Environmental Review Tribunal

Case Nos: 00-119/00-120/00-121/00-122/
00-123/00-124/00-126

Dillon et al. v. Director,
Ministry of the Environment

In the matter of appeals by Carol and Melvyn Dillon filed November 17, 2000; Michael and Maureen Cassidy filed November 20, 2000; The Council of Canadians; Kathleen Corrigan; Anne German; Eileen Naboznak; and Ken McRae filed November 21, 2000, for a hearing before the Environmental Review Tribunal (formerly the Environmental Appeal Board) pursuant to Part II of the *Environmental Bill of Rights, 1993* with respect to a decision by the Director, Ministry of the Environment, under section 34 of the *Ontario Water Resources Act*, to issue Permit to Take Water No. 00-P-4096 to OMYA (Canada) Inc. for the taking of water from the Tay River for process water at Lot 17, Concession 2, Former Township of Bathurst, now part of the Township of Bathurst, Burgess and Sherbrooke, County of Lanark, Ontario; and

In the matter of a motion brought by OMYA (Canada) Inc. and the Director, Ministry of the Environment, for an order quashing and striking out certain grounds of appeal set out in the Notices of Appeal and for other orders that were heard on March 5 and 6, and April 2 and 3, 2001 in Perth, Ontario.

Before: Pauline Browes, Vice-Chair

Dated this **2nd** day of **May, 2001**.

Reasons for Decision

Background:

On August 24, 2000 a Director acting under section 34 of the *Ontario Water Resources Act* issued a Permit to Take Water to OMYA Canada Inc. ("OMYA") for the taking of water from the Tay River.

On November 6, 2000 another member of this Tribunal granted the appellants leave, under the *Environmental Bill of Rights*, 1993, to appeal the Director's decision to issue the Permit. Notices of appeal were filed by the appellants. A preliminary hearing was held on February 5 and 6, 2001 in Perth, Ontario in preparation for the main hearing. At that time the respondents were requested by the Tribunal to meet and prepare a Joint Issues List. This was done and the following list of Joint Issues was submitted by those parties appealing the Director's decision as well as Ms. S. Cedar, who was named a party:

1. The Director based his Decision on insufficient and out of date information
2. The Director's Decision could cause significant harm to the environment.
3. The Director failed to apply a watershed approach to decision making as mandated by the *Ontario Water Resources Act*, Regulation 285/99 and by MOE's Statement of Environmental Values.
4. The Director failed to apply an ecosystem approach to decision making as mandated by the *Environmental Bill of Rights*, the *Ontario Water Resources Act*, Regulation 285/99 and by MOE's Statement of Environmental Values.
5. The Director fails to apply sufficient conditions of independence in the permit's conditions for monitoring, recording and further study.
6. The Director failed to have proper regard to conservation and caution as mandated by the *Ontario Water Resources Act*, Regulation 285/99 and by the MOE's Statement of Environmental Values.
7. The Director failed to have regard to Canada and Ontario's obligations under the Canada-Wide Accord Concerning Bulk Water Removals, the requirements of Reg. 285/99 concerning water exports, and the requirements of the Great Lakes Charter.
8. The Director failed to consult with, and otherwise have regard to the interests of First Nations in exercising his authority under this Act.
9. The staged nature of the approval at issue in these proceedings fails to comply with the requirements of the *Ontario Water Resources Act*, and the *Environmental Bill of Rights.*

10. The Director failed to have proper regard to Ontario's obligations under the North American Free Trade Agreement and the World Trade Organization.
11. The proponent failed to consider alternatives to this undertaking, or otherwise plan its endeavours with due regard to the environment.
12. The Director failed to have proper regard to those matters delineated pursuant to s.2(3) of Reg. 285/99 Ontario Water Resources Act, including the impact of this water taking on existing and planned developments in the watershed.
13. The Director failed to have proper regard to those matters delineated pursuant to Reg. 285/99 Ontario Water Resources Act, concerning the impact of this taking on agricultural uses in the watershed.
14. There are discrepancies and technical irregularities in the permitting process.
15. The Director failed to have regard to the applicant's record of environmental performance.
16. Terms and Conditions. (Exhibit 6)

The Joint Issues List does not prejudice the appellants right to rely upon the grounds contained in their respective Notices of Appeal. It merely serves to organize and clarify the issues before the Tribunal. OMYA and the Director, Ministry of the Environment ("MOE") filed Notices of Motion on February 23, 2001. On March 5 and 6, 2001 and April 2 and 3, 2001 the Tribunal heard evidence and submissions regarding these motions. The Tribunal has also received written submissions which it has found to be quite useful.

The Notices of Motion

(1) OMYA (Canada) Inc.

On February 23, 2001, OMYA submitted a notice of motion (Exhibit 7) requesting from the Tribunal an Order to:

- quash certain grounds of appeal set out in the notices of appeal
- direct that Ms. Cedar not be a party to these proceedings
- attain particulars in respect to the Cassidy and Council of Canadians appeals.

