File No. CA 011-03

L. Kamerman)
Mining and Lands Commissioner)

Friday, the 25th day
of June, 2004.

THE CONSERVATION AUTHORITIES ACT

IN THE MATTER OF

An appeal to the Minister pursuant to subsection 28(15) of the **Conservation Authorities Act** concerning the granting of permission with conditions for development through re-grading within the Fill Regulated Area within a well defined valley of the Don River, in order to construct a detached single family residential dwelling, 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 B154/03.

B E T W E E N:

JOHN McFADYEN, NANCY McFADYEN, ELAINE TRIGGS, DAVID TRIGGS, SEAN SHANAHAN, CATHERINE SHANAHAN, DAVID ROFFEY AND KAREN WALSH
Appellants

- and -

DEREK RUSSELL
Respondent

- and -

TORONTO AND REGION CONSERVATION AUTHORITY
Party of the Third Part

DECLARATORY ORDER

WHEREAS by a letter dated the11th day of December, 2003, received by the tribunal from Ms N. Jane Pepino, counsel on behalf of John McFadyen, Nancy McFadyen, Elaine Triggs, David Triggs, Sean Shanahan, Catherine Shanahan, David Roffey and Karen Walsh, sought to appeal the decision of the Toronto and Region Conservation Authority granting permission to Derek Russell for the development of certain lands;

AND WHEREAS Mr. John Inglis, counsel for Derek Russell and Mr. Jonathan Wigley, counsel for the Toronto and Region Conservation Authority, challenged the right of third parties to appeal a decision of a conservation authority;

AND WHEREAS the tribunal determined that it would consider this issue as a preliminary jurisdictional question and seek written submissions from the various counsel;

UPON consideration of the various filings in this matter;

1. THIS TRIBUNAL DECLARES that subsection 28(15) of the **Conservation Authorities Act** does not provide a right of appeal to an individual or individuals who are not the original applicant(s) before the conservation authority.

2. THIS TRIBUNAL ORDERS that John McFadyen, Nancy McFadyen, Elaine Triggs, David Triggs, Sean Shanahan, Catherine Shanahan, David Roffey and Karen Walsh, Derek Russell and the Toronto Region Conservation Authority make written submissions on the issue of whether costs should be awarded and if so, in what amount, to Derek Russell by John McFadyen, Nancy McFadyen, Elaine Triggs, David Triggs, Sean Shanahan, Catherine Shanahan, David Roffey and Karen Walsh, two copies of which are to be filed with the tribunal and one copy of which is to be served on each of the other counsel by no later than the 23rd day of July, 2004.

3. THIS TRIBUNAL FURTHER ORDERS that John McFadyen, Nancy McFadyen, Elaine Triggs, David Triggs, Sean Shanahan, Catherine Shanahan, David Roffey and Karen Walsh, Derek Russell and the Toronto Region Conservation Authority may make written submissions in response to the earlier filings of the other on the issue of whether costs should be awarded and on the amount(s) stipulated to Derek Russell, two copies of which are to be filed with the tribunal and one copy of which is to be served on each of the other counsel by no later than the 6th day of August, 2004.

Reasons for this Declaratory Order are attached.

DATED this 25th day of June, 2004.

Original signed by L. Kamerman

L. Kamerman
MINING AND LANDS COMMISSIONER

File No. CA 011-03

L. Kamerman)
Mining and Lands Commissioner)

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- and -

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REASONS

Executive Summary

This matter arises out of the permission granted by the Toronto and Region Conservation Authority (the "TRCA") on November 14, 2003 to Derek Russell for development of lands found at 119R Glen Road, Toronto. Permission was granted following in-camera deliberations by the Executive Committee of the TRCA, despite recommendations by its staff that the application not be approved.

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Counsel retained by and acting on behalf of several neighbours of the Russell property (the "McFadyen Group") sought to appeal the conditions imposed on the permission granted. Legal counsel for Mr. Russell and the TRCA sought the opportunity to make representations as to whether this letter could constitute a valid appeal pursuant to provisions of the **Conservation Authorities Act** and attendant legislation.

The words used in subsection 28(15) of the **Conservation Authorities Act** provide that "[a] person who has been refused permission or who objects to conditions imposed on a permission may… appeal to the Minister…" Counsel for Mr. Russell provided an analysis of the provisions, asserting that the clear grammatical meaning of this and related provisions could leave no doubt that only the original applicant could launch an appeal of a refusal or of permission with conditions. Counsel for the TRCA concurred with this analysis, stating that a third party does not have a right of appeal and that the permission was given without conditions. Counsel for the McFadyen Group asserted that the tribunal should apply a purposive interpretation of the **Conservation Authorities Act** along with a review of the context in which the appeal was filed, and in so doing, would find that the tribunal does retain jurisdiction and ought to hear the appeal as filed.

The law on appeals from statutory decision-makers sets out that no right of appeal is derived from the common law. Any such right must be expressly provided for in the governing statute. The **Conservation Authorities Act** provides a right of appeal solely to the person who seeks the permission and no other. This is the conclusion reached upon an ordinary reading of the relevant provisions, within the overall statutory context. This would also be the case with a purposive analysis, which is construed narrowly for purposes of section 28. A purposive analysis cannot create that to which the statute does not speak directly, namely the creation of a right of appeal in someone who has no such right through a reading of the statute.

