

# Environmental Review Tribunal

## Tribunal de l'environnement



**ISSUE DATE:** December 31, 2019

**CASE NO.:** 19-060

**PROCEEDING COMMENCED UNDER** section 100(4) of the *Ontario Water Resources Act*, R.S.O. 1990, c. O.40, as amended

Appellant: John Sherk (File No. 19-060)  
Appellant: Elizabeth Sherk (File No. 19-061)  
Appellant: Kathryn Stouffer (File No. 19-062)  
Appellant: Estate of Norma Sherk (File No. 19-063)  
Respondent: Director, Ministry of the Environment, Conservation and Parks  
Subject of appeal: Order issued to submit a completed application for a Permit to Take Water for the dam constructed 4567-BDKPTK-1  
Reference No.: 4567-BDKPTK-1  
Property Address/Description: Part of Lot 10, and Lot 11, Concession 14  
Municipality: South Frontenac  
Upper Tier: County of Frontenac  
ERT Case No.: 19-060  
ERT Case Name: Sherk v. Ontario (Environment, Conservation and Parks)

**Heard:** December 17, 2019 in Sydenham, Ontario

### **APPEARANCES:**

#### **Parties**

John Sherk

Director, Ministry of the Environment,  
Conservation and Parks

Rivendell Golf Corporation

#### **Counsel**

Self-represented

Paul McCulloch

Kenneth Harper

Robert Sherk	Self-represented
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Hannes and Dorina Friedli	Self-represented
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## REASONS

[1] On August 7, 2019, John Sherk, Elizabeth Sherk, Kathryn Stouffer, and the Estate of Norma Grace Sherk (“Appellants”) filed appeals regarding Director’s Order No. 4567-BDKPTK-1 (“Director’s Order”) made on July 24, 2019 by Trevor Dagilis, Kingston District Office, Ministry of the Environment, Conservation and Parks (“MECP”) under s. 100(4) of the *Ontario Water Resources Act* (“OWRA”). The Director’s Order requires the Appellants to submit a completed application for a permit to take water for a dam constructed at Part Lot 10 and Lot 11, Concession 14, South Frontenac (“subject property”).

[2] On December 17, 2019, a Pre-hearing Conference (“PHC”) was held in Sydenham, Ontario. At the outset of the PHC, the parties provided an overview of their positions on the appeals.

[3] The Director provided background to the matter. Counsel for the Director, Paul McCulloch, indicated that the parties had participated in a formal mediation process before Tribunal Member Hugh Wilkins and had constructive discussions that the parties hope to continue. Mr. McCulloch confirmed to the Tribunal that the issue in this matter is relatively narrow, specifically: “is a permit to take water required by law at the subject property?” He indicated that it would be appropriate to set a hearing date, and to prepare for a hearing. Mr. McCulloch stated that the Director would call three witnesses at the hearing, depending on whether matters could be resolved prior to then.

[4] John Sherk indicated that he has information that he would like to present at a hearing in regards to the background to the development of the pond and dam on the subject property. He expressed concern that the permit to take water will require the Appellants to enter into a formal water sharing agreement rather than the 'good-faith' agreement that is currently in place.

### **Requests for Status**

[5] There were a number of requests for party, participant and presenter status that the Tribunal addressed at the PHC.

[6] The Rivendell Golf Corporation requested party status.

[7] Robert Sherk requested participant status.

[8] Hannes and Dorina Friedli requested presenter status.

[9] The Tribunal granted party status to the Rivendell Golf Corporation, participant status to Robert Sherk, and presenter status to Hannes and Dorina Friedli.

[10] The reasons for the Tribunal's decision granting status are set out below along with procedural directions leading up to the hearing of the appeals.

### **Issues**

[11] The issues are whether:

- i) party status should be granted to the Rivendell Golf Corporation;
- ii) participant status should be granted to Robert Sherk; and
- iii) presenter status should be granted to Hannes and Dorina Friedli.

## Relevant Rules

[12] The relevant *Rules of Practice* (“Rules”) of the Tribunal are as follows:

### **Naming of a Party**

62. The following persons are Parties for the purpose of the Rules:
  - (a) Persons specified as Parties by or under the statute under which the proceeding arises;
  - (b) Persons otherwise entitled by law to be Parties to the proceeding; and
  - (c) Persons who request Party status and are so specified by the Tribunal as Parties for all or part of the proceeding, and on such conditions as the Tribunal considers appropriate.
63. In deciding whether to name a person as a Party to the proceeding, the Tribunal may consider relevant matters including whether:
  - (a) a person’s interests may be directly and substantially affected by the Hearing or its result;
  - (b) a person has a genuine interest, whether public or private, in the subject matter of the proceeding; and
  - (c) a person is likely to make a relevant contribution to the Tribunal’s understanding of the issues in the proceeding.