The second and third motions described above have been resolved. The motion regarding whether party status should be granted to Ms. Cedar was considered and determined by Order dated April 6, 2001. The motion concerning particulars was not heard since I was of the opinion

that the process to require particulars would adequately be addressed by the Procedural Order which will be issued shortly.

(2) Director, Ministry of the Environment

On February 23, 2001, the MOE submitted a Notice of Motion requesting from the Tribunal an Order to:

- strike out grounds of appeal raised in the respondents' appeals,
- refuse leave to add grounds of appeal
- require particulars of and the answers concerning any grounds of appeal remaining,
- if necessary, require notice of proposed summons, and disclosure of the evidence of any summoned and other witnesses, and the two participants with respect to any grounds of appeal remaining, and
- if necessary, require the provision of notice to the Attorneys General of Canada and Ontario with respect to constitutional issues by any grounds of appeal remaining which may raise issues. (Exhibit 8)

The third, fourth and fifth grounds can be disposed of shortly. As stated above, the motion regarding the provision of particulars will be addressed by the Procedural Order. In respect to summons for witnesses, the Procedural Order will indicate when witness statements are required (ample time prior to the beginning of the evidence for the main hearing) and the Tribunal can issue summons, if necessary, to require witnesses to appear before the Tribunal. With respect to the motion concerning notice to the Attorneys General of Canada and Ontario, I have requested, counsel for the Council of Canadians, in consultation with the counsels of the OMYA and MOE, to prepare a letter to be sent the Attorney Generals notifying them of any constitutional issues being raised in this hearing.

As a result, these Reasons for Decision will address the two remaining motions, namely:

(1) Motion to strike out or quash certain grounds in the respondents' appeals; and,

(2) Motion to refuse leave to add grounds of appeal.

Mr. Doug Watters, Counsel for the MOE stated that the Grounds for the MOE motions (Exhibit 8, p.2) are:

1. The Tribunal lacks jurisdiction to deal with a number of matters raised in the appeals.
2. The existing and proposed appeal grounds lack the necessary merit, delineation or support to warrant further Tribunal proceedings.

Mr. Alan Bryant, Counsel for OMYA, stated that the grounds for the motion for an Order to quash grounds of appeal by the respondents are:

1. the Appellants did not obtain leave to appeal from the Environmental Review Tribunal ("Tribunal") under the *Environmental Bill of Rights* or the *Environmental Protection Act* for grounds of appeal contained in their Notices of Appeal;
2. The Appellants' Notices of Appeal contain grounds of appeal which do not meet the statutory requirements of s. 41[1] of the *Environmental Bill of Rights*;
3. The Tribunal lacks jurisdiction over the subject-matter of grounds of appeal contained in the Appellants' Notices of Appeal (Exhibit 7, p.1-2)

Issues

During argument it became clear that the remaining issues can be broadly described as follows:

1. Do the grounds of appeal described in the Notices of Appeal go beyond the terms of the leave to appeal granted by this Tribunal?

2. Should certain grounds of appeal be struck out because they raise issues which are beyond the proper scope of an appeal hearing related to a Permit to Take Water, or otherwise lack merit ?

3. Should the Tribunal grant the appellants leave to add grounds to their Notice of Appeals?

ISSUE #1: Do the grounds of appeal described in the Notices of Appeal go beyond the terms of the leave to appeal granted by the Tribunal?

Appendix C contains a list of the grounds of appeal included in each of the respondents's appeal.

[1] Section 41 of the *Environmental Bill of Rights* states:
Leave to appeal a decision shall not be granted unless it appears to the appellate body that,
(a) there is good reason to believe that no reasonable person, having regard to the relevant law and to any government policies developed to guide decisions of that kind, could have made the decision; and
(b) the decision in respect of which an appeal is sought could result in significant harm to the environment.

Mr. Bryant's interpretation of Mr. Gertler's Decision was that the only issue that was granted leave to appeal was the 'information issue' and that the appeal should be limited to only that issue. In support of this view Mr. Byrant referred to the decision of this Tribunal, dated November 6, 2000, to grant leave to the appellants. In arriving at this decision Mr. Len Gertler, Vice-Chair of the Environmental Review Tribunal stated in the Findings and Conclusions section that:

> The Board's findings, in fact, are in the evaluation of the information issue. The Tribunal finds that it was not reasonable for the Director to issue a Permit for the taking of water, notwithstanding the limits on taking in Phase I, when the first relevant streamflow information would not be available until January 1, 2004; and, as explained by the instrument holder's engineer, reliable data may not be available before many years. (Exhibit 1, p.15)

Mr. Bryant reviewed each of the appellant's grounds of appeal under categories to determine those grounds that were not properly included in the appeal. According to Mr. Bryant, (Exhibit 7, Tab 2, Schedule A), he submitted that the Appellants did not obtain leave to appeal from the Environmental Review Tribunal ("Tribunal") under the *Environmental Bill of Rights* or the *Environmental Protection Act* for grounds of appeal contained in their Notices of Appeal.

