File No. CA 003-05

L. Kamerman)
Mining and Lands Commissioner)

Friday, the 9th day
of March, 2007.

THE CONSERVATION AUTHORITIES ACT

IN THE MATTER OF

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

AND IN THE MATTER OF

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

B E T W E E N:

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

Applicants For Party Status
(amended March 3, 2006)

- and -

DEREK RUSSELL

Appellant

- and -

TORONTO AND REGION CONSERVATION AUTHORITY

Respondent

O R D E R

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

1. IT IS ORDERED that the motion of the Applicants for Party Status to be added as third parties to the Russell appeal be and is hereby dismissed.

. . . . 2

IT IS FURTHER DIRECTED that counsel for the Appellant, Applicant and Respondent make written submissions as to costs on account of this motion at a time to be discussed with Registrar, Mr. Daniel Pascoe, after receipt of this Order.

AND TAKE FURTHER NOTICE that an Order to File documentation in support of the appeal on the merits will be issued in due course in consultation with counsel.

Reasons for this Order are attached.

DATED this 9th day of March, 2007.

Original signed by L. Kamerman

L. Kamerman
MINING AND LANDS COMMISSIONER

File No. CA 003-05

L. Kamerman)
Mining and Lands Commissioner)

Friday, the 9th day
of March, 2007.

THE CONSERVATION AUTHORITIES ACT

IN THE MATTER OF

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

AND IN THE MATTER OF

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

B E T W E E N:

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

Applicants For Party Status
(amended March 3, 2006)

- and -

DEREK RUSSELL

Appellant

- and -

TORONTO AND REGION CONSERVATION AUTHORITY

Respondent

REASONS

Counsel Appearances

Ms. Jane Pepino & Ms. Eileen Costello: for the Applicants for Party Status, David Roffey, Karen Walsh, Nancy McFadyen, John McFadyen, Elaine Triggs, Donald Triggs and Kathleen Shanahan, (the "Neighbours")

. . . . 2

Amber Stewart:	for Appellant, Derek Russell
Jeffrey Rosekat:	for Respondent, Toronto Region Conservation Authority (the "TRCA")

Motion to add Neighbours as Parties heard at Toronto March 3, 2006.

Introduction

In this motion I must decide whether to add the Neighbours as third parties to Mr. Derek Russell's appeal from the refusal of the Toronto Region Conservation Authority (the "TRCA") to grant permission to grade and build a home on his hillside ravine property. The TRCA represents the public interest. The Neighbours assert that the Commissioner must consider any potential adverse impact on their private property interests in reaching a decision. The question is whether the Neighbours' perspective and input is essential to a full and informed hearing of the issues in the appeal.

There is no statutory test applicable to the question of the adding of parties for an appeal of a conservation authority decision. The issue on this motion is which test should be applied in determining whether third parties should be added. Do the Neighbours meet the test?

The Neighbours advocate the application of Rule 13.01 of the **Rules of Civil Procedure** by analogy. Having their position heard by the Executive of the TRCA created a reasonable expectation that they would be heard on appeal. They maintain that the administrative law principle of a*udi alterem partem* requiring the hearing of both sides of an issue be heard, as elaborated in **Baker v. Canada (Minister of Citizenship and Immigration**) [1999] 2 S.C.R. 817, which supports their position .

The TRCA takes no position.

Mr. Russell opposes the Neighbours' motion as they have no legitimate interest in the subject matter of the appeal. He submitted that the same test as was applied in **Bye v. Otonabee Region Conservation Authority** [1993] Appeal No. CC. 1357, unreported (MLC) should be used. A third party should have a vital or legitimate interest in the appeal to be added as a party. In the alternative, Mr. Russell submitted that, if granted party status, their participation should be clearly delineated to minimize potential prejudice to him.

Background

Mr. Russell applied to the TRCA pursuant to subsection 28(1) of the **Conservation Authorities Act** and Revised Ontario Regulation 158/90 for permission to "develop" his property through grading of his hillside ravine property [119R Glen Road] and to build a home. His application was refused and has been appealed, pursuant to subsection 28(15) to the Minister of Natural Resources. The Mining and Lands Commissioner (the Commissioner)

. . . . 3

has been assigned the duty and authority of the Minister to hear these appeals. "Development" is defined in clause 28(25)(c) to include site grading and construction.

Mr. David Roffey, Ms. Karen Walsh, Ms. Nancy McFadyen, Mr. John McFadyen, Ms. Elaine Triggs, Mr. Donald Triggs and Ms. Katherine Shanahan (the Neighbours) seek the opportunity to make their own case as to why Mr. Russell's proposed development should be refused on appeal. The Neighbours maintain that they have a unique perspective which is different from the public interest and that it should be heard. They want to be granted full party status which includes but is not limited to, participation in any settlement discussions which may take place, the right to adduce evidence, call, examine or cross-examine witnesses and the right to appeal the decision of the Commissioner. Mr. Russell opposes the Neighbours' motion but in the alternative, asks that should status be granted, that their participation be severely circumscribed and carefully delineated.

Description

The Neighbours' and Mr. Russell's properties are at the crest of an undeveloped ravine in Toronto. The Bayview Extension and Don River are located within the valley floor below. The Neighbours' properties front onto one of three roads, Glen, Binscarth, or Beaumont. Mr. Russell's property and proposed building envelope, situated downhill from his neighbours, is accessible via a laneway which runs between two of the Neighbours' properties running off Glen Road. Given the landform configuration, if Mr. Russell is granted permission, his construction would stand between his Neighbours' homes and the remaining privately owned ravine lands further downhill. Not all of the surrounding landowners have sought party status in this matter.

Roffey

Mr. David Roffey, one of the Neighbours and owner of the property immediately to the north of the Russell property at 41 Binscarth Road, alleges use and possession of a portion of land between the two properties. Mr. Roffey served a Notice of Claim dated September 23, 2004, claiming adverse possession of this land. A motion for an interlocutory injunction restraining Mr. Russell and his wife from entering onto this land was issued by the Superior Court of Justice in October of 2004. It was pointed out that the outcome of this action in no way affects Mr. Russell's appeal as the Site Plan will comply with all zoning requirements such as set backs, regardless of the outcome.

History

In 2003, Mr. Russell made an initial application to the TRCA, which was considered by its Executive in November, 2003. Conservation authority staff prepared a technical report and presented their recommendations at the hearing before the Executive that the application be refused. The Neighbours made statements or representations opposing the granting of permission. The Executive convened its proceedings in an in-camera session following the presentations and granted permission for the application.

. . . . 4

The Neighbours attempted to appeal that decision to the Minister, delegated to the Commissioner, who determined that subsection 28(15) of the **Conservation Authorities Act** did not provide a right of appeal to individuals or persons who were not the original applicants in an application to a conservation authority. That decision did not address the issue of the adding of parties to a properly constituted appeal.

The Neighbours also sought to judicially review the decision of the Executive of the TRCA in that first application. In the meantime, Mr. Russell faced unspecified difficulties in executing his first approved application and chose to make a second, revised site plan and application for the same valley land property. Given that this second application had not yet been heard through to its conclusion, the panel of the Court stayed the judicial review application until all proceedings associated with the second Russell application have been exhausted. In other words, the Court would wait until the second appeal was heard by the Executive and, if appealed, the Commissioner.

The second Russell application was heard by the Executive Committee on January 14, 2005. Staff once again made its technical presentation and recommended that permission not be granted. The Executive Committee made its decision that this second application be refused and issued its decision in writing accordingly. Mr. Russell appealed this second decision.

Jurisdiction

The TRCA has jurisdiction over watersheds within the City of Toronto. Under subsection 28(1) of the **Conservation Authorities Act** and R.R.O. 158/90**,** its permission is required for such lands if, in its opinion, control of flooding, erosion, dynamic beaches or pollution or the conservation of land may be affected by proposed development. Essentially, lands encompassed in a watershed extend a distance beyond the top of the bank of the river or stream valley. [No official map corresponding with Schedule 4 of R.R.O. 158/90 has been filed, however and documentary references are to the TRCA Valley and Stream Corridor Management Program which is ostensibly its own policy delineating its jurisdiction under the regulation.] Jurisdiction appears to extend to 10 metres beyond the top of the valley bank which apparently reflects the fill line in the official mapping. In materials filed there is no indication of is any dispute concerning mapping or the extent of the TRCA jurisdiction in relation to the Russell property.

