party status to Mr. Russell's appeal, which was heard on March 3, 2006 and a decision was issued on March 9, 2007 to not add the neighbours as parties. This tribunal decision was appealed on April 6, 2007 and an application for judicial review was filed on April 11, 2007.

. . . . 2

In the meantime, the tribunal had issued an Order to File documentation, being part of its usual proceedings, dated March 13, 2007, with the first date for filing being April 23, 2007 by the TRCA of essentially its record from the hearing before its Executive Committee.

In its attempt to determine whether to proceed pending the outcomes of the appeal and judicial review, the tribunal, through its Registrar, Mr. Daniel Pascoe, brought sections 19 and 25(1) of the **Statutory Powers Procedure Act,** section 132 of the **Mining Act** and subsection 6(7) of the **Ministry of Natural Resources Act** to the attention of all counsel involved in either the hearing on the merits or the hearing on costs related to the preliminary motion. The following written submissions were received, in letter format:

On April13, 2007 Ms. Costello, on behalf of Neighbours David Roffey, Karen Walsh , Nancy McFadyen, John McFadyen, Elaine Triggs, Donald Triggs and Kathleen Shanahan:

> As you are aware, Aird & Berlis LLP has filed both a Notice of Appeal from the Commissioner's March 9, 2007 Order (Court File No. 156/07) as well as a Notice of Application for Judicial Review of the Order (Court File No. 153/07).
>
> Having reviewed the sections in the *Statutory Powers Procedure Act*, the *Mining Act* and the *Ministry of Natural Resources Act* in accordance with your email, it is our opinion that the proceedings before the Commissioner ought to be adjourned until such time as the court matters referenced above have been fully and completely disposed of by the parties. In our opinion, to proceed with either Mr. Russell's appeal or the consideration of costs arising out of our clients' motion before the Commissioner would be an inefficient use of both the Commissioner and the parties' time given that the disposition of the above-noted court matters will necessarily have bearing on the outcome of the matters still before the Commissioner.
>
> We would therefore request that the Commissioner adjourn both the proceedings referenced in your email until such time as the parties have fully and completely disposed of the above-noted court proceedings.

On April 17, 2007, Ms. Stewart, on behalf of Mr. Derek Russell:

> Based on, among other things, a review of the statutory provisions as suggested in your email, we are of the view that the Commissioner has the discretion to proceed with the hearing of our clients' appeal on the merits, in accordance with the Orders to File.
>
> Section 117 of the *Mining Act*, R.S.O. 1990, c. M. 14 contains a privative clause, as follows:
>
> > 117. Despite the Statutory Powers Procedure Act, the Commissioner may hear and dispose of any application not involving the final determination of the matter or proceeding, either on or without notice, at any place he or she considers convenient, and his or her decision upon any such application is final and is not subject to appeal but, where the Commissioner makes his or her decision without notice, he or she may later reconsider and amend such decision. [Emphasis added]

. . . . 3

> The Commissioner's decision on the motion for party status did not involve the final determination to the proceeding. The decision was an interlocutory order, and not subject to appeal.
>
> Section 25(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S. 22 provides that an appeal from a decision of a tribunal operates as a stay of the matter unless the court or the tribunal orders otherwise. Section 25(2) explicitly states that an application for judicial review is not an appeal within the meaning of subsection 25(1). As a result, the Commissioner is clearly not required or expected to stay the proceedings based on the filing of the application for judicial review.
>
> Based on the foregoing, we intend to comply with both Orders to File unless those Orders are formally rescinded by the Commissioner.
>
> In light of the delay hat has occurred in the hearing of this appeal (as referred to in the Commissioner's decision), we respectfully ask the Commissioner to proceed with the hearing in accordance with the Orders to File.

On April 16, 2007, Mr. Jonathan Wigley on behalf of the TRCA:

> We are in receipt of Aird & Berlis' letter of April 13, 2007. The suggestion made by Ms. Costello seems logical and reasonable and the TRCA would agree to that.

On April 18, 2007, Ms. Costello:

> This letter is further to Ms. Stewart's letter, dated April 17, 2007, wherein she requested that the Commissioner proceed with both matters currently before her with respect to the above-noted property.
>
> Having reviewed the sections in the *SPPA* and the *Mining Act*, as well as relevant case law, we continue to hold the opinion that the proceedings before the Commissioner ought to be adjourned until such time as the court matters referenced above have been fully and completely disposed of by the parties. This position is further substantiated by a commonsense approach to these matters as the resulting court decisions could very well impact on the outstanding proceedings before the Commissioner. We note that Mr. Wigley, on behalf of the TRCA, has indicated his support for this approach.
>
> We respectfully disagree that the Commissioner's decision not to grant our clients party status to the proceedings was an interlocutory order and, therefore, not subject to appeal. The Commissioner's refusal to grant our clients' motion was, in fact, a final determination of the issue insofar as our clients' substantive rights are concerned.