Appellant	**Paragraphs Nos. in Notice of Appeal**
Carol and Melvyn Dillon	2, 3, 4, 5
Michael and Maureen Cassidy	1,2, 3 (part), 4, 6, 7, 8, 9, 10 (part), 12, 13, 14, 15, 16
The Council of Canadians	1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 (part), 13 (part), 14
Kathleen Corrigan, Ann German, and Eileen Naboznak	i, ii, iii, viii, ix, x, xi, xii
Ken McRae	1, 2, 3, 4, 5, 7, 8, 9, 10, 11 (part), 12 (first), 13 (first), 12 (second), 13 (second)

Mr. Bryant stated that:

> ...Appellants are required to obtain leave from the Tribunal to advance grounds of appeal which raise issues beyond the "information issue". These grounds of appeal must satisfy the requirements of s. 41 *Environmental Bill of Rights.* (Exhibit 14, para. 19)

Mr. Bryant also submitted that the Appellants' Notices of Appeal contain grounds of appeal which do not meet the statutory requirements of s. 41 of the *Environmental Bill of Rights, 1993*.

Appellant	**Paragraphs Nos. in Notice of Appeal**
Carol and Melvyn Dillon	2, 3, 4, 5
Michael and Maureen Cassidy	1, 2, 3 (part), 4, 6, 7, 8, 9, 10 (part), 12, 13, 14
The Council of Canadians Kathleen Corrigan, Ann German, and Eileen Naboznak	1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 14 i, ii, iii, xi, xii
Ken McRae	1, 2, 3, 4, 5, 8, 9, 11 (part), 12 (first), 13 (first), 12 (second), 13 (second)

The Director supported OMYA's position and submitted:

- the Tribunal may not consider and give effect to the grounds which leave has not been sought and granted
- both the *EPA* and the *OWRA* show a clear intent to define the and scope the matters which may be raised on appeal
- leave may only be granted where someone shows, on a preliminary real foundation basis, that a decision is both, one no reasonable person could have made taking into account law and policy developed to guide decisions of the kind under scrutiny, and one which may cause significant effect to the environment;
- on a subsequent appeal the appellate body may not enlarge the grounds and relief that would otherwise be available to someone directly involved in and affected by the decision;
- in this case the Tribunal although granting leave with respect to the whole permit - found that only one of a number of grounds raised by the applicants met the test established by section 41 of the *EBR*; while it may be unfortunate that the Tribunal did not go on to consider and rule on whether other grounds met the test, the result of a necessary consideration that did not take place cannot now be assumed by this panel of the Tribunal.
- to allow the Appellant to raise these matters now and assume they could have formed the basis for leave would be to ignore the scheme for appeals both under the *EBR* and *OWRA*

The Respondents pointed to particular sections of Mr. Gertler's Decision (Exhibit 1) to point out that Mr. Gertler was not confining the leave to appeal to only the 'information issue'. The Decision states:

> **A number of other issues, with possibly far-reaching implications, have been raised by the Applicants**, such as observance of the ecosystem approach as expressed in the Ministry of the Environment's Statement of Environmental Values; the relationship between the taking of surface water and taking of ground water, and other implications of a through going watershed approach; and

> whether the transfer of water from the Tay in the form of an industrial product would fall within the scope of the Accord (federal, and some provincial and territorial jurisdictions in November, 1999) on "The Prohibition of Bulk Water removal From Drainage Basins". In view of the findings on the information issue, however, **these issues are moot**. It behoves us to observe the law of parsimony: the assertion that no more causes or forces should be assumed than are necessary to account for the facts. (Exhibit 1, p.15) *(emphasis added)*

Mr. Gertler's further states in his "Findings and Conclusion" section of the Decision:

> The Tribunal's findings, in fact are in the evaluation of the information issue. The Tribunal finds that it was not reasonable for the Director to issue a Permit for the taking of water, notwithstanding the limits on taking in Phase I, when the first relevant streamflow information would not be available until January 1, 2004; and as, explained by the instrument holder's engineer, reliable data may not be available for years. Further, the absence of this information creates a degree of uncertainty about impacts on the aquatic habitat of the Tay River which raises the possibility of significant harm to the environment. In view of these findings, the Tribunal concludes that the Applications meet both the reasonableness and environmental criteria for the Test for Leave to Appeal. Accordingly, **the entire permit is considered in the Tribunal's decision**. The more selective concerns of Carol and Melvyn Dillon can be addressed in any ensuing appeal. (Exhibit 1, p.15) *(emphasis added)*

The Decision of Mr. Gertler states:

> The Applicants are granted Leave to Appeal the Permit To Take Water No. 00-P-4096 issued by the Director to OMYA (Canada) Inc. on August 24, 2000, **in its entirety.** (Exhibit 1, p.16) *(emphasis added)*

In respect to Mr. Gertler calling other issues "moot", Mr. Cassidy's interpretation of the phrase was that:

> Mr. Gertler was simply saying that he did not need to consider them to decide that leave to appeal should be granted. The effect of this decision was to leave the merit of these other issues to be considered at the subsequent appeal hearing which is now underway. (Exhibit 25, p.5)