According to the Valley and Stream Management Program, the TRCA exerts jurisdiction over lands from beyond the top of bank down through to the valley floor, apparently in order to perform restoration and regeneration functions within city ravines. Mr. Russell's application was refused on the basis that the conservation of land would be negatively affected, due to the loss of natural vegetative cover caused by the proposed site grading and construction, which would have a significant impact on the TRCA's objectives of restorative, regenerative and enhancement functions within the valley. Also cited were the cumulative loss and precedential effect of the proposed development.

. . . . 5

The various legislation and guidelines which govern proceedings before the Commissioner do not specifically deal with the issue of the addition of parties, nor is the practice prohibited. Specifically, the powers and duties of the Minister of Natural Resources to hear the subsection 28(15) appeal have been assigned to the Commissioner by O. Reg. 570/00 made pursuant to clause 6(6)(b) of the **Ministry of Natural Resources Act,** R.S.O. 1990, c. M.31. Pursuant to subsection 6(7) of the **MNR Act**, Part VI of the **Mining Act** applies with necessary modifications to such appeals as do certain provisions of the **Statutory Powers Procedure Act**. Procedural Guidelines to hearings have been established as well. As outlined on behalf of the Neighbours, there is no specific reference in the aforementioned legislation or guideline governing the addition of parties nor is there an outright bar to parties being added as a matter of discretion. While one must look to elsewhere for guidance, nonetheless, the Commissioner has latitude to set her own procedures so long as in doing so, fairness is maintained.

Rule 13.01

The Neighbours submit that the best test available for determining whether to add parties, to be applied by analogy, is found in Rule 13.01 of the **Rules of Civil Procedure.** This test provides that a person may be added as a party if they have an interest in the subject matter of the proceeding, may be adversely affected by the decision or have a question of law or fact in common with an issue in the proceeding. In considering whether to exercise its discretion to add parties, the court will consider whether there is no undue prejudice or proceedings will not be unduly lengthened.

The Neighbours assert that their reasonable use and enjoyment of their properties are threatened by the outcome of the Russell appeal which may adversely affect land values. They maintain that this uniquely exceeds the public interest championed by the TRCA. Although no special interest beyond that of the public interest was found, this was the test adopted in **Gould Outdoor Advertising v. London (City)** (1997), 31 O.R. (3d) 355(Gen. Div.). Similarly, the test was adopted in **Temagami Wilderness Society v. Ontario (Minister of the Environment),** 33 O.A.C. 356 (Div. Ct.), where the direct commercial interests of the lumber operations of two companies and an association which promotes the interests of those in the forest products industry could be adversely affected by the decision was found to be sufficient to entitle the applicants to intervenor status. In **Johnson v. Town of Milton (No. 1)** (1981), 34 O.R. (2d) 289 (H.C.), the Court found that all that is necessary is a preliminary and tentative decision as to whether legal rights or economic interests may possibly be affected to trigger the exercise of discretion and add parties, indicating that it was neither necessary nor desirable to answer the question with certainty.

In Mr. Roffey's case, he asserts that he has a direct legal interest in the proceedings which is consistent with previous decisions of the court which has granted party status. In **Starr v. Puslinch (Township)**(1976), 12 O.R. (2d) 40 (H.C.J.), the court granted an application to third parties, finding that they had a commercial interest in judicial review proceedings concerning official plan proceedings for which they had received assurances which were not honoured in the end. This case was cited due to its adoption into Ontario precedent of the words of Lord Denning, M.R. in **Gurner v. Circuit et al.,** [1968] 2 Q.B. 587, where he stated that it must be

. . . . 6

demonstrated that the "dispute will directly affect a third person in his legal rights or in his pocket". In fact, Lord Denning's words are more expansive, in that the impact on his pocket was one where "he will be bound to foot the bill."

A number of decisions of the Ontario Municipal Board (OMB), an adjudicative tribunal dealing with the use and development of land, were presented for my consideration. It was suggested that the OMB "has generally adopted a liberal interpretation of Rule 13.01 in accordance with its mandate to render decisions in furtherance of the public interest". [paragraph 49, Outline of Neighbours' Argument, Ex. 1b]. [**Sandhill Aggregates Ltd., v. Durham (Region)**, [2001] O.M.B.D. No. 644; **Burak v. Toronto (City) committee of adjustment**, [2000] O.M.B.D. No. 469; **Ontario Municipal Board Decision/Order No. 2724,** issued October 4, 2005; **Lionheart Enterprises Ltd. v. Richmond Hill (Town)**, [2004] O.M.B.D. No. 66]. However, in examining the cases cited, I note that only one decision actually refers to a case in which the Rule was applied. Generally, the OMB has added parties where it has been demonstrated that the party would be directly or adversely affected by an outcome in proceedings or where the party could offer a unique perspective or make a similar contribution to the OMB's understanding.

Dealing with Mr. Roffey's position first, there is no evidence that he will incur any expense as a result of a potentially successful outcome of the Russell appeal, let alone that his claim for adverse possession may be in any way affected by Mr. Russell's appeal. They are fighting over a flower bed, apparently, which is located on lands along Mr. Russell's boundary which Mr. Roffey has been maintaining as his own for a number of years. No one wants to build on it beyond the garden structures currently in place. It is not necessary for access for Mr. Russell's proposed building envelope, apparently, nor does it form any part of required set backs. Mr. Roffey may have legal issues with Mr. Russell, but they are not issues concerning the impact of Mr. Russell's proposal on natural resources in the valley corridor.

Reasonable Use and Enjoyment

The Neighbours have raised the issue of impact on their reasonable use and enjoyment of their properties as being directly linked to the subject matter of the proceedings and of adverse economic impact on the value of their lands as being indicative of being adversely affected by the outcome of the Russell appeal.

No cases were submitted on the matter of "reasonable use and enjoyment" to suggest how this phrase was to be understood in the context of this appeal. Nor was there any discussion of how these issues came into play in connection with an appeal of this nature. Therefore, I was left to ascertain for myself what the case law on "reasonable use and enjoyment" could mean and how it might or might not be applicable in the context of this appeal.

One encounters the phrase, "reasonable use and enjoyment" when examining issues of the tort of nuisance. It is also considered in cases involving compensation or damages for expropriation where "injurious affection" was examined, such as in **St. Pierre v. Minister of Transportation and Communications,** [1987] 1 S.C.R. 906 (S.C.C.) where a public highway

. . . . 7

was built next to a retirement residence. Dealing with the question of whether damages were recoverable under the expropriation statute, the court examined nuisance at common law. The court noted that from the earliest of times, there could be no recovery of damages for loss of prospect (view).

What appears to be at stake for the Neighbours is the balance between the rights of Mr. Russell to use his property as he wishes and those of the Neighbours to ensure that their own use is not adversely affected. The rights of an individual landowner were noted by Spence J. in **Ottawa v. Boyd Builders Ltd**., [1965] S.C.R. 408 at 410, when he stated, "An owner has a *prima facie* right to utilize his own property in whatever manner he deems fit subject only to the rights of surrounding owners, e.g. nuisance, etc."

Discussion of the concepts of private and public nuisance is found in **Ontario (Attorney General) v. Dielman**, (1994), 20 O.R. (3d) 229, 117 D.L.R. (4th) 449, a case dealing with obtaining injunctions against picketers opposed to abortion protesting outside of a number of public venues as well as the private homes of abortion service providers. Essentially, public nuisance must affect a class of citizens as opposed to the general public. The purpose of recognizing a class of persons ostensibly stems from ensuring that there not be a multiplicity of individual actions for the same behaviour clogging the courts. In Cassels, J., "Prostitution and Public Nuisance: Desperate Measures and the Limits of Civil Adjudication" (1985), 63 Can. Bar Rev. 765, Professor Cassels suggests at page 784 that the purpose of public nuisance actions is to protect the use of public institutions, such as "pollution of public lands and water, the obstruction of roads and waterways, interference with public facilities and the creation of dangerous conditions on public property."

In private nuisance, the test is one of whether the conduct or interference alleged which adversely affects the reasonable use and enjoyment of a neighbour's property is unreasonable. In *Sedleigh-Denfield v. O'Callaghan*, [1940] 3 All E.R. 349 (H.L.), Lord Wright stated at p. 364:

> …It is impossible to give any precise or universal formula, but it may broadly be said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or more correctly, in a particular society.

