File No. CA 007-95

L. Kamerman	)	Thursday, the 13th day
Mining and Lands Commissioner	)	of November, 1997.

THE CONSERVATION AUTHORITIES ACT

IN THE MATTER OF

An appeal to the Minister under subsection 28(5) of the **Conservation Authorities Act** against the refusal to grant permission for the construction of a new residential development on Lots 7 and 8, R.P. 1224, Part Lot 71, G.C.T., Tallwood Drive, West Montrose.

B E T W E E N:

BILL CHALMERS

Appellant

- and -

GRAND RIVER CONSERVATION AUTHORITY

Respondent

O R D E R

WHEREAS an Order was issued by this tribunal on the 25th day of April, 1997, wherein it was directed that the parties or their representatives make submissions as to costs on account of the hearing of the merits;

AND WHEREAS on the 26th day of May, 1997, Mr. John Olah, counsel for the Respondent, the Grand River Conservation Authority, requested an opportunity to file documentation on the issue of costs;

AND WHEREAS on the 17th day of July, 1997, Mr. Olah filed the submissions of the Respondent;

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AND WHEREAS on the 11th day of August, 1997, Mr. Alan R. Patton, counsel for the Appellant, filed his response;

AND WHEREAS on the 25th day of August, 1997, Mr. Olah filed his response;

1. THIS TRIBUNAL ORDERS that the appellant pay to the respondent costs fixed in the amount of $4,000, on account of unnecessary delay and improper adjournments for the period leading up to the actual hearing of the appeal.

2. THIS TRIBUNAL FURTHER ORDERS that the application of the respondent as to an award of costs for the period following the pre-hearing conference up to the completion of the hearing of the appeal is hereby dismissed.

Reasons for this Order are attached.

DATED this 13th day of November, 1997.

Original signed by L. Kamerman

L. Kamerman
MINING AND LANDS COMMISSIONER

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B E T W E E N:

BILL CHALMERS

Appellant

- and -

GRAND RIVER CONSERVATION AUTHORITY

Respondent

REASONS

SUBMISSIONS REGARDING COSTS

of the Grand River Conservation Authority (July 17, 1997)

1. On April 25, 1997, the Mining and Lands Commissioner released reasons for the dismissal of Mr. Chalmers' appeal in this matter. A four day hearing took place in this matter, on January 28, 29, and 30, 1997 and on February 6, 1997.

2. The Respondent, Grand River Conservation Authority, hereinafter "GRCA" has brought this motion in support of an Order awarding it its costs of this appeal. GRCA is seeking a lump sum costs award of $25,000.00 from the Appellant. This sum includes legal fees incurred and disbursements paid, including expert witness fees, after May 13, 1996, (when it

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should have been clear to the Appellant that he was unlikely to succeed) and a minimal amount for the time and expenses incurred by GRCA staff. A detailed breakdown is included herein.

3. This sum of $25,000.00 represents a request by GRCA for the equivalent of solicitor and client costs from May 13, 1996, to the conclusion of the appeal.

Jurisdiction

4. The Commissioner in her reasons as page 56, sets out that ss.126 and 127 of Part IV of the *Mining Act*, grant the jurisdiction for a costs award to be made, because Part IV applies with modifications to the *Ministry of Natural Resources Act*. She queries, however, whether or not a costs award is appropriate, where the Appellant is specifically permitted by legislation to bring such an appeal to the Minister.

5. Sections 126 and 127 of Part IV of the *Mining Act* state:

> "126. The Commissioner may in his or her discretion award costs to any party, and may direct that such costs be assessed by an assessment officer or may order that a lump sum be paid in lieu of assessed costs.
>
> 127. (1) The costs and disbursements payable upon proceedings before the Commissioner shall be according to the tariff of the Ontario Court (General Division).
>
> (2) The Commissioner has the same powers as an assessment officer of the Ontario Court (General Division) with respect to counsel fees.

It is respectfully submitted that these sections give the Commissioner the discretion to impose costs in the appropriate case. These sections form part of the powers that are given to the Commissioner in dealing with appeals under the *Conversation Authority Act*.

6. It is submitted that the question of whether or not the Mining and Lands Commissioner has the jurisdiction to award costs to a successful Conservation Authority responding to an appeal, was settled in the decision of *Vanden Brink v. Niagara Peninsula Conservation Authority*.

> *Vanden Brink v. Niagara Peninsula Conservation Authority* March 10, 1992, Order on Motion for Costs, unreported.

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7. In *Vanden Brink*, Deputy Mining and Lands Commissioner Yurkow reviewed the decisions of *Credit Mountain Land Co. Ltd. and Credit Valley Conservation Authority*, *Re Drover et al and Grand River Conservation Authority,* and *Yorkville North Development Ltd. and The Central Lake Ontario Conservation Authority* and concluded that it is "settled law that this Tribunal has the discretion to award costs on appeals from conservation authorities."

> *Credit Mountain Land Co. Ltd. and Credit Valley Conservation Authority* December 19, 1978, unpublished.
> *Re Drover et al and Grand River Conservation Authority* 62 O.R. (2d) 141.
> *Yorkville North Development Ltd. and The Central Lake Ontario Conservation Authority* May 25, 1990, unpublished.

8. It is submitted that the fact that the right to an appeal is statutorily mandated, is not a bar to an award of costs, particularly when the appeal brought is clearly frivolous, vexatious and without merit. The Appellant still had to exercise a choice in deciding whether or not to launch such an appeal, when the entire circumstances of the matter had been reviewed.

9. It is further submitted that the fact that a conservation authority receives public funding does not make it ineligible for a costs award. Costs awards to a municipality or public agency should be considered on a case by case basis.

> *Re Regional Municipality of Durham P1 Contingency Landfill Site Cost Application* (1991), 25 O.M.B.R. 385.
> *Enterac v. Niagara Escarpment Commission et al* (1990), 25 O.M.B.R. 154.

Factors Governing Discretion

10. In the decision of the Ontario Municipal Board in *Re Regional Municipality of Durham Official Plan Amendment 147*, the Board awarded costs against an applicant-citizen whose opposition to the amendments sought was unmeritorious and whose conduct prolonged the hearing process. At p. 504, the Board commented:

> "When an informed citizen begins the appeal process, the board is entitled to conclude that the Appellant has considered the following matters, namely

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-the merit of the appeal
-the evidence to be called
-the chance of success
-the expense that will have to be carried by both sides in terms of time and money
-the risk of costs if the appeal is unsuccessful"

Re Regional Municipality of Durham Official Plan Amendment 147, (1987), 20 O.M.B.R. 493 at 504.

11. It is submitted that the comments of the Ontario Municipal Board are equally applicable to the Mining and Lands Commission, when this Tribunal is exercising its discretion on the issue of costs.

12. The Ontario Municipal Board further stated in its reasons in *Re Regional Municipality of Durham Official Plan Amendment 147*, that it could not conceive of an "informed person" (in this case Mr. Chalmers was represented by a highly knowledgeable agent who was experienced in appearing before the Ontario Municipal Board) being unaware of the possibility of costs if an unsuccessful court action was undertaken, and it then applies this to an appellant before a board:

> "An appellant before the board, having been through the whole process to date, would be aware of the tremendous expense that would have to be incurred to get this appeal completed."