Ms. Dillon stated that:

> After hearing evidence, the Tribunal may decide an issue is not relevant or not within the jurisdiction of the Tribunal, but the decision then reflects an open and fair process. It is important, for a case that has garnered so much local, national

> and international attention, that transparency prevail as afforded in a hearing of all issues. (Exhibit 23, p.26)

Mr. Shrybman brought to the attention of the Tribunal sections 44 and 45[2] of the *EBR* in respect to the powers and the procedures of the appellate body. Further, Mr. Shrybman stated that if Mr. Gertler has intended to limit the leave for appeal he could have done so explicitly as Mr. Gertler had done in a previous Decision concerning the *Federation of Ontario Naturalists v. Ontario* [1999] O.E.A.B. No. 18, August 27, 1999.

Mr. Shrybman stated that:

> Neither the Director, nor the OMYA, have argued that the Appeal Tribunal (Gertler Decision) did in fact explicitly reject the grounds of appeal which they have challenged. Rather, their common submission is that the Tribunal simply failed to "turn its mind" to these grounds. (Exhibit 22, p.3, para.16)

Ms. German on behalf of Ms. Corrigan and Ms. Naboznak stated that the appeals should stand in order that evidence can be submitted on all the issues that they have submitted.

Mr. McRae referred to the following portion of the Gertler Decision "the absence of this information creates a degree of **uncertainty** about impacts on the aquatic life" (Exhibit 1, p.15) (*emphasis added).* McRae said that the "uncertainty"cited in the Decision encompassed the entire appeal.

Conclusions

The central question is whether Mr. Gertler's decision in granting leave to appeal the Director's decision restricted the grounds of appeal.

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[2] *EBR*

s. 45 The appellate body has similar powers on an appeal under this Part to those the appellate body would have on an appeal relating to the same proposal and of a similar nature brought by a person referred to in paragraph 2 of subsection 38(1).

s. 46 The appellate body hearing an application for leave to appeal or an appeal under this Part may follow procedures similar to those the appellate body would follow on an appeal relating to the same proposal and of a similar nature brought by a person referred to in paragraph 2 of subsection 38(1), or may vary those procedures as appropriate.

Section 41 of the *EBR* states that the Tribunal has the authority to grant a person leave to appeal a "decision" if the "decision" was unreasonable and if the "decision" could result in significant harm to the environment. I wish to emphasize that the word "decision" is issued in section 41 rather than "issue" or "grounds". Of course a Tribunal in granting leave may, but does not have to, restrict the issues or grounds that can be raised in the appeal hearing, and I accept Mr. Shrybman's point that Mr. Gertler, on another occasion, had granted leave to appeal only on certain issues.

In ***Residents Against Company Pollution v. MOE,*** October 7, 1996, (File# EBR00003.P1-M1 and EBR00007.P1-M1), the Environmental Appeal Board granted the Residents leave to appeal a Certificate of Approval that had been issued by the MOE to Petro Canada. Leave was only granted to certain issues. A preliminary motion was brought by Petro Canada and the Director to strike out portions of the Notice of Appeal filed by the Residents. The Tribunal hearing the appeal (Alan Levy) refused to strike the grounds in the Notice of Appeal that did not appear to fall with the terms of the leave. He stated:

> Striking out portions of the notices of appeal on motion precluded the respondent's opportunity for a determination by the Tribunal after a full hearing on the merits and a heavy onus on the applicant is therefore appropriate. In general my approach on this motion is not to limit the appeal any more than is absolutely necessary to comply with the constraints imposed by the leave decision.

I agree with this approach.

In granting leave to appeal Mr. Gertler issued Reasons for Decision and Decision. The "Decision" portion states:

> The Applicants are granted Leave to Appeal the Permit to Take Water No. 00-P-4096 issued by the Director to OMYA (Canada) Inc. on August 24, 2000, in its entirety.

The Tribunal's Decision does not restrict the grounds of appeal. I reiterate the Reasons for Decision by Mr. Gertler which states:

> A number of other issues, with possibly far-reaching implications, have been raised by the Applicants, such as the observance of the ecosystem approach as expressed in the Ministry's Statement of Environmental values; the relationship between the taking of surface water and the taking of groundwater; and other implications of a thoroughgoing watershed approach; and whether the transfer

> from the Tay in the form of an industrial product would fall within the scope of the Accord ... on the "Prohibition of Bulk Water Removal From Drainage Basins. In view of the findings on the information issues, however, these issues are moot. It behoves us to observe the law of parsimony: the assertion that no more causes or forces should be assumed than are necessary to account for the facts.
>
> Findings and Conclusions:
>
> The Tribunal's findings, in fact, are in the evaluation of the information issue. The Tribunal finds that it was not reasonable for the Director to issue a Permit for the taking of water, notwithstanding the limits on taking in Phase 1, when the first relevant streamflow information would not be available until January 1, 2004; and, as explained by the instrument holder's engineer, reliable data may not be available before many years. Further the absence of this information creates a degree of uncertainty about impacts on the aquatic habitat of the Tay River which raises the possibility of significant harm to the environment. In view of those findings, the Tribunal concludes that the Applications meet both the reasonableness and environmental criteria of the Test for Leave to Appeal. Accordingly, the entire permit is considered in the Tribunal's decision. The more selective concerns of Carol and Melvyn Dillon can be considered in any ensuing appeal

Again nothing in the Tribunal's Findings and Conclusions suggest that it was the Tribunal's intention to limit the granting of leave to appeal only to the information issue, and, in fact, this passage seems to indicate that other concerns could be addressed in the ensuing appeal.

