

File No. OG 005-00

L. Kamerman)	Friday, the 2nd day
Mining and Lands Commissioner)	of March, 2001.
L.F.G. Carter)	
Deputy Mining and Lands)	
Commissioner)	

OIL, GAS AND SALT RESOURCES ACT

IN THE MATTER OF

An appeal pursuant to subsection 7.0.2 (1) of the **Oil, Gas and Salt Resources Act** from the decision of the Inspector, dated the 7th day of September, 2000, regarding the plugging of Metalore Resources Limited Gas Well #78, License #7533, located on Tract 3, Lot 1, Concession I, Charlotteville Township, Haldimand - Norfolk County;

AND IN THE MATTER OF

A referral pursuant to subsection 7.0.2 (2) of the **Oil, Gas and Salt Resources Act** to Linda Kamerman and Lorne F.G. Carter, dated the 2nd day of October, 2000, to hear the appeal.

B E T W E E N:

METALORE RESOURCES LIMITED
Appellant
- and -

MINISTER OF NATURAL RESOURCES
Respondent

DECISION REGARDING COSTS

We, the undersigned Linda Kamerman and Lorne F.G. Carter, acting as the Minister of Natural Resources' Designees pursuant to subsection 7.0.2 (2) of the **Oil, Gas and Salt Resources Act**, find that we have no jurisdiction to make an Order as to costs under this section.

Reasons for this Decision are attached.

DATED this 2nd day of March, 2001.

Original signed by L. Kamerman

L. Kamerman
Mining and Lands Commissioner

Original signed by L.F.G. Carter

L.F.G. Carter
Deputy Mining and Lands Commissioner

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REASONS

Background

On September 7, 2000, Mr. James A. Smith, of the Ministry of Natural Resources ("MNR") issued Inspection Order 2000-JAS-24, pursuant to section 7.0.1 of the **Oil, Gas and Salt Resources Act** (the "Act") requiring the plugging of Metalore Resources Limited ("Metalore") Gas Well #78 by October 7, 2000. Gas Well # 78 is located on Tract 3, Lot 1, Concession I, in the Township of Charlotteville, Haldimand Norfolk County. Specifically, the order required that Gas Well #78, Licence #7533, be plugged in accordance with the Provincial Standards.

Subsection 7.0.2.(1) of the **Act** provides:

7.0.2 (1) Any person who considers himself, herself or itself aggrieved by a decision or order of an inspector made under section 7 or section 7.0.1 may appeal to the Minister within 30 days after the decision or order is made.

Subsection 7.0.2 (2) provides that an appeal is to be heard by the Minister [of Natural Resources]'s designee. The Office of the Mining and Lands Commissioner was contacted by Brian Messerschmidt, Acting Manager of the Aggregate And Petroleum Resources Section of the Ministry of Natural Resources, seeking information regarding the wording of the designation. In particular, he was concerned that the proposed designation would accurately reflect that it was the Mining and Lands Commissioner who would be designated. He was advised to name two individuals, Linda Kamerman and Lorne F.G. Carter. Ms. Kamerman and Mr. Carter are the Mining and Lands Commissioner and a Deputy Mining and Lands Commissioner, respectively, appointed pursuant to section 6 of the **Ministry of Natural Resources Act** (the "**MNR Act**"). This was done to address the concern that the Mining and Lands Commissioner may not be an "agency, board or commission" within the meaning of the subsection 7.0.2(3) of the **Act**, as the **MNR Act** establishes a Commissioner, with Deputies, rather than a "commission".

On October, 5th, 2000, the Office of the Mining and Lands Commissioner received a referral from the Minister, designating the aforementioned Linda Kamerman and Lorne F.G. Carter to hear and dispose of an appeal made by Metalore Resources Limited, pursuant to subsection 7.0.2.(2) of the **Act**.

During the course of the hearing, the designation was specifically addressed. In particular, both parties agreed that it was understood that the designation was to be the Mining and Lands Commissioner, as appointed by the **Ministry of Natural Resources Act**, and to include the Deputy Mining and Lands Commissioner. For ease of reference, the designees will be referred to as the "Commissioner" in this Decision Regarding Costs.