Legitimate expectation cannot give rise to a right of appeal, particularly where participation at the hearing before the Conservation Authority is not a right afforded by the legislation. However, it is not the role of the tribunal to conduct what amounts to a judicial review of that which

The tribunal finds that there is no right of appeal in any individual, other than the applicant and as such, there is no properly constituted appeal in this matter. Accordingly, the tribunal will issue a declaration to this effect.

Submissions

In a letter dated December 11, 2003, Ms. Jane Pepino, counsel, on behalf of John McFadyen, Nancy McFadyen, Elaine Triggs, David Triggs, Sean Shanahan, Catherine Shanahan, David Roffey and Karen Walsh (the "McFadyen Group") sought to appeal what were characterized as the conditions imposed on the permission of the resolution of the Toronto and Region Conservation Authority (the "TRCA") to approve the application for the development of the Russell lands on Glen Road.

The McFadyen Group, along with the North Rosedale Ratepayers Association, staff of the TRCA, and the City of Toronto, had opposed the application before the TRCA. The tribunal has been called upon by counsel for Mr. Russell and the TRCA to determine whether there can be an appeal under the **Conservation Authorities Act** by individuals who did not bring the original applicant, and therefore, whether the tribunal has jurisdiction to proceed to hear this appeal.

Mr. Derek Russell is represented by Mr. John C. Inglis and the TRCA is represented by Mr. Jonathan Wigley. All were provided with the opportunity to make written submissions on the issue of whether individuals *other than* the person making an application pursuant to section 28 of the **Conservation Authorities Act** can appeal either a refusal or permission with conditions. All counsel were provided with the opportunity to make written submissions in this matter, based upon the tribunal's discretion and the request made on behalf of Mr. Russell to minimize the costs of this proceeding.

The Law

Relevant provisions of section 28 of the **Conservation Authorities Act** are reproduced:

> **28.** (1) Subject to the approval of the Minister, an authority may make regulations applicable in the area under its jurisdiction,
>
> > (c) prohibiting, regulating or requiring the permission of the authority for development if, in the opinion of the authority, the control of flooding, erosion, dynamic beaches or pollution or the conservation of land may be affected by the development;
>
> (12) Permission required under a regulation made under clause (1)(b) or (c) shall not be refused or granted subject to conditions unless the person requesting the permission has been given the opportunity to require a hearing before the authority or, if the authority so directs, before the authority's executive committee.
>
> (13) After holding a hearing under subsection (12), the authority of executive committee, as the case may be, shall,
>
> > (a) refuse the permission; or
> >
> > (b) grant the permission, with or without conditions.
>
> (14) If the authority or its executive committee, after holding a hearing, refuses permission or grants permission subject to conditions, the authority or executive committee, as the case may be, shall give the person who requested permission written reasons for the decision.

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> (15) A person who has been refused permission or who objects to conditions imposed on a permission may, within 30 days of receiving the reasons under subsection (14), appeal to the Minister [of Natural Resources] who may,
>
> (a) refuse the permission; or
>
> (b) grant the permission, with or without conditions.

The tribunal has been assigned the authorities, powers and duties of the Minister of Natural Resources to hear appeals made pursuant to subsection 28(15) of the **Conservation Authorities Act** by Ontario Regulation 571/00, made pursuant to clause 6(6)(b) of the **Ministry of Natural Resources Act**, R.S.O. 1990, c. M. 31. By virtue of subsection 6(7) of that legislation, provisions of Part VI of the **Mining Act**, R.S.O. 1990, c. M. 14 apply with necessary modifications to the exercise of those authorities, powers and duties.

Summary of Written Submissions

Ms. Pepino set out that the application was to re-grade the lands upon which the proposed development was to take place and to construct a detached single family residential dwelling comprised of approximately 4000 square feet with a detached garage.

The subject site, located at the rear of a laneway behind existing lots on Glen Road, is almost completely within the Fill Regulation Area of the Don River. Opposition to the application was based on assertions that construction and grading would have an impact upon and substantially alter the valley lands associated with the Don River floodplain and could irreversibly affect the conservation of land and flood control measures. Ms. Pepino made reference to Section 4.2.2 of the TRCA Valley and Stream Corridor Management Program, which addresses redevelopment within highly urbanized environments. The Program specifically sets out that new development "shall not be permitted within valley corridors that have not been designated as a special policy area". While the Program does consider infill if certain requirements are met, it was submitted that the application does not involve infill, as it is not located between two lots of record.

Staff of the TRCA did consider the application, for purposes of infill, and concluded that it would not meet the following requirements:

> (a) the proposed building would be constructed entirely below the top of bank in direct violation of TRCA guidelines and, in particular, the 10 metre setback;
>
> (b) the setback from the valley would not be consistent with any existing development in the area; and
>
> (c) the proposed development would violate the TRCA's primary objective to protect the valley lands and their habitat functions.