It is my interpretation of Mr. Gertler's Decision when he stated that the "appellants are granted Leave to Appeal the Permit to Take Water...in its entirety" that he was not restricting in any way the grounds on which the appellants were basing their appeal. Although he specifically acknowledged the "information issue" to be a key issue, other issues were considered "moot". I am of the opinion that since Mr. Gertler was able to find conclusively that the "information issue" would qualify the appellants to be granted leave to appeal, it was unnecessary to probe further to find other reasons for which leave would be granted. He concluded that the permit in its "entirety" be considered. His conclusion seems very clear to me. Therefore I find that the grounds of appeal articulated by the appellants shall not be 'quashed' or 'struck out' merely because Mr. Gertler's Decision did not specifically identify and grant leave on those particular issues.

I consider this appeal hearing to be a new hearing, 'hearing de novo'[3] and therefore those issues included in the respondents appeals shall form the basis of the issues to be considered subject to my findings below.

ISSUE #2: Should certain grounds of appeal be struck out because they raise issues which are beyond the jurisdiction of an appeal hearing related to a Permit to Take Water, or otherwise lack merit?

Both OMYA and the Director submitted that certain grounds in the Notices of Appeal should be struck out because the Tribunal lacks jurisdiction over the subject-matter of these grounds. Mr. Bryant submitted that the following provisions were beyond the Tribunal's jurisdiction.

Appellant	**Paragraphs Nos. in Notice of Appeal**
Carol and Melvyn Dillon	3, 4 (part)
Michael and Maureen Cassidy	2, 3 (part), 6, 9, 10, 13, 14
The Council of Canadians	1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 14
Kathleen Corrigan, Ann German and Eileen Naboznak	iii, xi, xii
Ken McRae	1, 2, 3, 4, 5, 8, 9, 12 (first), 13 (first), 12 (second), 13 (second)

Mr. Bryant stated that many of the more than 50 grounds for appeal were not addressed by Mr. Gertler and other grounds of appeal were simply beyond the jurisdiction of the Tribunal. With some of the issues, Mr. Bryant stated that further particulars were necessary in order to know what exactly the grounds of appeal were actually referring to. He stated that the appeals were long on generalities and short on specifics.

[3] *OWRA* s.100. (8) The provisions of section 144 of the *Environmental Protection Act* apply with necessary modifications to a hearing by the Tribunal under this section.

Environmental Protection Act s. 144 (1) A hearing by the Tribunal shall be a new hearing and the Tribunal may confirm, alter or revoke the action of the Director that is the subject matter of the hearing and may by order direct the Director to take such action as the Tribunal considers the Director should take in accordance with this Act and the regulations, and, for such purposes, the Tribunal may substitute its opinion for that of the Director.

Mr. Bryant stated that the Joint Issue List (Exhibit 6) should not supercede the individual grounds of appeal. In reference to the that list, Mr. Bryant cited the following issues which were not included in the leave to appeal application:

- Issue #8, "The Director failed to consult with, and otherwise have regard to the interests of First Nations in exercising his authority under this Act" ;
- Issue # 13 , "The Director failed to have proper regard to those matters delineated pursuant to Reg. 285/99 *Ontario Water Resources Act*, concerning the impact of this taking on agricultural uses in the watershed" and,
- Issue #15, "The Director failed to have regard to the applicant's record of environmental performance".

Mr. Watters examined the Joint Issues List (Exhibit 6) and found that "aspects of issues 3, 4, 6, 7, 12,13 and all of issues 8, 10 and 11 should be struck out and the appeals dismissed to this extent." (Exhibit 20, p.3) He stated that:

> Neither the Tribunal nor the Director has jurisdiction in this matter over decisions under the Planning Act, the Environmental Assessment Act, federal law or any other law, or about matters governed under such law, for example, environmental assessment litigation, international trade disputes, aboriginal or treaty rights determinations, and land use planning decisions.
>
> The Director must make a decision on a water-taking permit application under section 34 of the *Ontario Water Resources Act*, based on that Act, O. Reg. 285/99 under it, and the Permit to Take Water Program Guidelines and Procedures Manual, April 14, 1999.

North American Free Trade Agreement (NAFTA)

The Council of Canadians raised an issue in their Notice of Appeal, which is reflected in Issue #10 in the Joint Issues List, that "... the Director failed to have proper regard to Ontario's obligations under the North American Free Trade Agreement and the World Trade Organization."