Appearances

The Ministry of Natural Resources (the "Minister", "MNR" or the "Ministry") was represented by Mr. Stephen Gibson, of the law firm of Hennessey, Bowsher. Metalore was represented by Mr. Jeremy Devereux of the law firm of Meighen & Demers.

Issues

Does the Commissioner have jurisdiction to award costs in an appeal under section 7.0.2?

1. Can the Commissioner designated to hear an appeal to the Minister by the operation of subsections 7.0.2 (2) and (3) legitimately exercise greater or different powers than any other designee(s) or the Minister?
2. Could it have been the intent of the legislature to create two parallel and substantively different appeal procedures under the section through the operation of subsection 1(3)?

3. Does the designation under subsection 7.0.2 (2) and (3) of the Commissioner create a duty in the Commissioner under the **Act** within the meaning of subsection 1(3)?

Discretion

1. If the Commissioner does find jurisdiction to award costs, is this a proper case to exercise discretion?
2. If the answer to #1 is yes, what is the appropriate quantum?

Hearing on the Merits no Longer Necessary

A hearing was scheduled for January 16th, 2001. However, on January 10th, 2001, the tribunal was advised by Mr. Gibson in writing that Well #78 had been plugged and MNR was satisfied that the hearing of the appeal was no longer necessary, subject to this issue of costs. Metalore opposed consenting to an Order for Costs. The parties agreed to have the application for costs heard on the date set aside for the hearing on the merits.

Argument

Mr. Gibson

Jurisdiction to Award Costs

Mr. Gibson submitted that there are two questions for determination on the matter of costs. First, the Commissioner must determine whether it has jurisdiction to make an order for costs. Secondly, it must decide whether its discretion ought to be exercised in this case.

An appeal from an order of an inspector under the **Oil, Gas and Salt Resources Act** is pursuant to section 7.0.2 (1), which provides that a person aggrieved by an inspector's decision or order may appeal to the Minister within 30 days. Subsection (2) requires that the appeal be heard and disposed of promptly by the Minister's designee. Subsection (3) provides:

- (3) For purposes of this section, the Minister may designate one or more individuals or a board, agency or commission.

Mr. Gibson submitted that once the Mining and Lands Commissioner is designated by subsection 7.0.2.(3), then subsection 1(3) of that **Act** will govern the Commissioner's hearing of matters. The provision states:

1. (3) Part VI of the *Mining Act* applies, with necessary modifications, to the exercise of the Commissioner's powers and the performance of his or her duties under this Act.

Section 126 of the **Mining Act** gives the Commissioner the discretionary power to make orders as to costs. Specifically, it states:

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.

Mr. Gibson submitted that through these statutory provisions the Commissioner has the power and discretion to make an order as to costs in this appeal. In other words, while the Minister's designee under subsection 7.0.2 (2) may not normally have cost awarding powers, by virtue of designating the Commissioner, who has authority under the **Act** which is found in subsection 1(3), the Commissioner does have the power to award costs in this case.

Are Costs Warranted in this Case?

Mr. Gibson submitted that, even though there has been no hearing on the merits, the facts of this case justify the exercise of discretion by the Commissioner, in awarding costs. He stated that costs are an indemnity to reimburse a party for prosecuting or defending a legal proceeding.

In this appeal, the Minister responded to the appeal, retained counsel and prepared for a hearing on the merits. Therefore, costs have been incurred for which reimbursement is merited, thereby meeting the threshold. It was conceded that most cases do not give rise to an order for costs. However, on the merits of what actually took place, Mr. Gibson asked the Commissioner to agree that it was warranted.

Well #78 has been the subject of various inspector's orders since 1997. There was an Order to Plug issued by an inspector in July, 1997. This was appealed to the Minister and the appeal was denied. In April, 1998, a second Order to Plug was issued, with time frames specified. In December, 1998, Metalore filed for judicial review immediately prior to the expiry of the Order to Plug. The application for judicial review was dismissed in March, 1999, with costs in favour of the Minister, in the amount of \$2,500. Due to the absence of compliance, another order for compliance was issued in September, 1999.

Given the history of Metalore's conduct concerning Well #78, including a consent order in 1999, Mr. Gibson submitted that the current appeal was without merit and lengthened proceedings. These are basic factors or considerations which a judicial body may take into account if it is persuaded that there is authority to award costs. He submitted that such an award is justified under the circumstances of this case.