Re Regional Municipality of Durham Official Plan Amendment 147, supra, p.504.

13. While the purpose of a costs award should not be to deter other potential appellants from commencing proceedings, it is submitted there should be a serious sanction imposed, when there are exceptional circumstances to justify it. The unreasonable, frivolous and vexatious nature of the appeal and unduly protracting an appeal are such exceptional circumstances.

14. In *Re Township of Scugog Zoning Bylaw 23-89 (No. 2)*, the Ontario Municipal Board reviewed its guidelines for the award of costs. It stated that the first guideline for the exercise of costs discretion, is whether or not the conduct or course of conduct is found to be "clearly unreasonable, frivolous or vexatious having regard to all of the circumstances."

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Re Township of Scugog Zoning Bylaw 23-89 (No. 2), (1991), 24 O.M.B.R. 240 at 241.

15. The Board then stated that if the conduct is not frivolous or vexatious, the "reasonable man" test should be applied:

> "The test is: would a reasonable person, having looked at all of the circumstances of the case, the conduct or course of conduct of a party proven at the hearing, and the extent of his or her familiarity with the Board's procedure, exclaim `that's not right; that's not fair; that person ought to be obligated to another in some way for that kind of conduct'. "
>
> *Re Township of Scugog Zoning Bylaw 23-89 (No. 2)*, (1991), 24 O.M.B.R. 240 at 241.

16. It is submitted that the Mining and Lands Commission should adopt the approach taken by the Ontario Municipal Board with respect to costs.

Circumstances justifying costs award

17. In this case, the appeal under s.28(5) of the *Conservation Authorities Act*, was commenced on August 2, 1995. GRCA submits that the conduct of the Appellant throughout caused delay and further public expense, and that the actual hearing lasted much longer than necessary because of the conduct of the Appellant's agent.

18. The Mining and Lands Commissioner ordered on November 22, 1995 that GRCA file all of its documentation on or before January 5, 1996. Counsel for GRCA by correspondence dated November 22, 1995, requested necessary documentation from the Appellant, including a diskette of all HEC-2 runs performed by Totten Sims Hubicki Associates and information regarding Cross-section 144.5. The diskette was received by GRCA on January 4, 1996, necessitating an extension of the Commissioner's order.

19. On January 19, 1996, the Appellant's agent finally forwarded a map of the cross-section after repeated requests. Requests for information regarding expert and lay witnesses were finally responded to by letter on February 5, 1996.

20. GRCA submitted its documents to the Commissioner on April 30, 1996. A Pre-

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Hearing Conference was held on-site with the Appellant and the Deputy Mining and Lands Commissioner on May 13, 1996. At that meeting, the Deputy Commissioner "off the record" strongly suggested to the Appellant that he drop his appeal and consider other options with GRCA.

No response was made to this, and the Appellant informed GRCA in August of 1996 that he wished to proceed with the appeal.

21. GRCA submits that it was unreasonable of the Appellant, after having been advised by the Deputy Commissioner that he was unlikely to win the appeal, to proceed. After having been advised of the likelihood of success of his appeal, the Appellant should have been aware of the possibility of costs sanctions if he was unsuccessful.

22. The hearing was originally scheduled for November 5 and 6, 1996. One week prior to the hearing, a request for an adjournment of the hearing was made by a solicitor who allegedly had just been retained by the Appellant. The reason for the adjournment was Mr. Haley's unavailability. He had committed himself to another hearing despite knowing of the date that had been fixed in this matter. A request for an adjournment by Mr. Haley had already been denied by The Commissioner. The hearing was adjourned solely to accommodate the new counsel until January 28 and 29, 1997, but the solicitor was not retained for the hearing, and Mr. Haley handled it. It is the GRCA's respectful submission that this request by the solicitor was arranged to obtain the adjournment that had been denied to Mr. Haley.

23. The hearing itself, although originally scheduled for two days, lasted four days, due, in the Respondent's submission, primarily to the conduct of the Appellant's agent in handling the hearing. It is submitted that Mr. Haley's questioning was prolix and often touching on irrelevant matters, matters regarding planning issues rather than floodplain management issues and related and relevant matters. It is respectfully submitted that in fact the primary thrust of the Appellant's appeal was predicated on planning issues and not matters relevant to considerations under the *Conservation Authorities Act*.

24. As commented by Deputy Commissioner Yurkow in *Vanden Brink v. Niagara Peninsula Conservation Authority*, at p.6:

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> "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."
>
> *Vanden Brink v. Niagara Peninsula Conservation Authority*, supra.

25. GRCA submits that there are exceptional circumstances that justify an award of costs in this situation. The Appellant was advised early in the process that his appeal had little chance of success, and he chose to proceed in any event. Mr. Chalmers was present at the Pre-Hearing Conference. He knew from that hearing that his chances of success at a full hearing were minimal. He knew or should have known that determinative issues would be floodplain management principles, not planning policies. The Appellant should not now be allowed to avoid the costs consequences of this decision.

Costs incurred by the GRCA

26. GRCA states that its total costs incurred on this appeal are approximately $54,762.74 including legal fees spent, and the costs of the Conservation Authority witnesses and experts. GRCA states that $30,008.58 of this amount was incurred subsequent to the site meeting of May 13, 1996, at which the Appellant was advised that his appeal was unlikely to succeed.

27. The costs incurred by GRCA are broken down as follows:

Staff Time - preparation of background material, witness statements, presentation material, attendance at meetings, site pre-hearing meeting with Deputy Commissioner and attendance on four day hearing.

Elizabeth Caston	29.9 days @ $186.40 per day	$ 5,573.36
Gus Rungis	25.6 days @ $191.37 per day	$ 4,899.07
Lorrie Minshall	6 days @ $245.45 per day	$ 1,472.70
	TOTAL	**$11,945.13**

Legal Costs - services of John A. Olah, Beard, Winter for meetings with staff, preparation for hearing, attendance at pre-hearing conference with Deputy Commissioner and full hearing, communication with appellant and Commissioner's office, submissions at hearing.

TOTAL	**$30,638.62**

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Expert Witness - retainer of Ivan Lorant, Dillon Consulting Ltd., preparation of witness statement, attendance at meetings and hearing.

TOTAL $ 9,827.02

Other Expenses - disbursements for supplies for preparation of submissions and presentation, travel mileage and meal, hotel allowance.

TOTAL $ 2,351.97

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FINAL TOTAL: $54,762.74

28. Subsequent to the pre-hearing meeting with the Deputy Commissioner on May 13, 1996, at which the Appellant was strongly advised as to lack of merit in his appeal, a total expenditure of $30,008.58 was made by GRCA. Had the Appellant not pursued his appeal after May 13, 1997, GRCA would not have had to incur the further expenditures.

29. Of the amounts expended after the May 13, 1996 meeting, legal fees and disbursements of $18,768.73 were incurred, as well as further expert fees of $3,025.50.