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The Executive of the TRCA resolved, after its in-camera session held on November 14, 2003, to allow the application. Resolution #B154/03 states:

> THAT the unique Application #029/03/Tor by Derek Russell pursuant to Ontario Regulation 158, to regrade within the Fill Regulated Area and within a well defined valley of the Don River, described as 119R Glenn Road, City of Toronto, be approved;
>
> AND FURTHER THAT staff be directed to ensure that the conservation easement which forms part of the application and submissions today by the applicant be registered on title and that it contain provisions to ensure that no additions or additional buildings are to be constructed on the property and that the vegetation management plan be implemented to the satisfaction of the TRCA.

It is the position of the McFadyen Group that, while they would continue to object to the approval of the application, that the aforementioned Resolution constitutes permission with conditions which do not satisfy concerns raised by the opponents, including the TRCA staff, which were set out in detail.

On behalf of Mr. Russell

Mr. Inglis set out that it was Mr. Russell's position that Ms. Pepino's clients do not have a right of appeal in this matter, and as a result, the tribunal does not have the jurisdiction to hear an appeal concerning the TRCA's decision to approve the application for development of the subject property.

While not germane to the issue of jurisdiction, Mr. Inglis set out at some length his client's disagreement with the characterization of the site by Ms. Pepino, which he submitted is a legal lot, accessible by a proper driveway which is part of the lot, which in turn fronts onto Glen Road. It is entirely surrounded by other lots so that the entire ravine system at this location is in private hands through to the valley floor. Being wholly surrounded as it is, the Russell lot can properly be regarded as an infill lot. It is relatively flat and has been virtually surrounded on four of its sides by fill. The ravine at this general location is already highly disturbed and subject to invasion by numerous non-native species. There can be no suggestion that the proposed development would affect the control of flooding.

The **Conservation Authorities Act** gives a right of appeal only to the person making the application where permission has been refused or granted subject to conditions. That does not apply in this situation where the permission has been granted without conditions. As none of the statutory pre-requisites for an appeal have been met, there is no right of appeal. "Person" in the relevant legislation only refers to the applicant for a fill permit. The right of appeal is granted to only the applicant, as can be determined from the purpose of the legislation and the grammatical structure of the appeal section.

(a) purpose

It is argued that the word "person" in section 28 is used only in reference to the applicant requesting permission and therefore the appeal rights can only make coherent and logical sense only if they are restricted to the applicant. Subsection 28(12) states that "unless the *person requesting the permission* has been given the opportunity to …". Subsection 28(14) states where permission is to be refused or granted with conditions, "it shall give *the person who requested permission* written reasons…" Subsection 28(15) provides that "…*a person who has been refused permission or who objects to conditions imposed on a permission* may … appeal…" There is no right of appeal where unconditional permission has been granted. In the case where permission is granted with conditions, the person who is given a right of appeal, is "the person who objects to conditions imposed on a permission". In each case, the singular "person" is used. This reading accords with the context of the provision.

In this case, the permission has been granted without conditions and therefore, the legislation does not provide a right of appeal. Had the legislature intended there to be unlimited powers of appeal to all persons claiming an interest in the outcome, however remote, then it would have been necessary for the rights of appeal to extend to those cases where permission has been granted without conditions. It would not be logical or consistent to give a right of appeal in one circumstance and not the other, since the interest of the purported third person appellant is the same in both cases, namely in the objection to the approval. The only clear grammatical sense which can be made of the provisions points to the legislative intent that appeal rights are limited to the person making the application. The appeal rights make coherent and logical sense only if they are restricted to the applicant. The tribunal can draw the inference that there is no right of appeal when there are no conditions.

The TRCA does not have jurisdiction to attach conditions to its permission as can be seen by the manner in which clause 28(1)(c) is implemented by O.Reg. 158, R.R.O. 1990. The Regulation does not permit or authorize conditions to be attached to a decision of the TRCA. There is no regulation that has been made pursuant to subsection 28(23) allowing for permission to be granted subject to conditions.

b) context

Subsections 28(12) to (15) govern the person who requests permission under a regulation made pursuant to clause 28(1)(b) or (c). No one else is caught by these provisions. [see discussion under "purpose" above]. Noting the shift from the definite article in subsection 28(14) ["the"] to the indefinite article in the phrase found in subsection 28(15) ["a"], Mr. Inglis submitted that this occurs because it cannot be determined ahead of time whether the person requesting permission will be refused or not. Therefore, it is indefinite.

The pattern of establishing a subject category and referring to that category is used elsewhere in the **Act**. Subsection 28(17) establishes the subject "the person convicted" and then uses "that person's" and "a person" to refer to that subject [28(17)(a) and 28(18, respectively)].

(c) particular v. inclusive

The use of "a person" in subsection 28(15) is singular and specific, being "a person requesting the permission" as established by subsections 28(12) and (14). The **Conservation Authorities Act** creates broadly inclusive categories through use of words such as "every" such as in subsection 28(16) or "any" in subsection 28(24). Had it been intended that there be a more inclusive plural reading of "a person who objects" then it would have been written as follows: "a person who has been refused permission or every person who objects to conditions…"

2. Conditions under which an appeal may be made

In subsection 28(15), the subordinate adjective clauses beginning with "who" explain the conditions under which a person may appeal to the tribunal. It is the second adjective clause that the purported appellants use to argue that they have a right to appeal, namely, "who objects to the conditions imposed on a permission".