### **Role of a Party**

64. A Party to the proceeding before the Tribunal may:
  - (a) Bring motions;
  - (b) be a witness at the Hearing;
  - (c) be questioned by the Parties;
  - (d) call witnesses at the Hearing;
  - (e) cross-examine witnesses;
  - (f) make submissions to the Tribunal, including final argument;
  - (g) receive copies of all documents exchanged or filed by the Parties;
  - (h) participate in a mediation;
  - (i) attend site visits; and
  - (j) claim costs or be liable to pay costs where permitted by law.

In proceedings other than those under section 142.1 of the *Environmental Protection Act*, a person granted Party status under Rule 62(c) may raise an issue that has not already been raised by persons referred to in Rule 62(a) and (b) with the permission of the Tribunal.

### **Naming of a Participant**

66. The Tribunal may name persons to be Participants in all or part of a proceeding on such conditions as the Tribunal considers appropriate. A Participant to a proceeding is not a Party to the Proceeding. In deciding whether to name a person as a Participant, the Tribunal may consider whether the person’s connection to the subject matter of the proceeding or issues in dispute is more remote than a Party’s would be. A person who may otherwise qualify as a Party may request Participant status.

**Role of a Participant**

67. A Participant in a Hearing may:
- (a) be a witness at the Hearing;
  - (b) be questioned by the Parties;
  - (c) make oral and written submissions to the Tribunal at the commencement and at the end of the Hearing;
  - (d) upon request, receive a copy of documents exchanged by the Parties that are relevant to the Participant's interests; and
  - (e) attend site visits.
68. A Participant in a Hearing may not:
- (a) raise issues that have not already been raised by a Party;
  - (b) call witnesses;
  - (c) cross-examine witnesses;
  - (d) bring motions;
  - (e) participate in a mediation, unless permitted to do so by the Tribunal; and
  - (f) claim costs or be liable for costs.

**Naming of a Presenter**

69. The Tribunal may name persons to be Presenters in all or part of a proceeding on such conditions as the Tribunal considers appropriate. A Presenter to a proceeding is not a Party to the Proceeding. In deciding whether to name a person as a Presenter, the Tribunal may consider whether the person's connection to the subject matter of the proceeding or issues in dispute is more remote than a Party's or Participant's would be. A person who may otherwise qualify as a Party or Participant may request Presenter status.

**Role of a Presenter**

70. A Presenter in a Hearing may:
- (a) be a witness and present his or her relevant evidence at a pre-arranged time, either during a Hearing's regular day-time session or at a special evening session;
  - (b) be questioned by the Parties;
  - (c) provide the Tribunal with a written statement as a supplement to oral testimony; and
  - (d) upon request, receive a copy of documents exchanged by the Parties that are relevant to the Presenter's interests.
71. A Presenter in a Hearing may not:
- (a) raise issues that have not already been raised by a Party;
  - (b) call witnesses;
  - (c) cross-examine witnesses;
  - (d) bring motions;
  - (e) make oral and written submissions to the Tribunal at the commencement and at the end of the Hearing;
  - (f) participate in a mediation, unless permitted to do so by the Tribunal;
  - (g) attend site visits unless permitted to do so by the Tribunal; and
  - (h) claim costs or be liable for costs.

## **Discussion, Analysis and Findings**

### *Issue 1: Whether party status should be granted to the Rivendell Golf Corporation*

[13] Kenneth Harper, representing the Rivendell Golf Corporation, requested that the Rivendell Golf Corporation be granted party status to the appeals. Mr. Harper indicated that the golf course is downgradient from the subject property, and obtains water for irrigation of the golf course from a stream that exists from the subject property. He stated that the Rivendell Golf Corporation's interest is to maintain the agreement that currently exists with the Appellants in regards to the flow from that stream. There were no objections to the request for party status.