30. The lump sum of $25,000.00 requested is reasonable, it is submitted, because prior to May 13, 1996, GRCA incurred $6,801.52 in expert fees over and above its legal fees and disbursements paid to its counsel. GRCA will remain out of pocket for its own staff time as well as for a portion of its legal fees, disbursements and expert fees, even if awarded the lump sum of $25,000.

Lump Sum v. Assessment

31. It is submitted that it is preferable that the Commissioner fix costs in a lump sum amount rather than ordering an assessment. Deputy Commissioner Yurkow noted in *Vanden Brink v. Niagara Peninsula Conservation Authority*, that although the Tribunal has both the options of assessment and lump sum awards for costs, he preferred a lump sum award for costs. At p. 7, he stated:

> "My preference has been to make lump sum awards only. This preference was expressed in *Yzerdraat v. Buchanan Forest Products Ltd.* Assessing costs increases the legal costs to all parties. Having in mind that one purpose of an

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> administrative tribunal is to reduce costs, it seems that the less expensive route of awarding lump sum payments, is, usually, the desirable one."
>
> *Vanden Brink v. Niagara Peninsula Conservation Authority*, supra.

32. It is submitted that this is a case where the Appellant had been made fully cognizant of the risks and of his chances of success. In such a situation, it is unfair to GRCA and unreasonable, that the Appellant should not have to bear some portion of the costs that he forced the Authority to incur. A properly informed litigant in an administrative setting, it is submitted, should have known that costs would be one of the risks borne when choosing to proceed.

33. It is submitted that a reasonable person, advised of all of the facts of this case, would consider it "unfair" or "not right" that the Appellant not be obligated to bear some of GRCA's costs of this appeal.

34. It is further submitted that there must be some mechanism for discouraging unmeritorious appeals. Otherwise, wealthy litigants or litigants with unmeritorious cases can force a conservation authority to capitulate to such appeals, because the authority does not have the resources to contest such appeals. In these times of shrinking agency budgets and the reduction of government resources being allocated to public agencies, the citizens of this province should not suffer by having resources dedicated to their well-being slashed because the Authorities have to spend their scarce resources contesting unmeritorious appeals.

35. Furthermore, it is submitted that in cases such as this, where the Appellant's motive was to profit by having floodplain lands with minimal value redesignated as land capable of development, costs awards should be strongly considered. If the Appellant had been successful, he stood to substantially increase the value of his land holdings. Essentially, the Appellant gambled that he could win the appeal and make a major financial gain. He lost his gamble. It is submitted that he should be responsible for the risks involved in his gamble.

Order Requested

36. It is requested that GRCA be awarded its costs of this appeal in a lump sum amount of $25,000.

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SUBMISSIONS REGARDING COSTS

by Alan R. Patton on behalf of Bill Chalmers, Appellant

(August 18, 1997)

1. On April 25, 1997, the Mining and Lands Commissioner (the "tribunal") ordered that the appeal of Bill Chalmers (the "Appellant") from a refusal to grant permission for the placement of fill and construction of a new residential development in the Township of Woolwich, be dismissed.

2. A hearing was held on the matter on January 28, 29, and 30, 1997 and continued on February 6, 1997. The representatives for the Appellant included an expert land use planner who acted as agent for the Appellant and the Appellant himself.

3. A motion in support of an Order awarding costs of the appeal has been brought by the Respondent. The Appellant respectfully submits that this is not an appropriate case for an award of costs.

JURISDICTION

4. The Appellant does not dispute the jurisdiction of the Mining and Lands Commissioner to award costs. However, it is clear from previous decisions of the tribunal that the power to award costs should be exercised only in limited circumstances.

5. The current case is an appeal by a member of the public from a decision of a publicly funded body. The fact that the right to appeal is statutorily mandated is not a bar to an award of costs. There is no requirement for leave to appeal to be granted prior to the filing of an appeal. An appellant has a statutory right to bring an appeal without a threat of costs, which

threat may be used to silence legitimate causes and discourage genuine appeals that oppose the wishes of the stronger and publicly funded party.

6. In an application for the award of costs, the onus or burden of proof lies with the party seeking costs. The tribunal must be satisfied, on a balance of probabilities, that a party is entitled to costs, and the amount of the costs claimed must be justified by the party.

Re Regional Municipality of Durham P1 Contingency Landfill Site Cost Application, (1991), 25 O.M.B.R. at 386. Tab 7, Respondent's Book of Authorities

WHEN COSTS TO BE AWARDED

7. In cases where the conduct of a party to a proceeding is found to be clearly unreasonable, frivolous, or vexatious, the tribunal may exercise its power to award costs.

8. The Appellant had the onus of convincing the tribunal that the decision being appealed from, and made by the Respondent, was wrong. If it is the Respondent's position that the Appellant's case was clearly frivolous, vexatious or without merit, the Respondent should have moved for a "non-suit" to dismiss the appeal at the completion of the Appellant's submission of evidence in chief before the tribunal. Dismissal of the motion for a non-suit would not have prevented the Respondent from calling evidence in support of its position.

Enterac v. Niagara Escarpment Commission (1990), 25 O.M.B.R. 154

9. The subject of the hearing, a proposed residential development involving the creation of two new building lots and the placement of fill, clearly required the expertise of the tribunal for the fair and proper determination of legitimate floodplain management issues that were important and relevant to both parties to the proceeding, including a determination of the broader issue of precedence pleaded by the Respondent.

10. The Applicant retained an expert to act as his representative at the hearing. The Applicant's representative was knowledgeable, well prepared, and assisted the tribunal by providing fair and accurate evidence and submissions.

11. Paragraph 23 of the Respondent's Submissions Regarding Costs claims that the questions asked by the Appellant's Agent were "prolix and often touching on irrelevant matters...". It is

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respectfully submitted that the tribunal's reasons do not support this submission. It was recognized in the written reasons of the tribunal that seven (7) relevant and proper issues were before it for consideration and determination and in direct response to the issues raised by the Appellant the Respondent decided that it required four expert witnesses to substantiate its position before the tribunal, including viva voce evidence.

Re: Chalmers v. Grand River Conservation Authority (1997)

Reasons of L. Kamerman, Mining and Lands Commissioner, p.4, p.5

12. The Appellant and his representative acted responsibly, fairly, and in a conscientious manner throughout the appeal hearing. Reference has been made by the Respondent to the decision of the Ontario Municipal Board in *Re Regional Municipality of Durham Official Plan Amendment 147 (1987),* in which the Board awarded costs against an appellant (Mr. Reid). Mr. Reid received both repeated guidance and admonishments from the chairman but refused to accept it. Mr. Reid, among other things, appeared to the Board to be like "a person jousting with a windmill merely because it appeared to be in his path". The Board found that Mr. Reid wasted its time, was not prepared, and did not know how that level of hearing was conducted. This case is clearly and obviously distinguishable from the present case. No such finding was made by the tribunal in the present case. It was conceded by the Respondent in Paragraph 12 of its Submissions Regarding Costs that "..Mr. Chalmers was represented by a highly knowledgeable agent who was experienced in appearing before the Ontario Municipal Board". The Appellant and his agent were well informed, prepared, and there was no indication from the tribunal that it was not satisfied with the conduct of the Appellant and his representative.