There is no jurisdiction in the TRCA to attach conditions. Similarly, there is no evidence that the permission was granted subject to conditions. Rather, staff was directed to ensure that the conservation easement which had formed part of the application and submissions of the applicant be registered on title. This does not, in Mr. Inglis' submission, constitute a condition imposed by the TRCA as contemplated by the **Act.** Rather, registration of the easement forms part of the original application.

The approval of staff is not contingent upon any future or uncertain event as suggested by Ms. Pepino. There is no condition precedent attached to the permission. If the tribunal does find that conditions can be imposed and that the easement constitutes a condition, the McFadyen Group is not in a position to appeal for reasons discussed.

3. Previous Decisions adding parties

The cases provided by the tribunal, which considered the question of the tribunal's discretion to add parties to an already existing proceeding, are distinguishable from this case, in which a third party wishes to be given standing for the right of appeal in a manner not contemplated or provided for in the legislation.

(a) *Farmer's Oil and Gas*

In this case, counsel for the Ministry of Natural Resources requested that his client be added as a party. This was a proceeding which was already underway, and as such, the question determined is not an analogous issue or question to the one in the current case.

(b) *Donald Bye v. Otonabee Region Conservation Authority*

In *Bye*, the question was whether the City of Peterborough could be brought into existing proceedings as a party. Again, the questioned was whether the tribunal had authority to add a third party to a proceeding, but not whether that third party (stranger to the proceeding) would have a right to instigate the proceedings. Even if Mr. Russell had brought the proceeding and the McFadyen Group asked to be added as parties, their request would fail, for the following reasons as set out in *Bye*:

> The decision in no way should be interpreted as a general endorsement of the addition of all persons in the vicinity of lands which are the subject matter of appeals before the tribunal. The tribunal distinguishes such cases as involving interest in specific lands owned by third parties and not of general public interest in the powers of the conservation authorities and the tribunal (at p. 16)

4. Statutory Powers and the *SPPA*

The **Statutory Powers Procedure Act** ("**SPPA")** does not provide substantive rights of appeal, nor does it provide a right of appeal where the governing statute does not. The powers of review provided in subsection 21.2(1) are limited to the original decision-maker and would not extend to the tribunal in this situation. In elaborating this point, Mr. Inglis referred to the decision of the Ontario Municipal Board in *Hockley Valley Resort, et. al* (O.M.B. Decision/Order No 0692, issued May 29, 2002). This case demonstrated that even when a decision maker has the jurisdiction to carry out certain procedural power, care must be taken concerning the derivative consequences of the exercise of the power so that the inadvertent creation of substantive procedural rights, such as a right of appeal, is not created, particularly where that right does not otherwise exist.

This is contrasted with the current case, where the tribunal does not have the jurisdiction to create a right of appeal where none exists under the **Conservation Authorities Act**, even though there may be the power to add parties to a properly constituted appeal.

TRCA

Mr. Jonathan H. Wigley, acting on behalf of the TRCA submitted that the third party has no entitlement to appeal against a decision granting a fill permit pursuant to the provisions of the **Conservation Authorities Act.** Accordingly, the McFadyen Group does not have a right of appeal and the tribunal does not have jurisdiction to entertain any such purported appeal. The permission was granted to the applicant, Mr. Derek Russell, pursuant to subsection 28(13) of the **Conservation Authorities Act** without conditions.

Mr. Wigley submitted that three questions arise with respect to the interpretation of subsection 28(15):

1. Who, for purposes of subsection 28(15) is a person who has been refused permission?

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The only answer to the first question is that the applicant is the only person who can be refused permission.

2. Who, for purposes of subsection 28(15) is a person who objects to conditions imposed on a permission?

The wording found in subsection 28(14) establishes who is entitled to receive written reasons for the imposition of conditions on permission. The language is unambiguous, limiting the persons entitled to receive written reasons to "the person who requested permission". To contend otherwise cannot be supported by the words used.

It is the TRCA's position that the permission granted to Mr. Russell was without conditions. Staff was required to ensure that the conservation easement which had formed part of the original application and submissions be registered on title. This relates to the decision of the applicant in his application to include a conservation easement. The direction to staff was not a condition, but merely an implementation instruction.

3. Is there a right of appeal in circumstances where the permission is granted without conditions?

The wording of the **Conservation Authorities Act** does not afford any person a right of appeal in the circumstances where permission has been granted without conditions and expressly limits the right of appeal to the applicant and only in those situations where the permission has been refused or granted with conditions. Neither is the case in this matter.

Additional Comments

The TRCA indicated that it agrees with the linguistic and grammatical analysis provided by Mr. Inglis and with the conclusions he reached. As no right of appeal exists, the issue of the tribunal's jurisdiction to hear any such alleged appeal does not fail to be considered or determined by the tribunal.

The McFadyen Group

Ms Pepino submitted that, through a purposive and plain meaning analysis of the **Conservation Authorities Act** and a review of the context in which the appeal was filed, the tribunal does retain jurisdiction in this matter and ought to hear the appeal as filed.