Mr. Gibson stated that MNR seeks a cost award based upon the time spent on the file by Counsel, having provided a copy of his docket to the Commissioner and Mr. Devereux. Based upon his time spent since December when he was retained, up to and including the plugging of the well, with the balance relating to time spent on another file [OG 006-00], plus time for the hearing. A total of \$1,560 was billed in this matter on a solicitor and client basis, so that MNR is seeking half, being \$800 plus gst.

Mr. Devereux

Jurisdiction to Award Costs

Mr. Devereux submitted that, generally, the powers of an administrative tribunal must be found in its enabling legislation. In this regard, its powers are unlike those of a Court, which has the inherent jurisdiction to award costs. There must be a clear statutory basis in a tribunal for the exercise of the jurisdiction to award costs.

Metalore's appeal is to the Minister, who designates an individual or tribunal to hear the matter. There is nothing in section 7.0.2 or elsewhere in the **Act**, which gives the power to the Minister or his designate to award costs.

The specific reference in subsection 1(3) to the powers of the Commissioner, would apply for those matters under the **Act** which specifically empower the Commissioner to hear, such as applications under section 8, or referrals under sections 13 and 14. Only in those cases does the **Act** specifically state that Part VI of the **Mining Act** will apply.

Appeals arising under section 7.0.3 are normally heard by the Petroleum Resources Section (the "Petroleum Resources Centre" or "PRC") of the Ministry of Natural Resources. In this case, as Metalore had expressed concerns that there was a reasonable apprehension of bias in the PRC, the Minister designated the Commissioner to hear the appeal. Although the hearing of this cost application is taking place in the Courtroom of the Commissioner, it is nonetheless an appeal to the Minister's designee. There is nothing in the **Act** which gives the Minister's designee power to award costs. There is nothing in the nature of this appeal which could give greater powers to the Minister's designee than those of the Minister provided in the section. Mr. Devereux submitted that the Commissioner must look to the capacity upon which this appeal is being heard.

Alternatively, Is this a Proper Case for the Award of Costs?

In the alternative, Mr. Devereux submitted that, if the Commissioner finds that there is jurisdiction to award costs, then it should avoid the submissions on behalf of MNR as they touch too much on the merits.

Mr. Devereux submitted that Metalore is entitled to exercise its statutory right to appeal. This was done and through discussions with MNR, Metalore determined that it would comply with the order requiring the plugging of Well #78. In effect, Metalore did what it was required to do without requiring the hearing of the appeal. When asked about Metalore's own conduct in this matter, Mr. Devereux invited the Commissioner to consider the history of this matter, namely that Metalore convinced the Minister that there was a reasonable apprehension of bias. MNR agreed to the request that the matter be referred to the Commissioner.

Response

Mr. Gibson responded that, by its request, Metalore was requesting that the appeal be heard by a body with certain powers, including the power to award costs.

Findings

Jurisdiction

The Commissioner is defined under subsection 1(1) of the **Act**, as being appointed by the **MNR Act**. Subsection 1(3) of the **Oil, Gas and Salt Resources Act** sets out that Part VI of the **Mining Act** applies "to the exercise of the Commissioner's powers and the performance of his or her duties under this Act".

There are a number of sections in the **Act** which specifically name the Commissioner. Under section 8 of the **Act**, the Commissioner may make pooling or unitization orders. In subsection 10.1(2), a person who considers themselves aggrieved by the Minister's refusal to consent to the transfer of a licence relating to a well may *appeal directly to the Commissioner*. The Commissioner holds a hearing and reports to the Minister. In subsection 13(1), when terms or conditions are being considered in connection with the granting of a license or permit, the Commissioner may be required to hold a hearing and report. This can occur either through the Minister's initiative or at the request of the applicant. Similarly, a hearing and report by the Commissioner may be necessary under subsection 13(2). This would occur when the Minister is considering a proposed amendment, suspension or revocation of any term, condition, duty or liability of a licence or permit. Under section 14, upon certain conditions being met, the Minister is empowered to refuse the granting of a licence or permit or cancel or suspend an existing permit. The Minister may refer such matters to the Commissioner for a hearing and report, and if requested by the person who considers himself aggrieved, the Minister shall refer the matter to the Commissioner.