13. The Appellant understood and carefully considered the position of the Conservation Authority. Accordingly, the plans for the proposed development included suitable flood prevention measures to alleviate concerns expressed by the Respondent.

14. The Appellant and his representative were at all times co-operative with and responsive to both the tribunal and the Respondent.

15. The Appellant had formed a sound and reasonable expectation that based upon available evidence, past development approvals and past conduct, that subject to conditions, permission was possible in all of the circumstances.

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16. The Appellant was born in West Montrose and has spent most of his life living and working in the area he proposed to develop. Having been in the field of construction for 24 years, the Appellant has built 40 new homes. There is nothing unreasonable, frivolous or vexatious about the desire of an Appellant to continue to improve his land and use his expertise to create two lots and erect a home for his retirement; especially when the Appellant has anticipated and is willing to devise appropriate flood control measures and place protective restrictive covenants on the subject lands.

17. The Appellant retained professionals to prepare a report on the proposed development. The Totten Simms Hubicki report, marked as Exhibit 2, Tab Exhibit C by the tribunal, was relied upon bona fides by the Appellant and his agent.

18. It is clear from the evidence that the Respondent had failed to pursue land use planning measures available to it under the Planning Act to place restrictions on the subject lands through the local Official Plan or Zoning By-law.

19. The Appellant, acting as a reasonable person, looked at all of the relevant circumstances of the case and made an informed decision to bring the appeal before the tribunal. The appeal was reasonable, had merit, and was not brought for any improper purpose whatsoever. No action of the Appellant resulted in prejudice to the statutory responsibilities of the Respondent.

20. With the exception of the case cited as *Vanden Brink v. Niagara Peninsula Conservation Authority (1991),* costs have not been awarded to Conservation Authorities in the 1990's. In the case of *Dick v. Ausable Bayfield Conservation Authority (1995),* costs were awarded against the Conservation Authority in favor of the Appellants. Before 1990, costs were considered in the case of *Ihnat v. The Central Lake Ontario Conservation Authority (1979),* but were not awarded. Costs were awarded to a Conservation Authority in *Credit Mountain Land Co. Limited v. Credit Valley Conservation Authority (1978).*

21. The facts of the cases in which costs have been awarded to a Conservation Authority, *Vanden Brink (1991) and Credit Mountain (1978),* are clearly distinguishable from the present case. In *Vanden Brink,* the Appellants built a house in a flood plain control area, even after a violation notice was posted. The Appellants in that case attempted to deceive the tribunal by claiming that they had no knowledge the land on which they built was regulated by the Conservation 14

Authority. The conduct of those appellants, throughout the hearing, was found to be "disreputable". Not only did the tribunal find that the issue of knowledge had no merit, but that reliance on that issue unnecessarily prolonged the hearing and put the Conservation Authority to considerable extra expense. In *Credit Mountain (1978),* an appeal was brought after a revised application had been submitted. The appeal was flawed by significant inconsistency, the Appellant had accepted the permission initially offered by the Respondent, and despite being notified before the commencement of the hearing that costs would be requested against it, the Appellant proceeded regardless. In the present case, the Respondent asserts that the Appellant should have known as early as May, 1996 that the appeal would not be successful. From Paragraph 21 of the Respondent's Submissions Regarding Costs it is reasonably clear that the Respondent formed the intent to seek costs following the Pre-Hearing Conference in 1996. It was therefore fair and incumbent on the Respondent to advise the Appellant and the tribunal, either prior to or at the outset of the hearing, that it would be seeking costs.

22. The Ontario Municipal Board and this tribunal follow the same general principle: costs will not be awarded if there is a genuine dispute and the parties have acted reasonably.

23. As stated by Deputy Commissioner Yurkow in *Vanden Brink,* at p.5:

> "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."

24. An exception to the general principle of not awarding costs only arises when there has been an abuse of process in that the appeal turns out to have been essentially frivolous, or when unreasonable acts have prolonged a hearing or caused unnecessary expense.

Vanden Brink (1991), p.6, supra.

25. The Appellant submits that the exceptional circumstances required to justify an award of costs clearly do not exist in the present case. The decision to proceed with an appeal was informed and only made after considerable time, money and effort was expended to address the issues surrounding floodplain management. There has been no unfairness or injustice to the Respondent and the Appellant had a reasonable case on the merits. The hearing was not prolonged and unnecessary expense was not incurred. The Appellant was represented throughout the hearing and both the Appellant and his representative presented evidence useful to the

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determination of the issues before the tribunal.

26. It is completely irrelevant to the proper determination of costs that the Appellant may receive a financial benefit if the appeal is allowed.

27. As a matter of fairness, if the Respondent is of the position that costs should be payable from May 13, 1996, being the date "when it should have been clear to the Appellant that he was unlikely to succeed" (Paragraph 2, Respondents Submissions Regarding Costs), then the Respondent should have advised both the Appellant and the tribunal at the outset of the appeal hearing on January 28, 1997, that based upon the pre-hearing disclosure and conduct of the Appellant from May 13, 1996 to January 28, 1997, that the Respondent would be seeking costs.

> *Credit Mountain Land Co. Limited v. Credit Valley Conservation Authority (1978),* at p.10, p.11, p.19, Respondent's Book of Authorities, Tab 4

28. The Respondent has requested costs incurred by the Respondent for "Staff Time" which includes the costs of Elizabeth Caston, Gus Rungis, and Lorrie Minshall. These three witnesses are employees of the Respondent, not outside experts. The Respondent is not entitled to payment from the Appellant for merely performing the normal duties placed upon them of defending policies which the Respondent asserts in the public interest. An appeal hearing on the merits, properly conducted, is also in the public interest.

> *Enterac v. Niagara Escarpment Commission (1990)* 25 O.M.B.R. at 184.

28. The Respondent has requested an award of costs, in a lump sum, pursuant to Sections 126 and 127 of Part IV of the Mining Act. Section 127(1) of the Mining Act states that costs and disbursements payable upon proceedings before the tribunal shall be according to the Tariff of the Ontario Court (General Division). A proper breakdown has not been provided by the Respondent to support its submissions on costs. The Respondent has failed to provide hourly rates, details of the actual work performed, or an itemized list of expenses. The information provided by the Respondent is insufficient to support a lump sum award of costs. If costs are to be awarded by the tribunal, the Appellant respectfully requests that any award of costs be subject to assessment and awarded on a party and party basis.

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BREACH OF CONFIDENTIALITY BY THE RESPONDENT

29. By now deliberately and intentionally referring to statements made during the Pre-Hearing Conference, including those admitted to be "off the record" in paragraphs 20, 21, 25, and 28 of the Respondent's submissions, the Respondent has seriously breached professional obligations to both the Appellant and the Mining and Lands Commission. The failure to maintain the confidentiality of conversations held between the parties and the Deputy Commissioner very seriously prejudices the future purpose and value of Pre-Hearing Conferences. The "off-the-record" and privileged statement does not become part of the record simply as a result of the Mining and Lands Commissioner's decision to dismiss the appeal. Further, the privilege which attaches to the statement was that of the Mining and Lands Commissioner, the Appellant, and the Respondent jointly and the Respondent's unilateral disclosure of such an off-the-record statement should carry with it an immediate disqualification from any claim for costs whatsoever, such conduct of the Respondent itself being vexatious towards the Appellant.