It was Mr. Bryant's view that the Tribunal has no jurisdiction to rule on issues relating to the NAFTA as it is not a required document for the Director to examine in issuing a PTTW. He believes that OMYA should not have to suffer because of the Council of Canadians academic concern with NAFTA.

Mr. Shrybman referred to various aspects of Chapter 11 of NAFTA, and without getting into the merits of the NAFTA in respect to this appeal at this point, suffice to say that Mr. Shrybman stated that:

> ...the granting of a water taking permit to OMYA for purposes that include diversion from the Great Lakes Basin and export from Canada, have foreseeable legal and practical consequences which arise from Canada's international obligations. These may undermine the policy, regulatory and programmatic options available to both the federal and provincial governments, including those necessary to achieve the water conservation and protection goals of the *OWRA*. Accordingly, it would be inconsistent with the mandate of this Tribunal to reject, in advance of hearing evidence and submissions concerning these matters, the relevance of these issues to the determination of this appeal. (Exhibit 22, p.8, para 47)

In further reference to NAFTA, Mr. Shrybman stated that:

> In a decision[4] recently made in a proceeding arising under NAFTA investment rules, the Tribunal confirmed that NAFTA disciplines fully bind the actions of state, provincial and municipal governments. During those proceedings the government of the United States intervened specifically to stress this point. Moreover, the Tribunal went further by requiring the federal government to actively intervene to prevent a local government from acting in a manner that offends the constraints imposed by NAFTA disciplines.(Exhibit 22, para. 33, 34 & 35)

Ministry of the Environment's Statement of Environmental Values

Many of the Notices of Appeal that have been filed allege that the Director failed to apply certain principles of the Statement of Environmental Values ("SEV")(Exhibit 16, Tab 39). These submissions are also reflected in Issues 3 (watershed approach), 4 (ecosystem approach), and 6 (conservation and caution) of the Joint Issues List.

Mr. Watters stated that the SEV only applies when it is incorporated in the legislation as it is referring to regulations and policies.

Part VI of the SEV states:

> The Ministry will apply the purposes of the *EBR* and the guiding principles listed in Part III and integrate them with those considerations set out in Part V, as it

[4]Metalclad Corporation v. United Mexican States, ICSID Tribunal, Final Award (2000)

> develops Acts, regulations and policies. The principles and considerations will also guide the Ministry's internal management practices. (Exhibit 16, Tab 39, p.2)

Mr. Watters stated that O.Reg. 285/99 (Exhibit 16, Tab 34) captures a portion of the SEV which states in part:

> 2(1)A Director who is considering an application under section 34 of the Act for a permit to take water shall consider the following matters, to the extent that each is relevant.....
> 1. Protection of the natural functions of the ecosystem.

Mr. Watters therefore submits that the general principles found in the SEV are irrelevant when making a decision under section 34 of the *OWRA* unless such principles have been incorporated into a regulation or Ministry policy.

The sources of responsibility that the Director must rely, that Mr. Watters characterized these as 'touchstones', are the *OWRA*, the O.Reg. 285/99 (Exhibit 16, Tab 34) and the PTTW Program, Guidelines and Procedures Manual (Exhibit 16, Tab 36). Mr. Watters later stated in the hearing that the Great Lakes Charter also applied to the Director's Order.

Ms Dillon submitted that the SEV addresses the more abstract matters of values, spirit, intention and judgement that the Director should consider, for which the *OWRA* and other documents described in the preceding paragraph, offer little guidance. Ms. Dillon and Mr. Cassidy both referred to Section 11 of the *EBR* which states:

> The minister shall take every reasonable step to ensure that the ministry statement of environmental values is considered whenever decisions that might significantly affect the environment are made in the ministry,

Bulk Water Exports

The Council of Canadians raised an issue in their Notice of Appeal, which is reflected in Issue #7 in the Joint Issues List, that "... the Director failed to have regard to Canada and Ontario's obligations under the Canada-Wide Accord Concerning Bulk Water Removals, the requirement of Reg. 285/99 concerning water exports and the requirements of the Great Lakes Charter".

Concerning the bulk water export, Mr. Bryant indicated that OMYA produces a product (or a product slurry considered by OMYA as a product) for export which is an allowed item to be

exported. Mr. Bryant cited Regulation 285/99 s. 3 (2) and 3 (3)[5] (Exhibit 16, Tab 34) which further indicated that if the exported item is considered a product, then the water transfer does not apply. The definition of "waters"[6] in the *OWRA* was cited by Mr. Bryant, which indicated that "waters" was considered in its natural state but since the export is now a product it is no longer in its natural state. Mr. Gertler also referred to the export as a 'product' in his Decision.(Exhibit 1, p.15) The appeal concerning bulk water export, Mr. Bryant stated, does not apply in this case and therefore that issue should be excluded. Mr. Bryant indicted that OMYA has already been exporting the product for a long time and therefore he compares the issue to "the horse has already left the barn".

Mr. Watters shared Mr. Bryant's concern that this issue should be excluded from the hearing.