In Fleming, **The Law of Torts,** 6th ed. (1983) at page 418:

> The paramount problem in the law of nuisance is therefore to strike a tolerable balance between conflicting claims of the neighbours, each invoking the privilege to exploit the resources and enjoy the amenities of his property without undue subordination to the reciprocal interests of the other. … The eventual compromise of the latter 19th century was to seek reconciliation in the notion of "reasonable use". Legal intervention is warranted only when an excessive use of property causes inconvenience beyond what other occupiers in the vicinity can be expected

. . . . 8

> to bear, having regard to the prevailing standard of comfort of the time and place. Reasonableness in this context is a two-sided affair. It is viewed not only from the stand point of the defendant's convenience, but must also take into account the interest of the surrounding occupiers. It is not enough to ask: is the defendant using his property in what would be a reasonable manner if he had no neighbour. The question is, is he using it reasonably, having regard to the fact that he has a neighbour?

The Neighbours, by asserting that their reasonable use and enjoyment of their properties will be affected, are apparently asking for the right to raise the issue that Mr. Russell's proposed grading and construction on his private land will create a nuisance to theirs. From the very limited examination of the scope of nuisance, this argument would appear to have a very remote likelihood of success in general, meaning in an actual action for nuisance. Mr. Russell is not proposing to plunk an industrial development on his property; he is not proposing an illegal or politically controversial activity; he is not proposing to burn garbage or accumulate artifacts of questionable aesthetic worth creating a blight on the neighbourhood. He is simply proposing to build a house, just like the Neighbours around him, a single family dwelling, presumably of a size and character which would accord with the surrounding houses.

As far as I can determine, the question of reasonableness of Mr. Russell's proposed activity deals with the loss of an amenity to the Neighbours. The character of that amenity is that of undeveloped land located on the privately owned lands of Mr. Russell which abuts their own and forms part of a larger ravine system.

It is in connection with this amenity which the Neighbours wish to assert issues and interests which are different from those of the public interest. Without a doubt, the Neighbours' interests are markedly different from the public interest. Their interests are wholly private in nature, being the preservation of an exclusive amenity afforded to few in Toronto's urban environment, namely having their property abut on undeveloped ravine lands. However, in this case, the ravine lot in question is privately held.

What is clear is that the question of whether construction on Mr. Russell's land constitutes interference with the Neighbours' reasonable use and enjoyment of their lands beyond that which they can be expected to bear so as to create a nuisance is a matter for the courts and not for the Commissioner to determine.

The subject matter of the appeal is whether Mr. Russell's application will affect the conservation of land. There is a very real public interest issue to be explored here, namely, the extent and scope of the meaning of conservation of land and its applicability to the lands of Mr. Russell and those surrounding it which are within the jurisdiction of the TRCA. While there have been no submissions on this particular point, I have no hesitation in stating emphatically that conservation of land does not mean preservation of amenities for privately held interests. The issue of private nuisance between private landowners is simply beyond the scope and jurisdiction of an appeal pursuant to section 28 of the **Conservation Authorities Act.**

. . . . 9

Adverse Economic Impact

The issue in Mr. Russell's appeal is whether his proposal will adversely affect the conservation of land. For purposes of the section 28 application and appeals, the issues are technical, not social or economic.

Economic and social interests come into play in the planning process which precedes any application under section 28 of the **Conservation Authorities Act**. All municipalities and conservation authorities implement the new Provincial Planning Policy Statement, (2005) and before that, the Provincial Floodplain Planning Policy Statement. Both Policy Statements involve establishing locally the manner in which floodplain planning will be carried out. In this regard, decisions are made as to whether a one-zone, two-zone or special policy area will be implemented within certain areas. This is a pure planning exercise which, "provides for appropriate development while protecting resources of provincial interest, public health and safety, and the quality of the natural environment." The 2005 version has as its objectives "integrated and long-term planning that supports and integrates the principles of strong communities, a clean and healthy environment and economic growth, for the long term." [See Part I: Preamble]. The earlier Provincial Flood Plain Planning Policy Statement, OIC 1946/88, August 11, 1988, sets out as its objectives the prevention of loss of life, the minimization of property damage and social disruption and the encouragement of a coordinated approach to the use of land and the management of water. There are five principles enumerated, but for purposes of this discussion it is the second which is relevant:

> (2) local conditions (physical, environmental, economic, and social characteristics) vary from watershed to watershed and, accordingly, must be taken into account for the planning and managing of flood plain lands.

When planning is undertaken, involving official plans or zoning, local flooding conditions must be incorporated to identify flood prone lands within the affected watersheds. Policies will be implemented to address special development concerns for these lands. The Provincial Policy Statements do offer a degree of latitude, however. Without going into the details of how each is established, there are three possibilities on the ground. The one-zone policy area can be described as the most restrictive in terms of the development and land use throughout the flood plain. The two-zone policy is somewhat less restrictive in that its highly restrictive implementation is limited to the more treacherous floodway area, while some degree of limited development is permissible in the less risk-prone flood fringe. The special policy area concept may be established by special procedures. Special policy areas may permit degrees of development which might otherwise not be permissible, with corresponding flood protection works established to ensure safety.

Economic and social factors will be considered at this planning phase. They must, as the capacity within the watershed is a resource which must be rationed and accounted for, with dire consequences for failure to do so. Community viability may be at issue. Protection and enhancement of a historic old town may be vital to a community's economic

. . . . 10

viability. Values associated with increasing density through infill in a residential area with good access, services and amenities may be offset against the total capacity for encroachment into the flood plain by maintaining other areas as sparsely populated. Upstream and downstream effects of proposed encroachment will be offset against areas where development will be severely curtailed.

Once established for official plan or zoning purposes, the one-, two-zone and special policy areas provide the floodplain management standard for the lands involved. [There was also an earlier Wetlands policy which, like the Flood Plain Planning Policy, has been superseded by the new general Provincial Policy.] It is pursuant to this standard that the conservation authorities and the Commissioner make decisions when considering section 28 applications and appeals. It is not open for either to determine that local values require that another standard be applied. Not only would doing so run afoul of the planning process which had been completed, but it would also upset the underlying balance of the watershed as a resource which has been allocated through that prior planning process.

By the time a section 28 application is made, the focus is on technical watershed considerations. The statutory test is whether the proposed development will affect "control of flooding, erosion, dynamic beaches or pollution or the conservation of land" which is in no way balanced with the adverse economic impact on the applicant if the permission is refused. For a conservation authority or the Commissioner to take economic impact into consideration would encroach on the statutory authority of the planning process and is outside of their statutory jurisdiction.

Moreover, any consideration of economic interests would serve to shift the focus away from technical considerations which are at the heart of the statutory jurisdiction. This cannot be stated emphatically enough. It has always been irrelevant in a section 28 matter that the applicant/appellant could be left holding property that cannot be developed and is rendered virtually worthless from a development perspective as a result. The tests revolve around the question of the innate capacity of the land to withstand the proposed encroachment. It is of fundamental importance to the nature of the inquiry that potential adverse economic impact plays no role in the deliberation. This statement seems inadequate to the importance of this principle.

To allow the Neighbours to introduce elements of their own adverse economic impact in opposition to the proposed development would introduce a level of unfairness which cannot be justified. Economic impact which is irrelevant for an appellant must be equally irrelevant for those in opposition. Not only does this go beyond what is contemplated by the constituent legislation, but would put the whole of the conservation authority regulating and permitting process in severe jeopardy. The decision to be made does not involve balancing economic interests with watershed concerns. It has not been allowed as an issue by the Commissioner for over thirty years for very good reason. Control of flooding, pollution and conservation of land are technical.

. . . . 11

Rule 13.01- Test?

There seem to be two perspectives to Rule 13.01 and the adding of parties. One is that the issues in the action will have an impact on the persons seeking to be added. This perspective is clearly enunciated under subsection (1). The other is to provide persons who have a serious contribution to make to a resolution of the issues in an action the opportunity to be added as parties. This second perspective has shown up as an encompassing purposive statement.

I believe that the former perspective is most clearly represented in court-based litigation where the parties control the scope of the issues and relief sought. The third party seeking entry into the litigation is essentially saying, "This matter concerns me. You need to hear about it from my perspective or render a decision which will encompass my interests, rights etc."

