R. Yurkow	)	Tuesday, the 10th day Deputy
Mining and Lands Commissioner	)	of March, 1992.

IN THE MATTER OF THE CONSERVATION AUTHORITIES ACT

AND IN THE MATTER OF

An appeal to the Minister under section 28(5) of the Conservation Authorities Act against the refusal to permit construction of a residential structure at the premises known municipally as 215 Canboro Street, in the Town of Smithville, in the Township of West Lincoln in the Regional Municipality of Niagara.

B E T W E E N :

WILLIAM VANDEN BRINK and MARIANNE VANDEN BRINK

Appellants

- and -

NIAGARA PENINSULA CONSERVATION AUTHORITY

Respondent

MOTION FOR COSTS

William G. Charlton appearing for the appellants
John A. Olah appearing for the respondent

The appellants William Vanden Brink and Marianne Vanden Brink (Vanden Brink) had applied to the Niagara Peninsula Conservation Authority (Authority), under the *Conservation Authorities Act*, for a permit to build a house in a flood plain control area. The permit was refused. Vanden Brink appealed to the Commissioner. The appeal was dismissed by Commissioner Tieman after a hearing. The Authority has now brought a motion for costs.

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Background

Vanden Brink (and I will refer to Mr. Vanden Brink since it is his knowledge and actions that are in issue) owned land in Smithville, Township of West Lincoln. The land was in a regulated flood plain. Permission was required from the Authority in order to build on the land.

On May 2, 1990, Vanden Brink got a municipal building permit from the Township. Not long after, he started building a house on the land.

On July 24, 1990, the Authority posted a Violation Notice on the partially built house. On August 16, 1990, Vanden Brink applied to the Authority for a permit to build. The application was turned down. In the meantime, Vanden Brink continued with the house construction and now has a finished house on the land.

In the appeal, Vanden Brink argued two main points: that the permit should be granted because any effect his building had would be minimal and that he did not know that he needed approval from the Authority so, presumably, it would not be equitable to stop the building.

The Tribunal dismissed the appeal on the basis that "any negative effect" was too much. The second issue, which is not a real issue, was not dealt with.

Authority's Position

In asking for costs, the Authority says that Vanden Brink knew well before building that he was in a flood plain area. It, also, says that he lied about this on the witness stand. The Authority says that it had to bring witnesses to refute Vanden Brink and this greatly added to its costs and to the length of the hearing.

The Authority asks for cost on a solicitor and client basis to be assessed by an assessment officer. It says that the perjury (that it alleges) amounts to a flagrant abuse of the process and is something that ought to be discouraged by awarding full costs.

Vanden Brink's Position

Vanden Brink (through his counsel) seems to agree that the question of knowledge was not the real issue. Since there was no deception, is his argument, on the real issue, there was not a flagrant abuse of the process. This, he argues, is particularly so since the Commissioner did not comment on that aspect.

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JURISDICTION

Vanden Brink, in the his written submissions, questioned whether the Tribunal has authority to award costs. Counsel did not deal with this in his oral remarks but neither did he concede the matter.

Commissioner Ferguson dealt with this question in Credit Mountain Land Co. Ltd. and Credit Valley Conservation Authority[1] on page 6.

Subsection 28 (5) of the *Conservation Authorities Act*[2] provides for an appeal to the Minister. Clause 6(6)(b) of the *Ministry of Natural Resources Act*[3] allows the Lieutenant Governor in Council to assign, by regulation, authority, power and duties of the Minister to the Commissioner. Subsection 6(7) of the *Ministry of Natural Resources Act* makes Part VI of the *Mining Act*[4] applicable, with necessary modification, to the exercise of the assigned authority. By Ontario Regulation 364/82, the Minister's authority and duty to determine appeals from conservation authorities were assigned to the Commissioner.

Section 126 of the *Mining Act* allows the Commissioner to award costs either as assessed by an assessment officer or as a lump sum. This section is in Part VI of the Act.

This reasoning was affirmed in Re Drover et al. and Grand River Conservation Authority[5] and followed by Commissioner Ferguson in Yorkville North Development Ltd. and The Central Lake Ontario Conservation Authority[6]. I take it as settled law that this Tribunal has

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[1] December 19, 1978, unpublished.

[2] R.S.O. 1990, c. C.27

[3] R.S.O. 1990, c. M.31

[4] R.S.O. 1990, c. M.14.

[5] 62 O.R. (2d) 141 (Ont. High Ct.)

[6] May 25, 1990, unpublished.

the discretion to award costs on appeals from conservation authorities.

ISSUES

Now to look at the question of costs themselves. In dealing with costs, there are two issues to look at:

1. The circumstances under which costs should be awarded.

2. The method and basis of calculating the costs.

WHEN COSTS TO BE AWARDED

Court Rules Not Followed

The usual practice before a court is that the person who loses pays some portion of the costs of the person who wins. This, however, is not a practice that is necessarily applied before an administrative tribunal.

Right To Appeal

The current case is an appeal by a member of the public from a decision of a conservation authority, a publicly funded body. The *Conservation Authorities Act* gives the right of appeal. The conservation authority has to appear at the hearing to defend its decision.

Usually No Costs

The general principle established by the Ontario Municipal Board is very similar to that followed by this Tribunal: costs will not be awarded if there is a genuine dispute and the parties have acted reasonably. Certainly, costs have not been routinely awarded by this Tribunal to a publicly funded body - for example, a conservation authority or a ministry - that successfully defended an appeal.