All members of the McFadyen Group are property owners in the immediate vicinity of the site, some of whom own property abutting or adjacent to it. They have concerns regarding the loss of privacy and the disruption of views from their private properties. Concerns extend to slope stability, loss of flora and fauna and the creation of a dangerous precedent. There has been historical opposition to the proposed development from the TRCA staff, the City of Toronto, the local ratepayers association and numerous residents, maintaining that development and grading would substantially alter and have an impact on the valley, affecting the conservation of land, existing natural features and flood control measures in the area. There are

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ongoing concerns about the potential impact of the servicing or how the effect of construction related to their installation will have on slope stability, run-off, erosion and vegetation. It was submitted that no information has been provided and the true impact of servicing the site is unknown. No analysis of the reasons for the decision were provided.

i) Jurisdiction

On a purposive and comprehensive interpretation of the legislation governing the application, it was submitted that it is within the scope of the tribunal, and consistent with the public interest, to allow all parties who will be directly affected by a decision to appeal that decision when the conditions imposed are insufficient to ensure that both private and public interests affected by the decision will be properly addressed and protected.

The objects found in the **Conservation Authorities Act** are the conservation, restoration, development and management of natural resources in the areas under jurisdiction of an authority. These were characterized as broad public objectives and the broad powers afforded to an authority were summarized as being "to study and investigate watersheds, to enter into and upon land, including private property, to acquire, purchase, lease or otherwise expropriate land, to enter into agreements with private landowners to facilitate the carrying out of projects in furtherance of the goals and to generally do "all such acts as are necessary" for the carrying out of a project in furtherance of those goals." To exercise the limited jurisdiction advocated on behalf of Mr. Russell would have the effect of limiting and fettering the discretion

Adopting the limited jurisdiction put forward by opposing counsel in this case would limit and fetter the discretion of conservation authorities in respect of matter which have broad public significance. This would be inconsistent with the broad policy framework established by the legislation and in turn would have broad implications.

ii) Appeal Rights Pursuant to the **Conservation Authorities Act** and **SPPA**

"Person" is not defined in the **Conservation Authorities Act**. A review of decisions of the OMB and other administrative tribunals supports the position that subsection 28(15) through a purposeful interpretation can be read to provide a right of appeal to a person who objects to conditions imposed on a permission granted by the TRCA.

In *People for Sunday Association of Canada v. Bradford West Gwillimbury (Town)* (1992), 27 O.M.B.R. 485, the OMB considered the scope of appeal provided by the **Retail Business Holidays Act** concerning Sunday opening by the municipality. It found that the use of the "person" as used in the legislation was not sufficiently explicit to limit appeal rights to those living in the municipality. The Board concluded that the plain language reading of the provision did not support the position that a person must live in the municipality in order to appeal.

Such an approach is consistent with the purposive interpretation of appeal rights and should be applied in this case. Those seeking to appeal have a specific interest in the impact which the proposed development will have on the valley lands as well as on their own properties, extending to water run-off, slope erosion and the like.

Granting an appeal right is consistent with the decision of the tribunal in *Bye v. Otonabee Region Conservation Authority*, where the tribunal found:

> …the issue … is of sufficient importance to the future decisions of these bodies that a timely decision of this and related issues is of sufficient importance to allow the addition of the City as a party. …[continues as set out in argument above at page 8].

The McFadyen Group has both specific and general interest in the TRCA decision and conditions imposed. This matter has potential for a precedent-setting impact both in front of the TRCA and other conservation authorities which renders it no longer a *lis inter partes*. In this regard, the request falls within the ambit of the *Bye* decision.

In addition to those specified by statute, section 5 of the **SPPA** provides that those who are entitled by law to be parties to a proceeding shall be parties. Ms. Pepino argued that her clients have a clear legal interest in the approval granted. It is their position that the failure of the TRCA to impose adequate conditions could result in damage to their properties through erosion, slope instability and water run-off and cause irreversible damage to flora and fauna. Residents rely on the TRCA to fulfil its mandate and ensure that development below the fill line is not permitted, except in cases where sufficiently sound mitigation measures can be applied.

iii) Conditions Placed upon the Approval

The approval of the TRCA was clearly conditional, it being immaterial whether or not the terms were included in the original application. Their inclusion provides tacit recognition of the need to mitigate potential impact.

A purposive interpretation of the **Conservation Authorities Act** supports the contention that a third party could be given a right to appeal conditions while not being able to appeal the permit itself.

Both a purposive and plain language interpretation of the Resolution makes its conditional nature clear. Legal and English dictionary definitions for the meaning of "condition" were provided to support this conclusion. It was submitted that should Mr. Russell not file a conservation easement or enter into a vegetation management plan, the TRCA would be within its rights to rescind the permission; the permission will not be issued until after these two conditions have been undertaken.

In those situations where the conditions are inadequate or not adhered to, it is proper to appeal such conditions, ensuring that such outcomes do not occur. Without their fulfilment, Mr. Russell's proposed development will be unable to proceed.