The latter perspective may be better aligned with public interest litigation, such as what takes place before administrative tribunals. Generally, friends of the court are captured by this perspective.

There is a middle ground between the two perspectives, where there are individual interests or concerns, the hearing of which are necessary to a comprehensive resolution of the issues. Planning matters, as evidenced by the OMB cases cited, are an excellent illustration of this. The issues in land use have an impact on community in general whose individual or group perspectives are given status to be heard.

With section 28 of the **Conservation Authorities Act,** the interests of the private landowners are the subject matter of the application or appeal, which is determined from the perspective of the public interest in those private lands as well as surrounding lands.

The Test for Adding Parties

It was pointed out by counsel on behalf of Mr. Russell that the only existing precedent for granting third party status is **Bye v. Ottonabee Region Conservation Authority,** [1993] Appeal No. CC 1357 (unreported). The test adopted in granting the City of Peterborough status was that it had a "vital or legitimate interest in the appeal." The City's genuine interest involved issues regarding the impact of the Provincial Wetlands Policy Statement on conservation authorities and the Commissioner. It was advocated on Russell's behalf that the Neighbours have not satisfied this test and their application for party status should be denied.

In **Bye**, the City did in fact submit that Rule 13.01 should be applied by analogy. The qualifying tests in subsection **13.01**(1) were discussed, namely that the City did not have an interest in the subject matter of the appeal, but rather, that there were issues of fact and law which involved the City. The Commissioner also found that Rule 13 was a codification of the common law and any cases determined under the Rule would be applicable to its proceedings through the words, "persons entitled by law to be parties to a proceeding" in section 5 of the **Statutory Powers Procedure Act.**

. . . . 12

The cases cited and adopted in **Bye** do not, in fact, constitute a direct examination of the issue of adding a third party to an action, but rather dealt with the issue of standing to initiate an action in their own right, namely whether an applicant could succeed in commencing an action to call into question a government's administration of its legislation in a non-constitutional matter. Upon reflection, this is a different question from that of adding parties. The test in **Findlay v. Minister of Finance of** Canada [1986] 2 S.C.R. 607 was that the matter be justiciable, that a serious issue be raised, that there be a genuine interest in the issue and that no other reasonable means of bringing the issue before the courts exists.

While not specifically found in **Bye,** a re-reading of it suggests that the basis for the finding was an adoption, expansion and refinement of the third test in Rule 13.01, that of having one or more questions of fact or law in common with one of the parties which constituted having a "vital and legitimate interest in the appeal". On the facts of that case, the City was actually concerned about the manner in which the Ministry of Natural Resources had compounded successive scoring pursuant to several editions of the wetlands evaluation to arrive at a provincially significant designation for the Bye lands. The City's interest in the issue of the wetlands classification was broader than Bye's, from a public policy perspective, having met the tests set out in **Findlay.**

The outcome in **Bye** was that the Commissioner did not find the lands to be a wetland, despite having been evaluated as a class 1 provincially significant wetland by the Ministry of Natural Resources. The only mechanism for appealing a wetland classification was to raise the issue in conjunction with another proceeding, such as the one before the Commissioner. While the Commissioner was unable to find that the evaluation process was not fair, on the basis that such proceedings as conservation authority appeals are new hearings pursuant to section 113 of the **Mining Act**, the actual evaluation and methodology was questioned and found deficient. Scores from the application of the 2nd edition of the wetlands evaluation manual were added to, rather than replaced with scores from the 3rd edition. For example, the score for the sighting of a particular species of birds was added to scores corresponding with the establishment of the land as either a feeding or breeding ground for that species.

The City's participation in the **Bye** hearing resulted in the Ministry of Natural Resource's provincially significant wetland designation of the Bye lands not being upheld on the basis that the methodology did not withstand adjudicative scrutiny. The City was uniquely situated to realize that the manner in which evaluations had been conducted were problematic and assisted in bringing this to the Commissioner's attention. While Bye's position was supported by this effort, this line of questioning was not readily available to the individual land owner.

Initially, **Bye** may appear to be of limited applicability for determining whether to add parties to a conservation authority appeal, as it did not consider specifically all of the elements in Rule 13.01, despite having adopted the Rule as encompassed in the words of section 5 of the **Statutory Powers Procedure Act.** However, upon reflection and consideration of the assertions of the Neighbours in this current appeal, the test in **Bye** is found to be of continuing and persuasive merit.

. . . . 13

Duty of Fairness – <u>Audi Alterem Partem</u>

The Neighbours assert that their interest in the subject matter of the appeal constitute rights, privileges and interests which give rise to the administrative law concept of *audi alterem partem*, which requires that both sides of an issue be heard and that triggers the natural justice duty of fairness. They assert that they will be directly affected by the decision, Mr. Roffey in particular, through his claim for adverse interest in a portion of the Russell property. Being owed this duty, they are entitled to a proceeding which considers all sides of the matter, ensuring that the decision maker has access to all sides of the dispute. Only in this way can the reliability and transparency of the process be preserved. [Sara Blake, **Administrative Law in Canada**, 3rd ed. (Markham: Butterworths, 2001), in particular, pages 12 through 14]

The Neighbours and in particular Mr. Roffey, expressed concern that the decision could be made with incomplete and potentially inaccurate information regarding the impact of the Russell development on their properties. For example, in the case of Mr. Roffey, if the Commissioner were to accept Mr. Russell's position of what constituted his own property as encompassing that claimed by Mr. Roffey, that fact could be pled by Mr. Russell in the action against Mr. Roffey for adverse possession. The TRCA does not have the ability to put in front of the Commissioner, the evidence concerning usage of the line of ownership between Russell and Roffey. This is but one example of incomplete information.

Having appeared before the TRCA Executive, the Neighbours assert that they have a reasonable expectation that they will be heard. It is suggested that the reasons for supporting the initial TRCA decision and the rights and interests of the Neighbours may differ from those of the TRCA, whereby any decision made in their absence could be based upon potentially incomplete and inaccurate information in respect of the "impact of development" of the Russell property on their own. This duty of fairness could be met by making the Neighbours parties to this proceeding.

The Supreme Court of Canada case of **Baker v. Canada (Minister of Citizenship and Immigration**) [1999] 2 S.C.R. 817 at 836, sets out that "The fact that a decision is administrative and affects the rights, privileges or interests of an individual is sufficient to trigger the application of the duty of fairness". **Baker** involved a mother with Canadian-born children who was ordered deported to make her residency application from outside the country. Her application for exemption was denied on the basis of insufficient humanitarian grounds. She applied for judicial review, which was dismissed, but the court certified the question of whether Canada's international obligations with respect to the best interests of the child should be a factor in her exemption application. The Court of Appeal found that in considering an exemption based upon humanitarian considerations, the best interests of the child did not need to be the primary consideration.

. . . . 14

Heureux-Dubé stated at page 837, paragraph 22:

> Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances. I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that the administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

The Neighbours pointed out that in **Baker** at pages 838 to 840**,** the Supreme Court of Canada has identified those circumstances in which a duty of fairness will be triggered in the context of administrative decision making. The Commissioner's decision is judicial and exercises her own powers to determine the process to be followed. By having appeared before the TRCA, they have a legitimate expectation that they will be heard in this matter which is of extreme importance to them. The Neighbours submitted the following factors trigger a duty of fairness. A decision under the **Conservation Authorities Act,** whose objective is conservation of public resources and furtherance of the public interest, should be rendered in accordance with that broader public interest mandate. To allow development of the Russell property will impact on the Neighbours in addition to public interest concerns of the TRCA regarding the protection of the stream and valley corridor, in that it will affect their reasonable enjoyment and impact on their economic interests. Mr. Roffey's direct and distinct interest of adverse possession could be affected by the outcome of the Russell appeal. The Neighbours have enjoyed long-standing participation in the TRCA's proceedings involving the Russell applications and as such have a legitimate and realistic expectation that they will be involved in this appeal. Finally, the Commissioner has the jurisdiction to grant the application for the Neighbours to be made parties.

The Neighbours raise a very good point with this argument, namely that a decision maker can only make a decision after hearing both or all sides of an issue. However, it is the question of "what is (are) the issue(s)" in the matter which is determinative of who will be heard from. The determination is tied directly to relevancy and jurisdiction.