ORDER REQUESTED

30. The Appellant respectfully requests that the tribunal dismiss the Respondent's motion for an award of costs.

REPLY
OF THE GRAND RIVER CONSERVATION AUTHORITY TO THE
SUBMISSIONS REGARDING COSTS
OF THE APPELLANT
(August 22, 1997)

1. The GRCA repeats and relies upon the submissions made in its original costs submissions to the Board. It is submitted that this is an appropriate situation for the award of costs, and that the costs award of $25,000 is reasonable and appropriate in light of all of the circumstances herein.

2. GRCA submits, in response to paragraphs 9 to 18 of the Appellant's submissions, that the issues decided by the Commissioner were straightforward, and clearly in favour of GRCA's position that has remained steadfast throughout this matter.

Discretion as to Costs

3. In response to paragraph 20 of the Appellant's submissions, the GRCA agrees that the Mining and Lands Commission exercises its discretion regarding costs carefully and only in clear cases. The GRCA submits that upon review of all of the circumstances in this case, this is an appropriate case for the award of costs.

4. In response to paragraph 21 of the Appellant's submissions with respect to when GRCA formed the intention to ask for costs, GRCA states that the entire circumstances of the appeal must be reviewed. The delay of the original hearing, the prolonging of the actual hearing, the conduct of the Appellant's agent, combined with the earlier site meeting, are all circumstances that affected the decision of GRCA to request costs.

5. The Commission has made substantial costs awards to a Conservation Authority or other public body when it has determined that the circumstances render it proper. The fact that a Conservation Authority is a publicly funded body that can "afford" to respond to an appeal is no reason to refuse it its costs when an Appellant has acted unreasonably in pursuing a clearly unmeritorious appeal.

Vanden Brink v. Niagara Peninsula Conservation Authority March 10, 1992, Order on Motion for costs, unreported.
Credit Mountain Land Co. v. Credit Valley Conservation Authority December 19, 1978, unreported.
Parres v. Minister of Mines April 4, 1991, unreported.

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6. It is submitted that this Appeal is one where a reasonable person would consider it "unfair" or "not right" that the Appellant not bear some of the risks of the gamble that he took.

Issue of Disclosure of Pre-Hearing Discussions

7. In response to paragraph 29 of the Appellant's submissions, it is submitted that the GRCA's disclosure of the Deputy Mining and Land Commissioner's advice at the site hearing of May 13, 1996, regarding the chances of success is important information for this Commission to consider on this costs motion.

8. It is submitted that the disclosure of the Deputy Mining and Land Commissioner's advice at the pre-hearing is no different than the disclosure of offers to settle and settlement negotiations held throughout a civil trial after judgement in favour of one party. It has long been recognized that review of whether or not offers to settle should have been accepted is an important factor for the final determination of whether or not costs should be awarded, to which party and the quantum thereof.

Rule 49 of the *Rules of Civil Procedure.*

9. The purpose of the Deputy Commissioner's comment being "off the record" was to ensure that the Commissioner hearing the matter would not be unduly influenced in the main decision. Having heard the appeal and made a decision on the merits, there is now no harm in advising the Commission of an earlier opinion made as to the merits, particularly where such opinion has been proven to be correct. The reason for the "privilege" accorded this advice no longer exists.

Rule 49.06 of the *Rules of Civil Procedure.*

10. It is submitted that "an informed person" (which the Appellant and particularly, his agent, were), could not expect to take an expensive appeal to its conclusion, without some costs consequences upon losing, especially after having received advice from a knowledgeable source about the chances of success.

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11. It is submitted that an overall review of this situation leads to the conclusion that the GRCA should be compensated for its costs expended. While its employees were expending a great deal of time, effort and resources on this unmeritorious appeal, other projects were not pursued or had to be delayed. The main goal, however, in these costs submissions, is for GRCA to recoup some of the expert fees and legal fees and expenditures that GRCA has had to incur as a result of this unmeritorious appeal.

12. GRCA states that should the Commission require further documentation in support of a lump sum award, it would provide such documentation.

Order Requested

13. It is requested that GRCA be awarded its costs of this appeal in a lump sum amount of $25,000.

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Findings

It has been settled in previous cases that the tribunal has the statutory authority to award costs in conservation authority appeals (see **Credit Mountain Land Co. Limited v. Credit Valley Conservation Authority** (unreported) December 19, 1978). The issue of when costs should be awarded was discussed in **Vanden Brink v. Niagara Peninsula Conservation Authority** (unreported) March 10, 1992, which contains a discussion of the issue, entitled, "**WHEN COSTS TO BE AWARDED**", which is reproduced below:

> **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 in 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 pricniple 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.
>
> 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[1] 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."
>
> The Commissioner continues on page 11:
>
> > I can think of no more effective a device [the awarding of

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[1] December 19, 1987, unpublished

> 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 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[2], 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 be essentially frivolous.

The Parres principle was followed in aother appeal under the ***Mining Act***, 798839 Ontario Limited v. Minister of Mines and Andre Boudreau[3] 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 in the reasoning of the early decision and award costs to the Ministry to be paid by Boudreau."

Both these cases were referred to with approval in Sheridan v. Minister of Mines[4]

- Unreasonable Acts (prolonging hearing, unnecessary expense)

A function of an administrative tribunal is to serve as part, albeit an

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[2] 7 M.C.C. 2

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

[4] November 18, 1991 (**Mining Act**) unpublished.

> independent part, of the administrative system of government regulatory process. It provides an opporutnity 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 formatliy.
>
> 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.

Discussion

There is a range of preparedness, knowledge and expertise which adjudicators encounter in hearings from parties or their representatives. Added to this is the variability in advocacy styles utilized on behalf of parties. Taken together, there is great unpredictability regarding the tone and tenor of a hearing. Depending on the styles of the opposing advocates, the integration may be seamless, where philosophies and styles are similar or even complementary, or the integration may be full of interruptions, verbal sparring and objections.

Flowing from this, the length of the hearing proper will be impacted by the disparate styles. While the adjudicator can play a role in controlling its process, the individual adjudicator may be loath to impose his or her own preferences and values of how a case might be presented on advocates whose style and beliefs are tied into the manner in which that advocate seeks to preserve his or her client's interests and rights. By way of example, an adjudicator may take the position that, whether or not there are objections, decisions regarding admissibility and weight of evidence will be made based upon the adjudicator's expertise in hearing matters. If followed, this could allow for the presentation of evidence in a free-flowing manner, without interruptions whose effect might be to unsettle the witnesses or the advocate. Nonetheless, it does not necessarily mean that the tribunal has accepted the evidence as presented. In another example, an advocate may object at each phase of evidence, requiring a ruling, which permits the adjudicator to receive evidence which has a more relevant focus, but also ensures that his or her client can see in a very apparent manner, that their interests are being protected.