Mr. Shrybman stated that the issuance of a PTTW from the Tay River is inconsistent with provisions and principles of the Accord for the Prohibition of Bulk Water Removal from Drainage Basins. He said that:

> While s. 3 (3) of Reg 285/99 allows an exception for water "*...used in the water basin to manufacture or produce a product that is then transferred out of the water basin*," it is unclear whether, if at all, the water takings at issue would fall within the parameters of this proviso.
>
> Even so, it is clear that under the Accord, the rationale for prohibiting water removals from Canada drainage basins has to do with the environmental impacts associated with bulk water removals. Accordingly it is the quantity of water being removed, and the timing of those withdrawals that would be most important considerations, not the particular purpose of those water removals. (Exhibit 3C,, para. 4 & 5)

Parks Canada

The Corrigan, German, Naboznak grounds of appeal dealt with the information issue only in issues # iv, v,vi, and vii, Mr. Bryant stated. In respect to the reference to Rideau Canal system

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[5]O.Reg. 285/99 - Water Taking and Transfer
s. 3(2) No person shall use water by transferring it out of a water basin.
s. 3(3) Subsection (2) does not apply to water that is used in the water basin to manufacture or produce a product that is then transferred out of the water basin.

[6]OWRA s. 1 Definitions - "waters" - means a well, lake, river, pond, spring, stream, reservoir, artificial watercourse, intermittent watercourse, ground water or other water course.

being a 'heritage site', Mr. Bryant stated that OMYA does not control the outflow of water from Bob's Lake, as that is the jurisdiction of Parks Canada. Parks Canada is not a party to the hearing and further the Tribunal under this application cannot issue an Order to Parks Canada.

Jock Lake

In respect to the McRae appeal, Mr. Bryant stated that only part of issue #11, #12 (1st), 13(1st), #12 (2nd) and #13(2nd) were considered to be included as the 'data information issue'. Mr. Bryant indicated that much of Mr. McRae's appeal referred to Jock Lake and that was not part of the Tay River watershed. Further, Mr. Bryant stated that much of this appeal contained inconsequential or hypothetical matters not relating to the permit to take water.

Conclusions

The Director submitted that:

- the existing appeal grounds lack the necessary merit, delineation or support to warrant further tribunal proceedings
- it is open to, and appropriate for, the Tribunal to dispose of such grounds summarily.

In ***Residents Against Company Pollution v. MOE,*** (File #. EBR00003.A1-M1 and EBR00007.A1-M1), November 19, 1996, the Environmental Appeal Board heard a motion by Petro Canada (an instrument holder) for a dismissal of the grounds contained in a notice of appeal filed by an appellant that had been granted leave to appeal under the *EBR*. The Tribunal decided that issues should be dismissed only in the clearest cases and only where there is truly no genuine issue to be determined on the appeal. The Tribunal found that the appeal ought not to be totally dismissed at an early stage as the Tribunal could not rule, with relative certainty, that Petro Canada would be successful on the appeal.

Mr. Watters may very well be correct in saying that the issue that the issues described above that are advanced by the Council of Canadians and others have no chance for success but at this time I am not prepared to endorse that claim and will hear the evidence to be presented by the parties on the issues explained above. Mr. Bryant stated that issues should not be included if they would probably be "kicked out" later. I am of the opinion that it is necessary to hear the evidence on the issues prior to making a determination of whether specific issues have "no chance of succeeding" or whether the issues should be 'so called' "kicked out".

ISSUE #3: Should the Tribunal grant the appellants leave to add grounds to their Notice of Appeals?

At the preliminary hearing held on February 5 and 6, 2001, the respondents prepared a joint issues list. The Director submitted that several grounds in the joint issues list were not in the Notice of Appeal. In particular, grounds #8, 11, and 13 were new. Mr. Bryant agreed with these submissions. It was submitted that Issue #8 would be addressed by Ms Dillon and Mr Cassidy, Issue #11 by Ms. Dillon, Mr. Cassidy and Mr. McCrae and Issue #13 by Ms. Cedar.

Mr. Watters submitted that the "... Tribunal may not consider and give effect to grounds on which leave has not both been sought and granted". He further stated that on a subsequent appeal, after leave to appeal is granted under the *EBR*, "... the appellate body may not enlarge the grounds and relief that would otherwise be available to someone directly involved in and affected by the decision".

Mr. Bryant submitted that the Tribunal does not have the authority to expand the grounds of appeal following the granting of leave under the *EBR*

.