No Other Chance to be Heard

The Neighbours maintain that they have not had the opportunity to make representations for which there is no other time or place; there is no other body to which they might be taken and as a result, this would cause prejudice. This is the only one venue where the case can be heard. The factors cited in **Baker** are triggered in this case and require natural justice.

. . . . 15

This is not entirely true. Although not submitted by the parties, the Commissioner has located copies of decisions where the Neighbours did seek to oppose Mr. Russell's efforts in an action where Mr. Russell and another property owner appealed a ravine control by-law which required that all new building within ravine lots take place ten meters from the top of the bank.[1] The initial OMB proceedings dismissed the appeal. In a reconsideration, the appeal was allowed and the properties of Mr. Russell and another were exempt from the operation of the by-law. The Divisional Court allowed an appeal, restoring the first OMB decision. The Court of Appeal allowed the appeal and restored the reconsidered second OMB decision, which effectively gave Mr. Russell the desired exemption from operation of the by-law. Leave to appeal to the Supreme Court of Canada was not granted.

In the original decision at paragraph 13, Member Yao stated:

> 5. Toronto's interest in preventing development of ravine lands dates back to a 1960 planning report. After noting that the Ontario Municipal Board's only vision for preservation was the acquisition of private lands for public purposes, the report states that the challenge was to "find ways of assuring that privately owned land within the ravines will not be developed."[4] The report concluded with observations **echoed by many participants at this hearing**, namely that once lost, the ravines cannot be replaced. [emphasis added]

The decision discloses that several of the Neighbours, Katherine Shanahan, Elaine and Donald Triggs, and Nancy and John D. McFadyen, were represented by counsel at the OMB and subsequent hearings. Presumably, these representations were made on their behalf, as the counsel listed represented several named individuals and the only others represented were the City of Toronto and Mr. Russell.

In a rather interesting further submission made in the reconsideration of the OMB, at paragraphs 5 and 6, Members McLouglin and Lee state:

> 5. ….On the other hand, Mr. Longo [who represented a number of individuals, including several Neighbours] argued vigorously that the by-law is nothing but an imposition of a performance standard. He submitted that the by-law may not permit these two owners to build. However, in his view, it has no effect on the underlying zoning density rights as the applicants [Russell and another] can still sell the lands to abutting owners who may utilise the density for the enlargement of their own dwellings. 16

---

[1] Leave to appeal refused 2000 CarswellOnt 4876, 275 N.R. 396 (note), 153 O.A.C. 200 (note), 2001 CarswellOnt 2779 (S.C.C.); (sub nom. **Russell v. Shanahan**) 52 O.R. (3d) 9, 138 O.A.C. 246, (sub nom. **Dickinson v. Toronto (City)**) 72 L.C.R. 14, (sub nom. **Dickinson v. Toronto (City)**) 196 D.L.R. (4th) 558, 16 M.P.L.R. (3d) 1, 37 C.E.L.R. (N.S.) 114 (Ont. C.A.); Reversed 1999 CarswellOnt 3101, 5 M.P.L.R. (3d) 14, (sub nom. **Shanahan v. Russell**) [1999] O.J. No. 3647, (sub nom. **Dickinson v. Toronto (City)**) 72 L.C.R. 14 at 16 (Ont. Div. Ct.); Reversed (sub nom. **Dickinson v. Toronto (City)**) 65 L.C.R. 235, (sub nom. **Dickinson v. Toronto (City)**) 37 O.M.B.R. 362, 1 M.P.L.R. (3d) 270, 1998 CarswellOnt 5353 (O.M.B.); Reversed 36 O.M.B.R. 169, 1997 CarswellOnt 5707 (O.M.B.)

[4] City of Toronto Planning Board, Natural Parklands of the City of Toronto, June 1960, page 551, Tab 20, Exhibit 2

> 6. The Board finds Mr. Longo's arguments clever, but not acceptable as to valid propositions. Since the entirety of Mrs. Dickinson's premises and a good portion of Mr. Russell's premises lie below a defined top of bank pursuant to the impugned by-law, both of these properties will be rendered unfit for development….

Contrary to their assertions, the Neighbours have had the opportunity to voice their opposition to development of Mr. Russell's property. They have not had the opportunity to present issues of loss of reasonable use and enjoyment, nor of potential adverse impact on their economic well being, but those issues do not have any direct bearing on the questions which must be determined in accordance with the constituent statute under which this appeal was launched.

Legitimate Expectation

R.W. MacAulay & J.L.H. Sprague, **Practice and Procedure Before Administrative Tribunals**, (Toronto, Thomson Canada Limited: Looseleaf) devotes Chapter 40 to reasonable or legitimate expectations. Although the chapter does make reference to **Baker**, it is more expansive in explaining this aspect of procedural fairness. The chapter starts with the following:

> In its simplest form, the principle of reasonable or legitimate expectations[2] operates to provide one with a right to make representations prior to the making of a decision where the law would not otherwise require such a right as a result of some promise, undertaking or action by a decision-maker which leads to a reasonable expectation that the opportunity to make representations would be given before the decision in question was made.

In **Old St. Boniface Residents Ass. Inc. v. Winnipeg (City)** [1990] 3 S.C.R. 1170, 46 Admin. L.R. 161, [1991] 2 W.W.R. 1455, 2 M.P.L.R. (2d) 217, 75 D.L.R. (4th) 385, 116 N.R. 46, 69 Man. R. (2d) 134, Sopinka, J. described legitimate expectation as an extension of the rules of natural justice and procedural fairness, whereby the court will supply the omission if the conduct of a public official leads a party to believe that rights would not be affected without consultation where there is otherwise no requirement that consultation take place.

. . . . 17

[2] It appears that the alternative forms of 'reasonable" and "legitimate" expectations aroise from the early cases which introduced the concept. Lord Fraser of Tullybelton explained in *Council of Civil Service Unions v. Minister for the Civil Service*, [1985] A.C. 374 (U.K. H.L.) at p. 401:"…I agree with Lord Diplock's view, expressed in the speech in this appeal that "legitimate" is to be preferred to "reasonable" for the reason explained in *Ng Yuen Shiu* but it was intended only to be exegetical of "legitimate". Lord Diplock explained his preference for the use of the term "legitimate" over "reasonable" in order thereby to indicate that it has consequences to which effect will be given in public law, whereas an expectation or hope that some benefit or advantage would continue to be enjoyed, although it might well be entertained by a "reasonable" man would not necessarily have such consequences…. "Reasonable" furthermore bears different meanings according to whether the context in which it is being used is that of private law or of public law. To eliminate confusion it is best avoided in the latter…." In the balance of this text I shall be using the term "legitimate expectations".

MacAulay describes legitimate expectation as one aspect of the principle of fairness, being that individuals accept the decisions of public officials which cannot arise where those individuals feel they have been treated unfairly in the making of that decision.

MacAulay states the following at page 40-8:

> As a[n] aspect of procedural fairness, legitimate expectations cannot operate to give one a procedural right which is prohibited by law or which would preclude the exercise of a statutory duty or amount to an improper fettering of statutory discretion. See *Canada (Minister of Employment & Immigration) v. Lidder,*[3] *Demirtas v. Canada (Minister of Employment & Immigration,*[4] *Furey v. Conception Bay Centre Roman Catholic School Board*[5] and *R. v. Secretary of State for Health, ex parte United States Tobacco International Inc.*[6] A short reflection indicates the obvious merit of these restrictions. It could hardly be open to a public official by his conduct to displace a duty imposed upon him or to grant a procedural right which statute prohibits any more than he could do so by administratively fettering his discretion, by contract or by waiver.

Returning to the Neighbours' situation, the Minutes of the January 24, 2005 TRCA Executive hearing, found at Tab O of Exhibit 1a (Exhibit "O" to the Affidavit of David Roffey), disclose that deputations were heard from several individuals, including a solicitor from Aird & Berlis LLP., which presumably would have spoken there as here on the Neighbours' behalf. The title of proceedings lists the matter at that level as the application of Mr. Russell before the TRCA. Representations from TRCA staff and by or on behalf of Mr. Russell were not described as deputations. There is no indication that the Neighbours or any of the other deputation-givers were regarded as parties. The final comment indicated that the "Hearing Board" [presumably of the executive] "had no questions of the staff or the applicant/representatives."