The underlying premise seems to have been that so long as an appeal has some substance to it, a publicly funded body should not expect to collect costs.

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The first case where costs were considered in an appeal under the *Conservation Authorities Act* was Credit Mountain Land Co. Ltd. and Credit Valley Conservation Authority.[7] Commissioner Ferguson, on page 11, had the following to say:

> "There is precedent in the courts for an award of costs where improper procedures have been implemented and in making the award, the courts have referred to the doctrine of abuse."
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> The Commissioner continues on page 11:
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> I can think of no more effective a device [the awarding of costs] to prevent the bringing of insignificant or unauthorized applications before any tribunal ... . However, in my opinion it is not necessary to find that the conduct of an appellant constitutes an abuse of process in order to award costs against the appellant.

Exception:

- Abuse of Process

The general principle does not apply when there has been an abuse of the process by a party to the hearing. The decision in Parres v. Minister of Mines[8], an appeal held under the *Mining Act*, contains the following comment:

> "The Tribunal sees the purpose of the appeal process as providing a remedy from an administrative action by a mining recorder that results in an unfair or unjust consequence to the appellant. It does not feel that every appellant who is not successful should necessarily be penalized by having costs awarded against the appellant. However, the business of the Ministry could be ground to a halt if appeals are undertaken where there has been no unfairness or injustice or the appellant does not have a reasonable case on the merits. The Tribunal is prepared to award costs to the Ministry if it has to defend appeals that turn out to have been essentially frivolous.
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[7] December, 19, 1978, unpublished.

[8] April 4,1991, (Mining Act) unpublished, page 4

The Parres principle was followed in another appeal under the *Mining Act*, 798839 Ontario Limited v. Minister of Mines and Andre Boudreau [9] where the following comment appears:

> "It is contrary to the public interest for the Ministry to be called upon to defend appeals that are without any semblance of merit. The Tribunal will, therefore, follow the reasoning of the early decision and award costs to the Ministry to be paid by Boudreau."
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> . . . . .
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> Both these cases were referred to with approval in Sheridan v. Minister of Mines[10]

- Unreasonable Acts (prolonging hearing, unnecessary expense)

A function of an administrative tribunal is to serve as part, albeit an independent part, of the administrative system of government regulatory process. It provides an opportunity to the public to be heard and to ensure, as nearly as possible in an imperfect world, that government policy is fairly and properly applied. One advantage it has over a court is that it can provide a relatively inexpensive, speedy resolution without undue formality.

There is an obligation on all parties, before and during a hearing, to act responsibly and to refrain from conduct that unnecessarily prolongs a hearing or makes the resolution of the case more difficult. A party that unnecessarily or unreasonably prolongs a hearing or adds to the cost of a resolution should expect to pay costs.

The usual practice in the courts is to award costs on a party and party basis. This means that roughly two-thirds of the successful party's costs are reimbursed. The less common practice is to award costs on a solicitor and client basis. When costs are awarded on a solicitor and client basis, the successful party is reimbursed for all of the costs of the action.

Lump Sum Payment

In the past, this Tribunal has exercised both the option to order that costs

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[9] August 31, 1991, (Mining Act) unpublished, page 13.

[10] November 18, 1991, (Mining Act) unpublished

be assessed and the option to award a lump sum payment. My preference has been to make lump sum awards only. This preference was expressed in Yzerdraat v. Buchanan Forest Products Ltd.[11] Assessing costs increases the legal costs to all parties. Having in mind that one purpose of an administrative tribunal is to reduce costs, it seems that the less expensive route of awarding lump sum payments is, usually, the desirable one.

APPLICATION OF PRINCIPLES

Vanden Brink made it an issue of the hearing that he did not know that the land on which he built his house was in a flood plain control area that was regulated by the Authority. The evidence is clear that he did know. He continued building the house even after a violation notice was posted. His conduct is not such as should entitle him to "equitable" consideration.

The issue of knowledge not only has no merit but was an attempted deception. It unnecessarily prolonged the hearing and put the Authority to considerable extra expense.

Counsel for the Authority calculates, in an itemized statement, that addressing and rebutting Vanden Brink's insistence that he did not know that he was building in a flood plain control area added $12,844.50 to legal costs plus $300 in conduct money paid to a witness. Counsel for Vanden Brink was given the opportunity to comment on the costs and the calculations but did not do so.

Accordingly, I am awarding to the Authority full reimbursement of this additional cost. This is calculated as $13,144.50.

There was a second issue that, even though Vanden Brink lost on, was, at least, an arguable one. However, I concur with Commissioner Ferguson's views, as expressed in Credit Mountain Land Co. Ltd. and Credit Valley Conservation Authority (previously referred to), that it is not necessary to find abuse of process in order to award costs.

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[11] October 28, 1991, (Mining Act), unpublished

It has never been this Tribunal's intention to discourage genuine appeals. There is a duty, however, to protect publicly funded bodies from unreasonable expense. There is an obligation on appellants to behave in a responsible manner. Vanden Brink started building in contravention of the law and continued building after being put on express notice of the contravention. Accordingly, on the second issue, I am awarding the Authority $2,000 in costs.

IT IS ORDERED that the appellants pay to the respondent $15,144.50 in costs.

DATED this 10th day of March, 1992.

Original signed by R. Yurkow

R. Yurkow
DEPUTY MINING AND LANDS COMMISSIONER