[14] The Tribunal finds that the Rivendell Golf Corporation's interest in the appeals satisfies the considerations set out in the Tribunal's Rules, in that its interests may be directly and substantially affected by the hearing or its result. The Rivendell Golf Corporation also has a genuine interest in the subject matter of the proceeding, and is likely to make a relevant contribution to the Tribunal's understanding of the issues. As such, the Rivendell Golf Corporation is granted party status in this matter and, as a party, may participate in settlement discussions.

### *Issue 2: Whether participant status should be granted to Robert Sherk*

[15] Robert Sherk is a brother of John Sherk and the other Appellants in this matter. He is a part owner of the subject property, and also owns land in the vicinity. There were no objections to the request for participant status for Robert Sherk.

[16] The Tribunal finds that Robert Sherk's interest in the appeals satisfies the considerations set out in the Tribunal's Rules. Robert Sherk has a genuine interest in the subject matter of the proceeding, and is likely to make a relevant contribution to the Tribunal's understanding of the issues. As such, Robert Sherk is granted participant status to the appeals.

*Issue 3: Whether presenter status should be granted to Hannes and Dorina Friedli*

[17] Hannes and Dorina Friedli own property on the west side of the pond where the dam is located. The Friedlis obtain water from the pond for their vegetable garden. They expressed concern about environmental aspects in relation to the appeals. There were no objections to the request for presenter status for Hannes and Dorina Friedli.

[18] The Tribunal finds that Hannes and Dorina Friedli's interest in the appeals satisfies the considerations set out in the Tribunal's Rules. Hannes and Dorina Friedli have a genuine interest in the subject matter of the proceeding, and their participation is likely to make a relevant contribution to the Tribunal's understanding of the issues. As such, Hannes and Dorina Friedli are granted presenter status to the appeals.

### **Scheduling Matters**

[19] The parties agreed that a two-day hearing was sufficient for this matter, based on the provision of an Agreed Statement of Facts ("ASF") being available prior to the hearing, and the submission of witness statements prior to the hearing.

[20] In preparation for the hearing, the Tribunal directed that the Appellants, the Director and the Rivendell Golf Corporation are to exchange disclosure simultaneously on **February 7, 2020** in accordance with Rule 166 of the Tribunal's Rules. Disclosure does not need to be filed with the Tribunal.

[21] The Tribunal also directed that the Director is to serve and file witness statements and the documents he intends to rely upon at the hearing by **March 6, 2020**. The Appellants and the Rivendell Golf Corporation are to serve and file witness statements and documents they intend to rely upon at the hearing by **March 18, 2020**. If the Director has any reply witness statements and documents, these are to be served and filed by **March 27, 2020**.

[22] The Tribunal directed that the participant and the presenters are to serve and file witness statements and the documents they intend to rely upon at the hearing by **March 27, 2020**.

[23] Counsel for the Director also offered to seek to prepare an ASF. Upon consent, a Finalized ASF is to be provided to the Tribunal by **March 27, 2020**.

[24] The Tribunal directed that a two-day hearing is scheduled for **April 7-8, 2020**. The start time and the location of the hearing venue were not finalized during the PHC.

[25] The Tribunal directed that a telephone conference call ("TCC") be held on **March 3, 2020**, prior to the submission of the witness statements in order to provide the Tribunal with an update on whether the issue to be resolved at the hearing had been scoped or fully resolved.

[26] The Tribunal's Case Coordinator will provide the call-in numbers for the TCC closer to then.

## **ORDER**

[27] The Rivendell Golf Corporation is granted party status.

[28] Robert Sherk is granted participant status.

[29] Hannes and Dorina Friedli are granted presenter status.

[30] The Tribunal directs that the proceeding be conducted in accordance with the following schedule, as may be varied by agreement of the Parties, and confirmed by the Tribunal:



February 7, 2020	The Parties' exchange of disclosure
March 3, 2020	Telephone conference call with Parties and the Tribunal
March 6, 2020	The Director files witness statements and documents to be relied on at the hearing
March 18, 2020	The Appellants and the Rivendell Golf Corporation file witness statements and documents to be relied on at the hearing
March 27, 2020	Reply witness statements and documents, if any, to be filed by the Director Participant and Presenter statements to be filed Finalized Agreed Statement of Facts to be filed
April 7-8, 2020	Two-day hearing of the appeals

*Party Status Granted*  
*Participant Status Granted*  
*Presenter Status Granted*  
*Procedural Directions Ordered*  
*Hearing Dates Set*

*"Helen Jackson"*

HELEN JACKSON  
MEMBER

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### **Environmental Review Tribunal**

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