Whatever took place before the Executive, or Hearing Board, of the TRCA, has no bearing on the procedure before the Commissioner. The Commissioner in this appeal is a separate adjudicative entity, effectively an administrative tribunal in its own right, exercising on appeal jurisdiction to hear the matter again, as if for the first time. Clause 113(a) of the **Mining Act** provides that an appeal from a recorder is by way of a new hearing. In **611428 Ontario Limited v. Metropolitan Toronto and Region Conservation Authority**, (1996), File #123/94 (Ontario Court of Justice, Divisional Court) (unreported), the Court did not deal with what this provision meant for a conservation authority appeal. However, White J., after referring to the **Mining Act** and **MNR Act**, indicated that proceedings were governed by Part VI of the latter, subject to modifications required by the former, stated at page 2: "The Commissioner treated the appeal before her as a new hearing…".

. . . . 18

[3] [1992] 2 F.C. 621, 6 Admin. L.R. (2d) 62, 16 Imm. L.R. (2d) 24 (C.A.).
[4] [1993] 1 F.C. 601 (C.A.)
[5] (1993), 104 D.L.R. (4th) 455 (Nfld. C.A.).
[6] [1991] 3 W.L.R. 529.

There has been nothing in the conduct of the Office of the Commissioner itself which has given rise to a reasonable or legitimate expectation that the Neighbours would be accorded party status in this appeal. They didn't have full party status before the TRCA; if they did, they would have the right to either appeal or to be heard on Mr. Russell's appeal. The only recourse left to them is to make a motion to the Commissioner seeking party status and convincing me that party status is warranted in the circumstances of the case.

For the Commissioner to be bound by what can best be described as an informal proceeding before the TRCA, which in part was conducted like a town hall meeting in which deputations of neighbours and interested organizations were heard, would frankly fetter the discretion of the Commissioner. There is nothing in this situation, and I could not find anything in any case law, which even hinted that the Commissioner could or should be bound by proceedings which took place in front of the TRCA, however they may be characterized.

I find that the facts in this case do not support the reasonable or legitimate expectation that the Neighbours will either be granted party status or be heard from in some lesser capacity. What now must be decided is the circumstances or the test which will be applied when considering whether these or any other applicants will be granted third party status.

Test – Findings

While the test enunciated in **Bye** is that of "a vital or legitimate interest in the appeal", the re-reading of the case indicates that the test was actually whether the individual(s) seeking party status were able to make a significant contribution to the issue or issues in question. As was pointed out by the Neighbours, the test in Rule 13.01 was characterized in **Regional Municipality of Peel v. Great Atlantic & Pacific Co. of Canada** (1990), 74 O.R. (2d) 164 (C.A.), at page 167 as being an enquiry as to "the nature of the case, the issues which arise and the likelihood of the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties."

The actual elements listed in Rule 13.01 focus on the private third party interests. The concerns raised by the Neighbours are of no assistance to and have absolutely no bearing on the issues I must decide in Mr. Russell's appeal. On the other hand, there is room, as was evidenced in **Bye,** for a useful contribution to be made in certain circumstances, to the public interest as issues do arise in these appeals.

Subsection 13.01(2) provides that once one or more of the tests is met under subsection (1), the court has discretion as to whether party status will be granted. In the exercise of this discretion, prejudice and lengthening the proceedings are considerations.

I find that in section 28 appeals, where the subject matter is the public interest in privately held lands, the test for adding parties is that of making a useful contribution to the issues which must be determined. Attempting to raise issues of a purely private nature such as nuisance or issues which are outside of the Commissioner's jurisdiction, such as planning con-

. . . . 19

cerns, do not constitute a useful contribution to the issues at hand. These issues are found in the statutory tests set out in clause 28(1)(c), the meaning of the conservation of land and the extent to which that and the other tests are found to be applicable to Mr. Russell's situation.

The Role of Public Participation

I have grappled at length with the issue of adding parties to what in essence is a hearing on a public interest issue, namely that the conservation of land on land which is privately owned but under jurisdiction of a conservation authority. My attempts to come to terms with this issue have taken what I agree may be viewed as an unconscionable length of time, but the time is reflective of the importance of this issue which, if party status is granted, has the potential to forever change the very nature of these appeal hearings. Having found that legitimate or reasonable expectation does not apply to these facts, there is no limiting factor in this or any case which would make it a "one time only" situation.

To date, hearings of this type of appeal before the Commissioner have never had a public participation element. As I've said in the previous **Russell** decision, section 28 matters do not involve posting on the Environmental Registry, which is at least one indication that the legislature did not intend this procedure to be one which could be challenged by third parties or "strangers" to the question. So long as these procedures continue to be regarded as planning matters rather than permit applications and appeals, there undoubtedly will be those who will seek to have a voice at the proceedings.

There would be several potential participants to many proceedings, as a matter of course. Not these Neighbours, but neighbours in general, may often wish to raise arguments commonly referred to as NIMBY or "not in my back yard". The Urban Development Institute or UDI may be interested, in cases having considerable weight or precedential value, taking appropriate but pro-development stances. Conservation Ontario, the umbrella organization for all conservation authorities in Ontario, could similarly seek to echo and support the respondent conservation authority's position in an appeal. Municipalities may wish to be given a voice. This is certainly not an exhaustive list, but mere conjecture on interested individuals or organizations which could seek party status.

The prospect of adding the Neighbours as parties to this proceeding for the reasons they have sought clearly has the potential to completely change the tone and tenor of these appeals before the Commissioner. Allowing the motion would add to the complexity of this appeal, add to its length and add to the number of parties who can appeal matters further. It cannot be otherwise.

Nothing I have heard from the Neighbours has persuaded me that I have any jurisdiction over the issues which they wish to raise and to allow them status would give voice to their "issues", however compelling they may be to the individuals involved.

. . . . 20

One reference made by Ms. Pepino did resonate, however, in that the as yet unmade application for a building permit would not give the Neighbours the opportunity to be heard. I cannot help but think that a section 28 permit application must be similar to the building permit situation. The rights of local interests or public interest groups to be heard are relevant at the planning stage when the general nature of how all the lands will be zoned or designated is determined. Once there is a permit application, be it under the **Conservation Authorities Act** or for a building permit, the individual interests no longer speak to the "public interest" of the former or the purely private rights and obligations involved in the latter. Both are private to the applicant. The interests of "others" are not relevant to the question of whether the permit will be issued.

Returning to the issue of public participation before an administrative tribunal, I have tried to comprehend the overall rationale behind the decision to add parties in hearings before administrative tribunals as opposed to the courts. It is quite clear that there has been a shift in the paradigm towards public participation in areas involving environmental assessments and official plans or the establishment of the Environmental Bill of Rights and Environmental Registry. One even sees this in connection with mine rehabilitation under Part VII of the **Mining Act**.

One of the themes with which I have struggled was the effectiveness of public participation or even third party interest participation. Frankly, I could not find much written on the subject and probably should have been looking at policy discussions rather than legal texts to derive a better grasp of the discussion. I've come to realise that I was confusing the right of participation with the effectiveness of the participants. To put it in bald terms, unrepresented neighbours may oppose a certain process, but unless they understand it substantively and are able to make a useful contribution, either through engaging their own experts and counsel able to cross-examine those of a proponent, their participation amounts to little more than a town hall meeting.

That is not the case here. Clearly, the Neighbours are in a financial position to engage very able and persuasive counsel and to the extent that they could participate, I would not characterize allowing that participation as in any way patronizing on the part of the decision-maker. However, while I have been confused by the issue of means as an avenue to effective participation, that is really not the issue and I believe I have effectively dispensed with this confusion in my own mind. There remains the matter of what would constitute effective outside participation.

The best analogy for understanding the operation of the section 28 jurisdiction and the identification of appropriate parties is when considering an appeal where the control of flooding may be affected. A property owner applies to build on lands which have been established as floodplains on floodplain maps. Floodplain mapping is an extensive engineering exercise which is only done after complex computer models involving data taken from vast areas of land in the vicinity of watercourses is gathered. One of the effects of building in a floodplain is that flood elevations may rise upstream and downstream or the speed with which the water

. . . . 21

moves through a reach of the watercourse system may be affected. This is because the development constitutes an encroachment into the floodplain and has the effect of displacing water and storage capacity for that water. The proposed development, if allowed, could affect those flood levels, the reach of the flooding (flooding previously non-flooded lands) or velocities of floodwaters.