From the foregoing, it is apparent that the **Act** provides proceedings involving applications, referrals and appeals directly to the Commissioner. There can be no doubt that these specific references fall under the "duties" of the Commissioner "arising under this Act", within the meaning of subsection 1(3) of the **Act**.

Section 7.0.2 is substantively different. The initial order or decision is that of an inspector. The appeal is to the Minister to whom the legislature has given the statutory authority to designate a range of individuals and statutory bodies to hear and dispose of the appeal.

During the course of this and an earlier section 7.0.2 appeal involving Metalore, the Commissioner was told that most appeals arising under this section are heard by the Manager of the PRC. The purpose behind allowing the Minister to designate an individual outside of the PRC or a statutory body, such as an agency, board or commission, was not discussed at the hearing. Presumably, there are times when either MNR or the appellant wishes a clearly arm's length determination. One example may be where there is an apprehension of bias by the Manager, who must maintain a working, if not supervisory, relationship with the inspectors. Another may be where the Manager is involved in a number of ongoing matters with the appellant, and may become concerned about merely the appearance of an apprehension of bias. These are but two examples and are not exhaustive.

Section 7.0.2 provides that the **Statutory Powers Procedure Act** (the "SPPA") does not apply to the appeal [s. 7.0.2 (9)]. A hearing to which Part VI of the **Mining Act** applies is much more formal and court-like and gives the Commissioner considerable powers, including the power to award costs, which the **SPPA** does not.

Mr. Gibson pointed out that Metalore specifically requested that the Commissioner hear this matter. A fact with which Mr. Devereux did not disagree. What Mr. Gibson seems to be stating is that, by specifically requesting that the Commissioner hear the appeal, Metalore has effectively attorned to the jurisdiction of the Commissioner acting as Commissioner (ss 1(3)) and not as the Minister's designee.

The power to award costs requires clear statutory authority. By accepting the Ministry's argument, the Commissioner would effectively be creating or adopting a parallel process to that which is specifically set out in section 7.0.2, on the basis that it is a duty of the Commissioner. Yet, under the **Act**, the Commissioner has no inherent jurisdiction under that section. The statute clearly intends that the Minister have control over who can hear these appeals. The statute itself clearly and unequivocally sets out how such appeals are to be heard.

The Commissioner has considered the framework of the **Act** and finds that there is nothing in the drafting of subsection 1(3) and section 7.0.2 to support a finding that the Commissioner may hear such an appeal other than as the Minister's designee. As such, the Commissioner must proceed with no greater powers than those of the Minister's designate, namely to make findings and rescind, affirm the inspectors order or make a new one in substitution. The **SPPA** does not apply to this matter and certainly, Part VI of the **Mining Act** does not apply. There is no inherent power in the Minister, nor is any created in the **Act** for the Minister to award costs.

Conclusions

The Commissioner finds that, while subsection 1(3) of the **Act** does make specific reference to the powers of the Commissioner in performing his or her duties, the requisite statutory authority does not exist to extend or import these powers and authorities into appeals under section 7.0.2. Appeals under section 7.0.2 are to the Minister.

The Commissioner further finds that, in accepting the designation by the Minister to hear an appeal under section 7.0.2., there is no power in the Commissioner to make any order, other than what is allowed to the Minister's designee in subsection (8). These powers are to substitute findings or opinions for those of the inspector, to rescind or affirm the decision or order or to make a new one in substitution.

The Commissioner derives its powers under section 7.0.2. as the designee of the Minister of Natural Resources. In this respect, the Commissioner is not acting as the Mining and Lands Commissioner and its powers as Commissioner specifically referred to in subsection 1(3) do not apply.

Although purely speculative, it may be possible for the Lieutenant Governor in Council to make a regulation pursuant to clause 6(6)(b) of the **MNR Act**, "assigning to the Commissioner authorities, powers and duties of the Minister". Such a regulation could specify the parties to the appeal and be applicable only to that appeal, as was done with appeals to the Minister under section 28 of the **Conservation Authorities Act** prior to the passing of a general regulation in 1984 assigning all such appeals to the Commissioner. Pursuant to any such regulation subsection 6(7) of the **MNR Act** would apply in much the same way as subsection 1(3) of the **Oil, Gas and Salt Resources Act** applies to the duties of the Commissioner, namely those specifically laid out in the legislation.