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iv) Jurisdiction of the TRCA to Grant Permits with Conditions

Section 7 of O. Reg. 158/00 provides:

> **7.** The Authority may, at any time, withdraw any permission given under section 4 if the representations contained in the application for permission are not carried out.

There are no express powers in the TRCA to grant permission with conditions. This is evident from its assertion that the permission is without conditions. Should the tribunal accept that the TRCA lacked authority to implement a decision with conditions, then its resolution for the subject property exceeded its jurisdiction and should be considered void for illegality. For this reason alone, the appeal should be heard to determine whether a decision was made within the proper legislative framework.

If the conditions formed part of the original application, as is asserted by the TRCA, there would have been no need to make further reference to them. By having made the reference, they have become prerequisites, upon whose existence the permission depends. If this were not the case, Mr. Russell could withdraw these terms and the permission would still issue. The conditions materially affect her clients.

v) No Prejudice

The tribunal is a public agency charged with implementing and overseeing the TRCAs' decision under a public statute. A finding that it lacks jurisdiction would effectively cause it to fetter its discretion at this preliminary stage. It would be more appropriate, given the purpose of the legislation, to permit the appeal to proceed and be heard on its merits. To do otherwise would allow a potentially irreversible impact on the unique subject lands. It would be difficulty to reconcile this narrow approach with the broader public purpose of the legislation and the mandate of the TRCA.

Duty of Fairness and Reasonable Expectation

Subsection 17(1) of the *SPPA* requires that a tribunal issue reasons in writing if requested by a party. In Re *Temple and Liquor Licence Board of Ontario* (1982), 41 C.R. (2d) (Div. Ct.) it has been held that a member of the public who makes representations at a meeting is entitled to reasons for that tribunal's decision. Also, those who take part in a process before a tribunal have a legitimate expectation to receive reasons. As her clients took part in the TRCA process, it was required and gave reasons for its decision to them.

Having done so does not acquit the TRCA of its duty of fairness. By involving her clients, it has created a legitimate expectation confirmed by the statutory right of appeal from conditional decisions that they would be given the opportunity to comment on the conditions contained in the approval. The concept of legitimate expectation is recognized as a discrete category of interest protected by the duty of fairness in *Old Saint Boniface Residents Association Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170. Through administrative rules of procedure or the procedure involved in the particular case, there can give rise to a legitimate expectation that such

procedures will be followed. When an agency fails to meet those expectations arising from its procedures or conduct, it will be found to be in breach of the duty of fairness. It is expected that a public body will honour an undertaking given either expressly or by implication, particularly when a party has come to rely upon it.

Ms. Pepino recognizes that the doctrine of legitimate expectation does not create substantive rights when such rights do not otherwise exist. However, in this case, where there is a conditional permission coupled with the involvement of her clients in the process, it has given rise to a reasonable expectation that her clients would have further rights with regard to those conditions. The failure of the TRCA to provide her clients with the opportunity to make submissions on the conditions constitutes a failure of its duty of fairness. This is the reason that they must seek to implement their rights to natural justice and fairness through the appeal process.

Findings

The location of the subject lands, while not an issue in this jurisdictional motion, may serve some assistance to gaining one's bearing in this matter. The lands along the nearby portion of Bin-Scarth Road, Glen Road and Beaumont Road in this vicinity abut a ravine which joins the larger Don Valley complex. The roads form a broad based "U" configuration, and lots and homes are found along all three roads. The Russell lands are located at the inner portion of those lands. Effectively, that same valley forms a "V" on the inside as it is at the point in the "V" where a very large piece of land owned by Mr. Russell is located. No fewer than twelve properties abut the Russell lot, with a further six located along the corners of the various roads, being at the far reaches of the bottom part of the "U" described.

Only two structures shown on Map 2, found in Exhibit 7, Tab 2, are partially located within the regulatory fill line and a third is almost wholly within the fill line.

Reasonable Expectation

Two somewhat conflicting affidavits were filed setting out what allegedly took place both prior to and during the hearing before the Executive. Where there is no opportunity to cross-examine on the contents of the affidavits, their inclusion can be problematic. The tribunal chose to not convene a proceeding in this case, as it is not charged with conducting a judicial review of the proceeding before the Executive, either in this jurisdictional motion or in a full-fledged appeal.

Also, concerning the reasonable expectation argument raised on behalf of the McFadyen Group, it is not for the tribunal to comment on whether their involvement in the proceedings before the Executive was proper. Such propriety would be a question for judicial review, which is beyond the jurisdiction of the tribunal in this or any other proceedings. However, involvement at that level, should there be no entitlement at law for such involvement, would not give rise to rights of appeal which do not otherwise exist.

Interpretation

It does not appear that an applicant must notify neighbours or the municipality of intention to make an application, nor does it appeal that the conservation authority seeks representations from such others before determining whether permission will or will not be granted.

Examination of the hearing scheme found in section 28 of the **Conservation Authorities Act** indicates that there is no right or requirement that a hearing be held where it is anticipated that permission without conditions will be forthcoming. The granting of permission, where staff and an authority, or its executive, are in accord, is no more than an administrative act. In such circumstances, no one, not the municipality, not interested neighbours and not even the applicants themselves, have a right to a hearing. This is true even in the situation where the only opposition to an application is from neighbours and the municipality. The applicant, in such a case, cannot demand a hearing for purposes of public airing of the issues. This fact is of central importance when considering the role outside opposition to an application plays in such proceedings, including whether there is a right of appeal in others.