In this Commissioner's observations, the various advocates who appear before the tribunal have a wide range of strengths and weaknesses. It is not for the tribunal to favour one style over another, nor to impede the presentation of the respective cases. There is but a small

cadre of advocates who are known to the tribunal in the conservation authority or mining fields. Mr. Olah falls into this group. For the most part, however, the advocates are appearing before the tribunal for the first time, and notwithstanding their recognized experience before the courts or other tribunals, there has necessarily been a steep learning curve, particularly where highly technical evidence is concerned. This learning curve has oftentimes been observed during cross-examinations which are lengthy, drawn out and seemingly rambling. However, with few exceptions, the tribunal has observed the creeping understanding enter into the questioning, whereupon there is a change in direction to regain their footing and move on to attempt to gain the necessary admissions or concessions in support of their case.

To the extent that the tribunal has played a role in allowing this lengthy approach to its proceedings to continue, efforts up to now to affect the length of the hearing have been moderately, but not wholly successful. It is clear that this learning curve is not best undertaken during the hearing itself, but would be better undertaken in a less formal, less adversarial setting. Certainly, the pre-hearing conferences have helped to play an educational role, but at least part of their purpose has been to attempt to assist the parties in reaching a compromise or settlement. Where intransigence or immutability is observed, the matter has proceeded rapidly to a hearing on the merits. It would appear that an intermediate step has been overlooked, namely that of meeting with the parties in a neutral manner to discuss the issues substantively, by which is meant not merely to define them in a manner which parallels the wording in the incumbent legislation, but to delve into the actual meaning, with passing discussions regarding the nature of the evidence which the tribunal has historically considered, the type of evidence which the tribunal has disallowed and the associated reasons, along with providing copies of past decisions. This "information conference" might also be enhanced through the attendance of technical experts to summarize evidence and allow for the type of information-seeking questioning which is currently being observed during the hearings proper, particularly during cross-examination.

In this Commissioner's experience of the hearing of conservation authority appeals, appellants and their counsel or representatives have painfully little ready access to prior Commissioner's cases. Furthermore, there are few published decisions of the Commissioner, the notable exeptions being **Drover et al. and the Grand River Conservation Authority** 62 O.R. (2d) 141 and **Hinder v. Metropolitan Toronto and Region Conservation Authority** (1984) 16 O.M.B.R., 401. If this were not enough, the general jurisdiction and issues of these appeals is not the subject matter of reporting services or other publications, such as those which are accessible in the environmental, energy, planning or, to a lesser extent, mining fields.

It is a fact that previous decisions of the Commissioner may be viewed at the tribunal offices as well as the Ministry of Natural Resources Library, which was once located on Sheppard Avenue in the City of North York, but is now located in Peterborough. They have not been widely disseminated, with mailings of all decisions going to all conservation authorities in the province and several interested counsel.

Added to this lack of availability, all cases available in the tribunal office have not been indexed or otherwise entered on some method of electronic search and retrieval, so that any research which might take place will have to be done the old fashioned way, namely reading every case, something which Mr. Lorant was engaged to do by the GRCA.

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The forgoing discussion was produced as a starting point to these Findings, because the essence of submissions on behalf of the GRCA is that the conduct and representation by or on behalf of Mr. Chalmers was such that it should merit the award of costs.

Was the Appeal Unreasonable, Frivolous and/or Vexatious?

Mr. Haley's presentation of the Chalmers case revolved around the issues of floodline elevation, safe access, adequate flood proofing measures, upstream and downstream impacts, and precedent. These will be addressed in sequence.

It has been extremely common in conservation authority appeals before the tribunal to hear a discussion of the accuracy of the floodline elevation. Appellants have been commonly heard to say that they have never seen flooding to the extent predicted and therefore, it could not reasonably occur. The fact that the elevation is based upon engineering modelling appears to be hocus pocus to them, and not nearly as reliable as annecdotal evidence.

There is a line beyond which prior disallowance of annecdotal or even challenging engineering evidence by the tribunal in advance of the hearing would be tantamount to raising an apprehension of bias, that the adjudicator has made up his or her mind in advance as to what the outcome will be. The willingness of the tribunal to unequivocally state what evidence would be considered relevant or having weight is very dependent on the technical knowledge of the appellants or their advocate as well as their subjective belief of what should fairly be considered. The question of the extent to which such evidence should be pre-empted is certainly raised in the case of **Bye v. Ottonabee Region Conservation Authority** (unreported) CC.1357, November 19, 1993. The issue of the drawing of the floodline elevation was challenged successfully by the appellant, through an expert witness. In that case, the amount of water which would overtop a spillway and the proper engineering method for its determination were at the heart of the matter.

Aside from the engineering evidence in the drawing of the floodline elevation, it appears in many cases and certainly was true in the Chalmers matter, that no matter who, on behalf of the GRCA, or even apparently on behalf of the tribunal at a pre-hearing conference, stated unequivocally that the floodline was properly drawn, the appellant needs to have this fact stated in writing in an Order of the adjudicator. This need for an independent assessment of the essential facts of an appeal is certainly at the heart of this and other such appeals. It is not enough to say that the appellant should have been listening to everyone who has provided an opinion along the way. Clearly, the independent formal adjudication and resultant Order is, in some cases, the only word the appellant will accept. The legislation provides for this by allowing a right of appeal, which is ultimately assigned to an independent adjudicative body, the Mining and Lands Commissioner.

The issue of safe access was addressed on behalf of Mr. Chalmers through approaching the local fire department, which provided some encouraging responses upon which the appellant sought to rely. This misguided approach was not followed in favour of reliance of the Provincial Flood Plain Planning Policy and associated Implementation and Technical Guidelines. The primary mandate of the conservation authorities is in relation to matters of

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flooding. This is a highly technical field which requires the knowledge of experts in engineering modelling of hydraulics and hydrology. The purpose behind the Policy and the Guidelines is to provide a consistent, province-wide, reasoned and researched approach to issues involving, amoung other things, safe access, although the exercise of discretion has been observed through the creation of Policies peculiar to a certain authority, where standards may vary from those of the province, both on the side of more liberal and generous to development, or more rigourous and denying of development. Depths and velocities are inherent to the issue of access and egress, and the attitude or confidence of a local fire department cannot override the overwhelmingly technical expertise behind the standards set. Moreover, there are other emergency vehicles involved, such as ambulance, which must also be able to pass safely in extreme conditions. The approach taken by Mr. Haley is characterized as misguided. However unauthoritative it was, nonetheless, the tribunal sees his efforts in regards to this issue as being well intentioned and honest. Again, it may have been that the appellant needed to hear from a definitive, independent source, the lack of acceptability of the approach undertaken.

The approach taken which asserted the adequacy of flood proofing measures failed to take into account the big picture concerning the proposed development of this property, namely that no portion of the proposed construction and development was above the floodline elevation prior to the placing of fill and that the placing of fill would create two islands surrounded by floodwaters under extreme conditions. The tribunal had the impression that the raw facts regarding the flood situation was known by the appellant, but the gravity was simply not understood. More particularly the significance of the overwhelming evidence that the situation was untenable was simply not accepted.