Clearly, those who have built upstream and downstream of the proposal in a manner which was felt to be safe to levels pre-set by a storm standard set by legislation have the right to believe that their existing residences or buildings would continue to be safe. Given the public interest jurisdiction of the legislation and the decision-making power of the conservation authorities, those neighbouring property owners should expect that any decision is going to be made without adversely affecting their interests, meaning that any or additional flooding will not occur. Those adjacent or far reaching property owners are not heard from in these applications. They do not receive notice of the proceedings as part of the normal course.

That they may directly or adversely be affected is clear. Concerning an appeal of such decision to the Commissioner, two potential scenarios emerge. If the conservation authority floodplain planning expert engineers have estimated that a proposal will affect the upstream reach, so that increased flooding will be experienced in the order of a half a centimetre, whether the particular property owner affected has or has not retained their own corresponding floodplain expert, and they agree that the increase in flooding would be one half centimetre, and all agree that the degree of increased flooding is tolerable under the circumstances, there would be no reason to add that property owner as a party or hear from them or their experts. If, however, there was disagreement as to the effect of that incremental increase in flooding on their property, or if their expert were to find that the increase in flooding was more in the order of 10, 20 or more centimetres, it would quite clearly be necessary and imperative that this information be heard. In the words of the court in **Regional Municipality of Peel v. Great Atlantic & Pacific** decision, (*ibid*), it is very clear that the evidence of the neighbour would be able to make a useful contribution to the resolution of the case. In fact, it would be imperative to hear this evidence, as lives could easily be at stake, should such potential evidence be ignored.

Yes, the Neighbours are concerned about the possibility that Mr. Russell may be allowed to build a home on his land. That does not mean that they have an interest in the subject matter of the litigation, which is the capacity of Mr. Russell's land and the surrounding ravine lands to withstand the proposed encroachment. There is, frankly, a difference between having an interest in law and being interested in the outcome. The Neighbours' interest, as far as I can determine, is that they do not want to lose the amenity of having Mr. Russell's undeveloped ravine land abutting their own. It is clear that they are willing to engage able counsel to oppose Mr. Russell's appeal, but I fail to see just how a useful contribution would be the result, given the issues raised. The right to question the experts of Mr. Russell and the TRCA would simply add to the length and cost of the proceedings and offer little, if anything that would be useful in my deliberations, if one takes the one-half centimetre analogy. Nothing raised by the Neighbours suggests that there is any issue in which they have profound concerns with the evidence of either Mr. Russell or the TRCA and over which the Commissioner has jurisdiction.

. . . . 22

I find that I am not persuaded on the issues raised in this motion that Rule 13.01 is a suitable test for determining, by analogy, whether to add the Neighbours as parties. The test presupposes a degree of latitude in circumscribing the issues to align with areas of common law. Applications and appeals pursuant to section 28 of the **Conservation Authorities Act** anticipate the private interests of the applicant/appellant against the backdrop of the public interest in the function of the land. Neither of these encompass nuisance or planning matters. The fact is that the focus in Rule 13.01 is on private third party interests, none of which have any bearing on the issues in this case. Allowing an airing of the particular concerns raised by the Neighbours, being totally irrelevant to the questions at issue, would serve only to lengthen the proceedings and make them more costly.

Subject Matter of Russell Appeal

According to **Baker,** the nature of the statutory scheme from which the Commissioner's jurisdiction is derived is also important. It is the function of Mr. Russell's land and those ravine lands which surround it which is important to the statutory scheme. The public interest is found in the protection, preservation and restoration of, in this case, private lands which are alleged, according to the position taken by the TRCA, to perform a public interest purpose, one which meets the objectives of the legislation.

Based upon the documentation in the file and keeping in mind that no evidence has been heard, the Russell property is described as being located mainly on lands below the top of bank within the Binscarth Ravine, a tributary ravine of the Don River. The TRCA has characterized the Binscarth Ravine as being part of an Environmentally Significant Area in which a biological inventory had been carried out as part of the TRCA Terrestrial Natural Heritage Program. The results of this inventory identified a number of forest birds and plants which were characterized as being of concern to the TRCA within the larger ravine system.

The reasons for refusal set out that the proposed grading of the Russell property and construction of a home will adversely affect the conservation of land, being the statutory test set out in clause 28(1)(c) of the **Conservation Authorities Act** and section 4 of R.R.O. 158/90. According to the statute, Mr. Russell's application is for development, which is defined in subsection 28(25):

> **(25)** In this section,
>
> "development" means,
>
> (a) the construction, reconstruction, erection or placing of a building or structure of any kind,
>
> (b) any change to a building or structure that would have the effect of altering the use or potential use of the building or structure, increasing the size of the building or structure or increasing the number of dwelling units in the building or structure,

. . . . 23

(c) site grading, or

(d) the temporary or permanent placing, dumping or removal of any material, originating on the site or elsewhere;

In their reasons, the Executive indicated that if it were to allow the Russell application, the ongoing regenerative and enhancement objectives of the valley will be reduced, there would be detrimental impact due to cumulative loss of natural cover and the proposed development would not comply with the objectives of the TRCA Valley and Stream Corridor Management Program for protection and development within established urban areas. All the foregoing would constitute a negative impact on the conservation of land and thereby create a precedent for future consideration.

The necessary technical documentation and witness statements in this appeal have not yet been filed, so the exact nature of the issues to be explored has not been determined. However, there is a general range of issues which are regarded as typical inquiries concerning a section 28 appeal where conservation of land is at issue. The tests applied are to determine whether the natural resource function can withstand the proposed encroachment. There may be argument as to whether any encroachment can be tolerated or to what degree encroachment may be tolerated through mitigating measures. Where the conservation of land is at issue, determinations have revolved around slope stability and preservation of ephemeral or first order streams and their functions in relation to hydrology. To this, the TRCA has introduced the vast array of ecosystem functions of valley and stream corridors.

What may be examined to determine questions of slope stability are the composition and depth of soils and angle of the slope. Engineering evidence concerning the extent to which such soils or the depth at which underlying bedrock is found may be material. The angle of the valley wall is of considerable significance to slope stability.

The role of any depression in the valley walls in capturing storm run off is of considerable significance generally in a valley and stream corridor ecosystem. While flooding may not be an issue along valley walls, which are located a considerable distance from a permanent and apparent watercourse, the actual existence of and role played by ephemeral streams which have the appearance of gentle gullies in valley walls may be material to the Russell appeal. Creation of impermeable surfaces, such as that of a building, will reduce the amount of land available to absorb rainfall. The water collected through downspouts will discharge onto land at a faster rate than would occur naturally and in turn, that land's ability to absorb water may be significantly challenged as a result. The surface run off over saturated lands will cause some degree of increased flooding downhill.

It appears that the TRCA is seeking to rely upon its Valley and Stream Corridor Program and its Terrestrial Natural Heritage Program in support of its position that the Russell appeal should be dismissed. A Draft version of this was apparently relied upon in **611428 Ontario Limited v. Metropolitan and Toronto Region Conservation Authority**, (February 11, 1994) Appeal No. Conservation Authorities Act 007-92 (unreported), when I considered the meaning of "conservation of land" and stated at page 63:

. . . . 24

> The term "ecosystem" comes to mind when looking at either definition. [Black's & Webster's New International in reference to "land"] It is a recent word which does not appear to have been in common usage at the time the legislation was drafted, Indeed, the 1959 edition of **Webster's Dictionary** discloses no such word. The tribunal finds that "conservation of land", in the context of clause 28(1)(f), includes all aspects of the physical environment, be it terrestrial, aquatic, biological, botanic or air and the relationship between them. Therefore, notwithstanding the fact that the term was not used, "ecosystem" not having yet been coined, "ecosystem" is found to be included in the definition of "land" as used in "conservation of land".

And at page 71:

> For purposes of clarity, it must be stated that the jurisdiction of any conservation authority arises by virtue of a legislative mandate which is directly concerned with specific watersheds. Dr. Brown questioned the jurisdiction of the MTRCA over the subject lands suggesting that, if taken to the extreme, would support it exercising jurisdiction over any swale or undulation in the landscape. The tribunal is satisfied that the subject lands are properly within the jurisdiction of the MTRCA, and these findings should in no way be construed as giving any conservation authority a mandate to regulate green space. These findings are limited to lands which are scheduled pursuant to regulations made under the **Conservation Authorities Act** and are only applicable in connection with proposed development within a watershed.