The **SPPA** affords parties a hearing that is open to the public, but this does not include a right of participation to the public.

This absence of rights afforded to outsiders to a hearing continues under the **Conservation Authorities Act** in those cases where a hearing is to be held. The provisions of subsections 28(12) through (15) speak directly and clearly to the issue of who may appeal a decision. From the outset, pursuant to subsection (12), the only person who has the right to require a hearing is the person seeking permission. There is no parallel structure in the drafting of this provision which lends itself to the type of alternative interpretation advanced for subsection (15).

Subsection (14), speaks clearly to the issue of who has rights in a proceeding. It is "the person who requested permission" who is entitled to receive written reasons for a decision to refuse permission or grant permission with conditions.

It would be well outside of the plain and ordinary meaning to find, in subsection (15) that "a person who has been refused" should be a different individual from "[a person] who objects to conditions imposed". The parallel structure found throughout these provisions provides support for this limited, but grammatically accurate interpretation of the rights to appeal.

The case law and books on administrative law are clear on this issue. In Sara Blake, *Administrative Law In Canada (2nd ed.)*(Toronto: Butterworths, 1997) states at page131:

> Any right to appeal a tribunal's decision must be found in the statute governing that tribunal. If none is found, the tribunal's decisions cannot be appealed.[1]…

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[1] *Nfld. Transport Ltd. v. Nfld.(Public Utilities Board)*(1983), 45 Nfld. & P.E.I.R. 76 at 78 (Nfld. C.A.).

> Who may appeal a tribunal decision? This question is often answered by the statute that grants the right of appeal. It may state that "the parties" may appeal. This means that anyone who was a party to the proceeding before the tribunal may appeal the tribunal's decision. *Some statutes state that any person "adversely affected" or "aggrieved" by the tribunal's decision may appeal.* [emphasis added] Such a provision permits appeals by persons who were not parties before the tribunal, but who can show adverse effect. A "person" aggrieved" is a person against whom a decision has been pronounced where the decision has wrongfully deprived that person

In David Jones & Anne DeVilliars, *Principles of Administrative Law (2nd ed.)* (Toronto: Carswell, 1994) at page 441:

> First, the legislature may have provided a specific method of appealing the action or decision taken by its delegate in first instance. In general, the right of appeal does not derive from the common law, but must be expressly provided for by statute. As a result, the legislation in question will determine to whom the appeal lies, the procedure that must be followed and the scope of the appeal.

It is role of a conservation authority to protect the public interest, including such concerns as may have an impact on neighbouring properties, when considering an application for development. In an application involving potential flood prone lands, one of the tests imposed on an application is that it must cause no upstream or downstream increases in flood line elevations. Owners of neighbouring properties along a watercourse within the regulatory flood line elevation are not made parties to an application or appeal. The authority itself is entrusted with the responsibility of being satisfied that no adverse impact will occur. The type of expertise found on staff supports this responsibility.

In the initial letter filed on behalf of the McFadyen Group, reference is made at the bottom of page two to the TRCA staff evaluation of the proposal from the perspective of an infill project. Similarly, at the bottom of page three, reference is made to the deficiencies found by staff in the environmental report. This reliance on staff expertise in attempting to launch an appeal in this matter underscores the fundamental structure of the application process contemplated by the legislation. Would TRCA staff be relied upon by the McFadyen Group in support of their position? Would staff be required to give evidence as hostile witnesses? Whose written reports would be filed in support of the appeal and how would the McFadyen Group ensure that they are produced and filed? Such a proceeding is clearly not contemplated by the legislation.

Purposive Approach

This approach to legal interpretation would see the tribunal, in this case, look beyond the meaning found in the immediate provisions found in the legislation for the reasons it was enacted. Generally, this is understood to mean a reading of the **Act** as a whole, rather than the insular sections. It is in this context that the objects found in section 20 of the **Conservation Authorities Act** were raised, namely of programs to further the conservation, restoration, development and management of natural resources.

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The TRCA has developed a program concerning the natural resource found in the subject lands, namely that of the Valley and Stream Corridor Management Program. The tribunal fails to see how a purposive analysis of the legislation could give rise to a right of appeal not found in the statute. As discussed above, what the McFadyen Group is seeking to do is either latch on to the statutory role played by the TRCA or to suggest that the TRCA failed in carrying out that role.

The legislation provides for the right to require a hearing where it is anticipated that permission will be refused or provided with conditions. The legislation does not delve into the situation where a conservation authority or its executive disagrees with the recommendations of its staff, nor with what takes place beforehand. By this is meant, is it the recommendations of staff which will trigger the right to a hearing or is the conservation authority/executive consulted, thus indicated a pre-disposition to refusal or permission with conditions? None of this is clear. However, what is clear is that the authority for making the final decision rests with the authority or executive and not its staff.