. . . . 4

> We find support for our position in *Piscone v. Poston,* [1986] O.R. No. 897, 12 C.P.C. (2d) 154 (H.C.J.), where the court held that an order refusing to add a plaintiff to a proceeding was a final determination of the issue for that plaintiff. Based on this authority, we submit section 117 of the *Mining Act* does not prohibit our client from appealing the Commissioner's decision.
>
> As we intent to exercise our clients' rights to both appeal and seek judicial review of the Commissioner's decision, it remains our position that the Commissioner should adjourn the proceedings until such time as our clients' appeal and judicial review have been finally disposed of by the courts.

Findings

I thank counsel for their submissions based upon the informal request made by this Office. I had hoped that through their submissions, some sense could have been made of how a stay of proceedings is meant to operate or not operate, based upon provisions of Part VI of the **Mining Act,** relevant sections of the **Statutory Powers Procedure Act** and the fact that Part VI of the **Mining Act** applies with necessary modifications to section 28 **Conservation Authorities Act** appeals to the Minister of Natural Resources, which have been assigned by cabinet to the Mining and Lands Commissioner (the tribunal).

I've often felt that the amendments in 1971 to the **Mining Act** which made provisions of the **Statutory Powers Procedure Act** applicable in certain situations made interpretation of Part VI more and not less difficult, as I have regarded Part VI and its predecessors as having been adequate for the first 65 years of the existence of the tribunal. Where it has proved inadequate, my predecessors have often resorted to the Rules of Civil procedure by analogy.

In a way, I can appreciate that counsel may have wished to not make submissions as to what these various provisions, taken in concert, might actually mean, preferring instead to examine practical aspects of the situation in which we find ourselves in at this time. Added to the complexity of interpretation is the extent to which Part VI even does apply to **Conservation Authority Act** appeals, given **Drover v. Grand River Conservation Authority** (1983), 62 O.R. (2d) 141, wherein the High Court of Justice, Divisional Court found that the statutory time limit found in [now section 135] of the **Mining Act** with respect to applications for judicial review having to be made within 30 days applied only to Orders of the Commissioner made under the **Mining Act** and was not imported by subsection 6(7) of the **Ministry of Natural Resources Act**. The Order in question was found to be made under the **Conservation Authorities Act.**

Potts, J. noted at page 143 that the Commissioner's decision was not filed with the mining recorder and is not the type of document under the legislation for which the mining recorders are responsible. The office of the mining recorders was created specifically for purposes of the **Mining Act** and given certain duties, in connection with the processing or essentially the administration of mining claims. This is applicable given the wording of the current section 132, which notes that when a final order of the recorder filed with the Superior Court of Justice, either the Commissioner or the Court may stay proceedings therein if an appeal is brought.

In fact, there is little direction offered in either Part VI of the **Mining Act** or the **Statutory Powers Procedure Act**. The only case I could find dealing with section 25 of the **SPPA** is **Devgan f. College of Physicians and Surgeons (Ontario)**, 2003, WL 22999679 (Ont. Div. Ct.), 2003, Carswell Ont. 5347, where the Court was asked to stay a motion to review another order because the doctor failed to pay costs. The Court did not agree and considered the motion, with the result that it was dismissed.

I would like to hear submissions from Counsel on what test should be applied when considering whether to stay the Order of March 9, 2007. Section 25 of the **SPPA** provides that, unless there is a contrary provision in the governing legislation [which in this case would be the **Mining Act]**, that an appeal acts or operates as a stay unless otherwise ordered by the Court or in this case the Commissioner.

In **Circuit World Corporation v. Lesperance** (1997), 33 O.R. (3d), Laskin, J. states commencing at page 676 that the test for staying an order was set out in **RJR – MacDonald Inc. v. Canada (Attorney General)**, [1994]1 S.C.R. 311, 111 D.L.R. (4th) 385, being similar to that of an interlocutory injunction. The three questions posed were 1) whether there is a serious question to be tried, which is a test supposedly of a low threshold, rather than a hearing of the case itself; 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 the stay pending a decision on the merits.

Comment

I note that the Neigbours and the TRCA prefer to have the matter stayed at this time, while Mr. Russell would prefer to forge ahead with his hearing on the merits. No matter what happens upon appeal and judicial review, it would not be inordinately speculative, based upon what has gone on before between Mr. Russell and the Neighbours, to suggest that the losing side(s) are likely to appeal until such time as all appeal rights have been exhausted. Whether or not this should also be a factor for me to consider should be addressed.

Conclusion

Counsel for the parties and Neighbours will be asked to make submissions on what test should be applicable for me to determine whether a stay is warranted on the facts of this case, with respect to the costs of the motion and the hearing on the merits.