In the Toronto Court of Justice appeal of this decision (*supra*), White, J., speaking for the panel, stated in response to the first issue of whether it was an error in law that I found that the [then] clause 28(1)(f) provided for conservation of an ecosystem, at page 27:

> Issue 1, the Commissioner did not err in her interpretation of the purpose of s. 28(1)9f) of the *Conservation Authorities Act.* The conservation of an ecosystem is comprehended in the words "or conservation of land" as stated in s. 28(1)(f) of the *Conservation Authorities Act.*

Application for Leave to Appeal to the Court of Appeal was dismissed with costs, no reasons given, on July 9, 1996 before McMurtry, C.J.O., Robins, J.A. and Labrosse, J.A., Court File No. M18250.

In writing the decision in **611428 Ontario Limited v. MTRCA,** I did not treat the Draft Valley and Stream Corridor Program as a TRCA policy. Given that the applicability of the program as policy regarding whether the Commissioner will adopt and apply it in relation to lands which may not have a direct hydrological function, it may be useful to review the test on how policies in general have been treated by the Commissioner since 1993.

. . . . 25

I adopted a four part test based on **Segal v. The General Manager, The Ontario Health Insurance Plan** (Gen. Div. Div. Ct.) unreported, 347/94 November 24, 1994 (Hartt, Saunders, Moldaver) in determining how policies of conservation authorities and the Director of Mine Rehabilitation would be treated. [see **Chalmers v. Grand River Conservation Authority**, CA 007-95, April 25, 1997 (unreported); and **MacGregor v. The Director of Mine Rehabilitation,** Mining Act 033-93, December 23, 1993 (unreported)]:

> 1. Consider the policy and determine whether generally it will be adopted or rejected by the Commissioner.
> 2. If adopted, it need not be reconsidered, unless a party pleads exceptional circumstances.
> 3. If rejected, the Commissioner will give reasons.
> 4. If adopted, the Commissioner will consider whether it is reasonable to apply the policy in the circumstances.

To reiterate, this test has not been applied to date in connection with the TRCA Valley and Stream Corridor Program or the Terrestrial Natural Heritage Program.

Consideration of policies whose focus is the ecosystem as opposed to hydrology is novel insofar as the Commissioner's office is concerned when considering the ambit and scope of the meaning of "conservation of land". Essentially, the question is which ecosystem services are contemplated under the auspices of the **Conservation Authorities Act.** This will be an issue under consideration in this appeal.

Unless persuaded that some other test is applicable, the Commissioner will apply the test as modified, above, to see whether it will adopt or reject the Programs as policy and whether it will be reasonable to apply them in the circumstances. If adopted and applied, the following issues may also be material to Mr. Russell's appeal.

In conjunction with either of the aforementioned Programs, the TRCA may seek to introduce issues concerning disruption of the ongoing biological functions which take place on the ground under a naturalized setting, be it original forestation or reforestation of mixed natural and invasive species. The biological functions referred to may be the decomposition of organic material on the ground and their role in supporting communities at the lowest end of the food chain. It may be the case that on the ground decomposition provides forage or habitat for microscopic species which support larger species downhill and downstream, such as insects, which in turn provide support to fish or aquatic communities in the permanent watercourse located further downhill, be it a small stream feeding into or the river itself. Existing microclimates may be material and potential long-term effects of disruption may need to be examined, both on-site and within the entire system.

In addition to potential disruption of the biological communities, there may be issues arising from silt and sedimentation caused by disruption of the soils through any proposed filling, grading or other activity designed to support a dwelling or other structure. There may be

. . . . 26

issues associated with the necessary regeneration which would take place should the proposed development be allowed. One issue which may arise is whether the disruption can be fully remediated over time and what would be the ongoing impact of the disruption to the ecological functions of the Russell lands or lands downhill or downstream from the proposed filling.

The role of the valley corridor in which the Russell property is located must be established and placed into context within the larger Don River corridor and the TRCA strategy for corridor systems and green space restoration. There may need to be evidence concerning the dynamic nature of this system and existing pressures. The role of the Russell property/corridor within the larger system may be material to existing ecosystem functions or ongoing regenerative efforts. To support its position, it may be necessary for the TRCA to present evidence of inventories of existing wildlife and supporting flora, habitat function, migration routes or other linkages and the condition of each along a continuum of degradation through restoration. The Russell property corridor may play a role in attenuation of noise levels from the Bayview extension or it's on and off ramps from the Don Valley Parkway.

Proposed disruption to valley corridors may cause minimal or significant disruption to the valley function. How would Mr. Russell's proposed disruption be characterized? Can such disruption be adequately mitigated? If found to be minimal, what role, if any, does incremental loss play in the valley corridor function? Is potential cumulative loss valley corridor function material? What is the relationship between incremental loss, cumulative loss and the statutory test that conservation of land not be affected? If the disruption is found to be minimal, is potential fragmentation of habitat, linkages or the corridor material? If no fragmentation is found to occur, given that the Russell property is at the apex of the valley wall and is surrounded on the uphill sides by what appear to be fully developed properties on which residential buildings and some swimming pools have been constructed, would the impact of incremental loss be significantly less material?

There may need to be an evaluation of the benefit afforded by the Russell property to the TRCA valley and stream corridor objectives comparing values afforded by its current "as is" state with the net benefit of its altered state, factoring in disruption. Such an analysis may need to weigh the values associated with mature tree and under storey cover of mixed native and invasive species with newly planted native species.

The Neighbours' Issues

With the greatest respect to their specified interests, hearing from the Neighbours is not necessary to the purely technical issues, along the lines set out above, which will be introduced and determined. While the exact issues have not yet been defined by the TRCA and Mr. Russell, I am satisfied that they are likely to focus on one or a number of those which are directly connected with conservation of land relating to valley corridors, ephemeral streams, ecosystem functions and linkages.

. . . . 27

To the extent that the Neighbours may have sighted certain species material to the issues, this amounts to data which can readily be provided to or collected by TRCA staff to be included in their technical reports. This represents acceptable use of admissible hearsay evidence, which is permissible under the **Statutory Powers Procedure Act**. Even use of such nominal evidence would depend on the credibility of the individual making the sighting and identification, where issues of competency or professional qualifications could arise.

It would be otherwise unreasonably onerous to require individual testimony on each item of data collected. The usefulness of proceeding in this manner would be highly questionable given that the substantive issue is not one of itemization of inventories. It would not be too much of a stretch to suggest that every homeowner in Toronto has seen birds and other animals in their backyards on at least one occasion. It is however the overall role and significance within the context of the ecosystem as a whole that data concerning wildlife will play. This is a question which can be addressed only by trained professionals who are able to provide contextual and expert opinion evidence. It is anticipated that the TRCA is more than adequately staffed in this regard. Mr. Russell will need to address any such issues from the perspective of his appeal as well.

It is not reasonable to assume, given the expertise possessed by the TRCA by the very nature of its role and function outside of this hearing process, that the Neighbours will be in a position to provide anything of a useful nature or to contribute to the resolution of issues associated with whether the conservation of land will be affected.

If the Neighbours were to have brought this motion on the basis that the data collected and presented by the TRCA and Mr. Russell regarding slope stability was, in their submission, wholly wrong and faulty, such that one could anticipate, if the appeal were allowed, that it would have dire consequences for the stability of the Neighbours' own structures or land. That has not been the case here.

Costs

Both Ms. Pepino and Ms. Stewart asked that they be able to make submissions on costs. In the interests of everyone's schedules, Mr. Daniel Pascoe, Registrar, will contact each directly, as well as Mr. Jonathan Wigley, counsel with carriage of this file on behalf of the TRCA, to establish a workable schedule for filing written submissions on costs and an Order to File will be issued accordingly.

Order to File on the Merits

Similarly, Mr. Pascoe will consult with counsel regarding acceptable dates for filing of materials on the merits, following which an Order to File will be issued in due course. It is strongly suggested that dates and length of time for a hearing also enter into these discussions so that an Appointment for Hearing may be issued and that the scheduling of the hearing in this matter can proceed in the most expeditious time frames possible under the circumstances.

Conclusion

For all of the above reasons, the motion of the Neighbours to be added as parties to Mr. Russell's appeal is denied. Their application will be dismissed.