Extrinsic aids, although certainly not used to replace examination of the legislation itself, have come to play an increasing role in legislative interpretation [see Chapter 18, Ruth Sullivan, *Driedger on the Construction of Statutes, 3rd Ed.,*(Markham: Butterworths Canada Ltd., 1994), commencing on page 427.] However, *Hansard* is recognized as a viable source for establishing purpose [*Driedger, supra*, at page 50].

The appeal provision first appeared in the **Conservation Authorities Act** in 1973, c. 98, s. 8, whereby what was to become clauses 28(1)(b), (e) and (f) [now 28(1)(b) and (c), as subsequently amended] were amended to add the words "or requiring the permission of the authority for". As was explained by Hon. Mr. Bernier, Minister of Natural Resources at the time, in Legislature of Ontario Debates (*Hansard*), for October 9, 1973, on 4098:

> Fifthly, conservation authorities have the power to make regulations restricting and regulating the use of water and prohibiting and regulating the construction of buildings in flood plains and the dumping of fill. We are not broadening this power under this bill but are merely clarifying the right of the conservation authorities to make the regulations which they have made for many years, requiring the obtaining of permits under their regulations.

And at page 4111:

> It is pointed out to me that the hearings are statutory powers of decision and of course come under the Statutory Powers Procedures Act [*sic*]. But I would point out to the member, that if the conservation authority is, of course, going to refuse permission, then they have the obligation now to hold a hearing and to have that individual there and to explain to him their reasons of refusal. If that refusal is there, then that applicant has the right of appeal to the minister, which I think is the right course of action.

What is interesting to note about the *Hansard* transcripts is the historical reference of what took place with the Hamilton District Conservation Authority or Hamilton-Wentworth Conservation Authority [the Honourable Members differ in their references to the name] which gave rise to the drafting of the right of appeal. This discussion is found in the October 9, 1973 *Hansard* speech of Mr. R. Gisborn, the Honourable Member from Hamilton East, commencing at page 4099. Without reproducing the entire transcript, essentially what had taken place was that there was growing concern regarding the amount of landfill being placed in Hamilton Harbour. This was being carried out by the Hamilton Harbour Commission and two private interests, the Dominion Foundries and the Steel Co. of Canada. It was determined by the conservation authority, pursuant to regulations referred to in the speech above, that the filling of the harbour should cease. While the public record may be located elsewhere, the speech in *Hansard* merely refers to the Minister of Natural Resources having reversed the decision of the conservation authority.

There was debate reflected in the transcript as to whether the decision-making powers should reside with the conservation authorities or rest with the Minister [or see an appeal to Cabinet, for that matter]. The outcome was to allow the bill to pass as drafted with an appeal to the Minister of Natural Resources. Over time, the authorities, powers and duties of the Minister were permanently assigned to the tribunal through regulation by the Lieutenant Governor in Council.

The issue of how an assignment of a Minister's powers to adjudicate an appeal might differ from a delegated power of a Minister has never been explored in this forum. However, a Minister cannot, much like a court cannot, create a right of appeal which does not appear in statute, that much is clear.

The tribunal finds that the purposive approach to interpretation of the legislation does not have the result desired by the McFadyen Group. The legislative drafting is sufficiently specific, narrow and crafted with parallel provisions that there can be no mistake as to its meaning. To suggest that there should be a right in others to second guess the manner in which a conservation authority executes its role in relation to applications is beyond what is contemplated by a purposive interpretation. The purpose as found in the objects provides for the responsibilities of the authorities themselves, not for third parties claiming an interest. Either the conservation authority has a role to carry out or it does not. It does not need coaching from the sidelines.

Had the statutory power of decision been retained in the Ministry, as was at least alluded to in the *Hansard* debates, it is possible that a decision would have been classified as an "instrument" within the meaning of the **Environmental Bill of Rights**. However, that legislation only applies to decisions of ministries and not of conservation authorities. Had the legislature intended to provide third party rights, it could have raised that possibility in relation to that statute.

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Bye Decision Distinguished

The issue which involved the City of Peterborough in the *Bye* case was the unilateral classification of privately and publicly held lands as wetlands by the Ministry of Natural Resources, which classification was relied upon, in part, by the Otonabee Region Conservation Authority in disallowing the Bye application. The City of Peterborough took no position on the issue before the tribunal, namely the approval of the application itself. Instead, it sought to raise questions concerning the imposition of a classification system which provided no notice, and for which a considerable portion of lands under its auspices were affected. The City sought to raise this very real concern before the tribunal to ensure that it made an informed decision and sought to satisfy itself that the classification was warranted before unilaterally applying the purportedly applicable wetlands classification.

Costs

Mr. Inglis has sought costs against the McFadyen Group to be awarded to his client. The tribunal finds that it will entertain submissions on the issue of costs.

Conclusions

There is no right of appeal in a third party in relation to decisions made by conservation authorities pursuant to subsection 28(13) of the **Conservation Authorities Act**.

Accordingly, the McFadyen Group does not have a right to appeal the Resolution of the Executive of the TRCA in relation to the Russell property.

The parties will be ordered to make submissions on the issue of whether costs should be awarded to Mr. Russell by the McFadyen Group.