In a similar light, the approach taken on behalf of the appellant was to downplay nature of the upstream impact of the proposed placing of fill, or perhaps more accurately, to bring a layman's perspective to the raw numbers, even though engineering expertise was utilized to establish those numbers by the engineering consultant hired on his behalf. Assertions that the conservation authority was bound to consider impacts on a reach basis, rather than the micro approach of examining the next cross-section, were simply not accepted by the appellant. This was another instance when the determination by the tribunal appeared to be all that Messrs. Chalmers and Haley were likely to heed.

The issue of precedent was similarly clouded by insistance that any activity within the floodlines was equal, with no recognition of degrees set out in the Implementation Guidelines. Relying on his sense that all activities were equal or equivalent, Mr. Chalmers saw his neighbours being allowed to carry out activities within the regulated area and firmly believed that he could also carry out whatever activity he chose. The fact that there was a water treatment facility, built on fill and raised above the floodline, did nothing to discourage this belief, but rather seemed to encourage the hopefullness of the appellants case, at least in his and his agent's perception.

The sum total of the approach taken on behalf of Mr. Chalmers, which the tribunal is of the opinion that he fully endorsed, was to disavow the knowledge, expertise and indeed the very mandate of the conservation authority staff or its outside expert, Mr. Lorant.

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It was further obscured by a miopic view that the facts of his case were unique, which they were within the immediate neighbourhood in which the property was located. This uniqueness is primarily the fact that the two proposed lots were the only ones available for the such proposed development along this particular stretch of the Grand. The fact that vacant lots exist throughout the watershed under similar circumstances was not appreciated for the potential impact which would occur if they are taken as a group, each adding its separate impacts to the issue of available flood storage. This seemingly naive approach suggests unreasonableness or intransegence. However, another explanation is more reasonable under the circumstances. All over the province there are lands which are kept in an undeveloped or underdeveloped state, excepting pre-existing buildings, infrastructure and recreational development. These appear to be choice pieces of real estate, near an attractive watercourse. If the uninitiated were to be told that these lands were floodprone, this information is likely to be disbelieved as annecdotal evidence would tell them otherwise. The continued existence of such tracts of seemingly prime real estate in pristine, undeveloped states should be a warning to the uninitiated that something unseen is behind the absence of development and yet time and again, landowners are being caught unaware.

While Mr. Chalmers' dreams of the development on his property may seem to be extreme, with the placing of considerable fill to create islands well into a broad floodway, in fact his proposal is not out of the ordinary, nor at the extreme end of the types of appeals seen by the tribunal. Appeals have involved the proposed placing of cement culverts in streams to accomodate bridges, the dredging of shallow marsh land to create a marina, the widening and extensions of minor spits of land to create land bridges around fragile ecosystems, the filling of seemingly minor undulations in land which contain intermittent watercourses, the urbanized cultivation or terracing of slopes which skirt watercourses, cantelievering of buildings over watercourses experiencing extreme ice flow conditions, all in the hope of creating found developable and highly desireable land. Time and again, the conservation authorities have refused such applications, which were denied on appeal, and yet the desire and pressure for development continues.

Under any other circumstances, such growth and inflow of capital in the local economies would be commendable. However, for the most part, the lands within the floodline elevations are not developable or have restrictions attached. The province, through both its legislation and policies, has not created an out and out ban on the development in flood prone lands. There are guidelines and there is discretion to be exercised. As long as the legislation continues as it currently does, to not provide an absolute prohibition on development of these lands, there will be continuing applications and appeals, which in many cases will be accompanied by misconceptions and misplaced hopes. The situation is further clouded by the existence of One-Zone and Two Zone as well as Special Policy areas, which to the uninformed looks as though flood prone lands are open for development. It is only upon careful examination and study of the factors underlying the different Policy areas, an awareness of the necessary procedures and various steps for having the Policy governing an area changed, can the extremely technically complex nature of the exercise, which necessarily involves a planning aspect, be understood.

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The sense of entitlement regarding development of lands owned by individuals or corporations is extremely hard to displace. Where there is land and the financial resources to develop the land, the natural impediments to its development are not readily understood. This is even despite the fact that persons wishing to develop such lands are told by municipalities that conservation authority approval is required.

The tribunal has considered the conduct of the case on behalf of Mr. Chalmers and finds as follows. The integration of styles of Mr. Haley and Mr. Olah on behalf of their respective clients was not compatible. Nonetheless, neither did anything improper in their respective efforts to maintain the presentation of their cases on the course which they had set out, in a manner which the tribunal firmly believes, each was conducted in the best interests of their clients. In this regard, the tribunal was reluctant to overly interfere with the differing styles, or to impose its own expectations of what those styles should be. Therefore, it is concluded that Mr. Haley was not unreasonable during the hearing proper in his conduct of his clients case. His lengthy cross-examinations, which displayed a certain element of learning the intricacies of the highly technical nature of the evidence, were not so extremely protracted as to warrant censor by the tribunal, nor was it such that it should merit an award of costs.

As an aside, this type of lengthy cross-examination has often been observed by the tribunal, both by agents and by experienced counsel. The approach taken has been to put it down to the vagaries of dealing with technically complex material and unfamiliar and widely unavailable legal precedents. Without serious strides in imposing its own expectations and forcing the advocates to come to terms with issues in advance of its hearing process, the tribunal feels that it would be remiss in holding those advocates to such a high standard only after the fact.

The tribunal finds that there was nothing improper, unreasonable, and certainly not vexatious or frivolous, in seeking to have the position of the GRCA staff, ruled on by the executive, adjudicated by a second independent decision-making body. It should be noted here, although not raised in this appeal, that the executive or full boards of the conservation authorities also make their decisions in an independent manner, hearing the recommendations of staff as well as the case of the original applicant. The fact that they use the same facilities should not cloud this fact. Those initial decisions are recognized by the Tribunal as being impartial.

The cost awarding powers of the tribunal were historically in its legislation in relation to mining only. Between 1956 and 1973, the tribunal was known as the Office of the Mining Commissioner, at which time jurisdiction over certain public lands issues was added. Between 1924 and 1956, the office was known as the Mining Court, and functioned as a court, with the presiding Judge having been a barrister and solicitor of 10 years membership of the Law Society of Upper Canada, whose provincial Order-In-Council was confirmed by federal fiat. In its decision in **Dupont et. al. v. Inglis et. al.**, [1958] S.C.R. 535, the Supreme Court of Canada, dealing with the issue of constitutionality of the Office of the Commissioner and powers conferred under the **Mining Act**, stated, "Since the Province can create and appoint justices of inferior courts, there is no reason in the nature of things why it cannot establish an inferior Court of review or appeal, it is the subject-matter rahter than the apparatus of adjudication that is determinative."

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This historical note is mentioned as there is clearly a difference in the manner in which costs have been awarded in mining matters with those having been considered in conservation authority and other public lands matters. In the latter cases, the tribunal functions as an administrative tribunal and exercises its cost awarding powers much the same way as is done by the OMB, which is also recognized as having court-like powers, namely in cases involving extreme abuse of its proceedings. In mining matters, costs, where requested and conduct of the solicitors warrants, often follow the cause.

If the legislature intends to free up public bodies from the expense of defending their decisions before appellate tribunals, more strongly worded, definitive powers would have to be given to all administrative tribunals to make clear that this is what the legislature intends. This is mentioned because the issue of legislatively granting broader cost awarding powers to tribunals, as against parties and as a means of recovering costs of the tribunals themselves, is addressed in a recent Consultation document entitled, "Excellence in Administriative Justice: Delivering Better Service, A Concultation on Reform of Ontario's Regulatory and Adjudicative Agencies, Background Paper: Improving Tribunal Hearing Procedures" issued by the Agency Reform Commission in September, 1997. Commencing on pages 30 and 35, under the headings, "XI Costs of the Parties" and "XII Payment of Hearing Costs & Other Tribunal Expenses", respectively, the issues of desireability, extent and feasibility of such powers are widely discussed. Each chapter ends with several consultation questions for consideration. It is contended by the tribunal that until such time as the legislature seeks to address the issue in an aggressive, deterring and cost-recovery manner in legislation, then this tribunal will continue to award costs in only extreme and blatently wanton abuse of its powers and not in situations where parties are proceeding with their statutory right of appeal.

The extent to which Mr. Chalmers or his representative were unwilling to accept the position of the GRCA and their insistence to being entitled to proceed with the case in the manner in which they did, while certainly speaks to the general education of the public in this complex and highly technical matter, which is discussed in some detail above, does not detract from the fact that an appellant, entitled to a statutory right of appeal, is entitled to have his or her day in court, despite how impractical or unlikely of success it appears to those who hold a contrary position. A seasoned veteran in this subject matter might have handled this case differently on behalf of Mr. Chalmers, but the tribunal is not pursuaded that this should be determinative. Certainly, there are many instances of seemingly impossible cases which go forward and succeed. That is what this public appeal process is about.

Mr. Olah has suggested in his submissions that appellants should be deterred from proceeding with appeals in certain circumstances, referring to the unlikelihood of success and protracted proceedings. The tribunal has considered his position and finds that it cannot do as requested without first modifying its proceedings to ensure that the actual adjudicator is being thwarted in his or her efforts to move the process forward in an expeditious manner, that efforts to ensure subjective understanding of complex issues are being ignored or by-passed, before it will impose a sanction on such behavior. This tribunal is not alone in experiencing long, protracted and seemingly irrelevant excursions into questionable evidence or issues. The purpose behind it may be inexperience on the part of some members of the administrative justice sector, but it is equally an attempt to ensure that those who are entitled to a public proceeding are heard

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and feel that they have been heard, even if much of what is dwelt upon may be irrelevant or of little weight. Attempting to reduce it to the court-like principles of irrelevance and objections only hampers administrative tribunals in their task as a more user-friendly, expeditious alternative to the highly legalistic courts.

There are two other matters which the tribunal needs to discuss in making this order as to whether costs are payable by the appellant in these circumstances. The issue of privilege of settlement discussions is problematic for the tribunal in conservation authority matters particularly. The Rules of Civil Procedure provide for settlement discussions, timing, quantum and the like to be taken into consideration in the determination of the cost issue. The substance of those settlement discussions in large part are dependent on issues of damages, quantum owing on contracts, in essence money, where there is room to move on either side, compromise, hedge, move towards one another. There is no such room in the matter of conservation authority appeals. There are simply refusals or permissions to do certain activities, the latter of which may entail conditions. While there is hedge room in the conditions, such as agreement as to level of dry floodproofing, requirements to register an easement for access and egress over the land of a neighbour to ensure safety concerns are met, the experience of the tribunal has been that, if the parties are quibbling over the exact nature of conditions, the conservation authority is essentially supportive of some sort of permission. Otherwise there is only outright refusal advocated on their part.

The fact of the settlement negotiations is found to be relevant to the issue of costs and the tribunal finds that no serious breach of ethics has occurred in disclosing the results of the pre-hearing conference at this stage of the proceedings.

The tribunal is not surprised in learning these facts. Its former Deputy Commissioner, Knox Henry, and its Registrar, Daniel Pascoe, are well-trained, highly experienced and knowledgeable in this subject matter. Past experience in dispatching these two gentlemen to pre-hearing conferences has shown that if there is a creative solution to allow development while addressing the concerns of the conservation authority, they will be able to uncover it. The fact may still remain that the parties are unwilling to compromise on any of the points, wanting to proceed to an "all or nothing" hearing and that is, as always, the purpose of the hearing - to hear the parties and decide on the merits. There also remains the possibility that the tribunal will disagree with the Conservation Authority and exercise its discretion in favour of the appellant.

The other matter which is of concern to the tribunal is the less than expeditious and straight-forward manner in which this matter proceeded to a hearing. The Order to File had to be reissued to accomodate the late provision of the computer model, which formed the technical basis of the engineering report upon which the appellants relied. Matters were further complicated by the circumstances surrounding the requested adjournment, so that Mr. Haley could attend an OMB hearing which he had essentially, although possibly inadvertently, booked for the same time. The resultant adjournment, not to accomodate Mr. Haley but to allow the new representative hired by Mr. Chalmers to schedule and prepare, ultimately had the appearance of granting Mr. Haley his adjournment by the back door, when Mr. Marvin Geist was not kept on by Mr. Chalmers. These circumstances, although unfortunate and even possibly

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inadvertant, had the effect of causing unnecessary delay in the hearing of the matter, late re-scheduling of the hearing for both the tribunal and Mr. Olah and his client and outside expert witness. In order to send a strong message to parties who engage in delaying tactics, carelessly manage their calendars at the expense of others and ultimately have the appearance of gaining advantage by other means when their requests are denied at first instance, the tribunal finds that it will fix costs associated with delays, wasting of time and appearing unwillingness to abide by the tribunal's decision to not allow an adjourment, in the amount of $4,000.00. This amount will be payable by the appellant to the respondent within 30 days of the making of this order.

Conclusions

The tribunal has disallowed the respondent's request for costs for proceedings after the date of the pre-hearing conference. The circumstances of the case, the conduct by and on behalf of the appellant, the means by which the tribunal itself did not actively seek to ensure that the appellant or his represenative, were as informed as possible concerning its jurisdiction (something which is noted that tribunals do not generally do, though their subject matter may be technically complex) and the incumbent legislation which provides for an intial hearing only in those cases which are anticipated to entail refusal and then provides for a public, independent appeal, do not warrant the severe sanction of costs advocated by the respondents.

The issue of settlement and certain details thereof, are properly before the tribunal in its consideration of costs, having been disclosed after its decision on the merits only.

The circumstances leading up the the hearing proper and as a general deterrent to parties seeking to delay generally, support the ordering of costs fixed at $4,000.00, payable within 30 days of the making of this Order.