Mr. Bryant referred to Mr. Gertler as the "gatekeeper" in respect to which issues in the leave to appeal were able to pass through the threshold of s. 41 of the *EBR*. According to Mr. Bryant, Mr. Gertler only allowed one issue to pass through that threshold and that was the 'information issue'. Ms. Dillon stated that her practical experience with gatekeeping is:

> when you open the gate - be it for water, sheep or children - they all surge forward. At the airport, when they open the gate, all passengers with a ticket pass through. Mr. Gertler gave us a ticket and opened the gate. (Exhibit 23, p.7)

Environmental Assessment

Issue #11 of the Joint Issues List states that the proponent failed to consider alternatives to this undertaking, or otherwise plan its endeavours with due regard to the environment. There is also a reference in the Cassidy and Council of Canadians appeal remedies and respondent's motion submissions to 'environmental assessment'. Mr. Watters submitted that:

> ...the appeals based on the proposition that documents, principles and standards of environmental assessment under the *EAA* or land use planning under the *PA* must be followed cannot stand. These are not provisions which the Director either can

> or must follow, except to the degree they fall within the proper sources of his jurisdiction. (Exhibit 20, Tab 1, p.2)

I agree with Mr. Watters. Therefore this hearing is not and will not be considered an environmental assessment hearing, nor will it import an approach mandated and used when undertakings are subject to the statutory requirements of the *Environmental Assessment Act*. It is my view that this matter is beyond the jurisdiction of the Tribunal when determining whether a PTTW should be issued under section 34 of the *Ontario Water Resources Act*.

Failure to Consult with a First Nation

Issue #8 of the Joint Issues List states "The Director failed to consult with, and otherwise have regard to the interests of First Nations in exercising his authority under this Act". Ms. Dillon stated (Written Submissions, March 1, 2001) that she wished to advance this issue. She stated:

> ... we would like to include this issue as an example of how the Ministry of the Environment failed to follow its own Statement of Environmental Values (SEVs) which state in Part V:
>
> The Ministry of Environment and Energy will promote and implement the principles of the Statement of Political Relationship and will develop, with First Nations and Aboriginal communities in Ontario, a government-to-government forum. Within this context, the Ministry will evaluate the impact of proposed decisions on First Nations and Aboriginal communities.
>
> We will show that the Ministry did not consult with First Nations as a particular part of the community, as mandated, but relied on the same approach used with the general population without consideration as to whether *EBR* postings and notices in local papers would reach First Nations people in remote areas. Since the SEVs give special mention to First Nation and Aboriginal people, it is contended that something beyond the common approach was required.

Mr. Watter's response was:

> One Appellant seeks to add an alleged failure to consult with unspecified First Nations as a ground of appeal. There is no obligation to consult separate and apart from what may be required of the Director under the *OWRA* and *EBR*, in the absence of a specified claim by someone else entitled to make it in proceedings different that [sic] these. Leave to add this ground should be rejected for this reason alone, among others. (Exhibit 20, p.3)

Mr. Watters relied on the Ontario Court of Appeal's decision in Transcanada Pipelines Ltd. v Beardmore (Township) [2000] O.J. No. 1066 for the principle that the law does not require the Crown to consult with a First Nation unless the Crown's action has been found to infringe an existing Aboriginal or treaty right of a First Nation.

I agree with Mr.Watters and it is my view that the law does not impose a duty on the Director to consult with a First Nation in these circumstances.

Mr. Robert Lovelace, of the Ardoch Algonquin First Nation attended the scheduled hearing concerning motions on March 5, 2001 to seek party status for the hearing. (This request had not been made at the preliminary hearing held on February 9, 2001) On April 2, 2001, Mr. Lovelace, who represents 450 members in the non-status band residing on unceeded territory, submitted written documentation in his quest for party status. In that documentation he stated that "The Ardoch Algonquin First Nations and Allies is an Algonquin Community recognized by both Ontario and Canada. AAFNA is governed by a traditional Ka-pishkewandemin (family heads council).The area defined by use and occupation of AAFNA includes the entire watershed of the Tay River." Mr. Lovelace, who stated that:

> - AAFNA had concerns centring on the environmental impact which the taking of water from the Tay River would have on people, vegetation and wildlife and;
> - the Director's decision had not included Traditional Ecological Knowledge.

In addition, Mr. Lovelace contended that the Tribunal has jurisdiction to hear evidence and make findings based on the Royal Proclamation of 1763 and Section 25 of the Canadian Constitution Act, 1982.

Mr. Michael Cassidy, an Appellant and party supported the request that AAFNA be a party indicating that AAFNA had responded to and opposed the PTTW application in the spring of 2000.

The MOE and OMYA both opposed the request for party status by AAFNA. In the written submission, Mr. D. Watters, Counsel for MOE stated:

> "The Tribunal has no ability to make any determination as to the duty to consult in relation to matters such as those raised by AAFNA. ....

> The AAFNA is one of a group of Algonquin claimants who are engaged in a comprehensive land title negotiation and these matters of claim to title are being and are best raised there."

Mr. Watters said, that with reference to the Statement of Environmental Values, that the language did not supercede or override the direction and law under which a water-taking permit is to be assessed.

Mr. Watters stated, " Failure to grant party status does not mean in the least that the Director does not wish to hear from or discuss with AAFNA those matters which lie within his purview that may be of concern to AAFNA. The Director welcomes and invites such discussions. Obviously they cannot deal with the matters which are part of the comprehensive negotiations in which AAFNA together with other Algonquin groups are now engaged."

Mr.A. Bryant, Counsel for OMYA, submitted in a written document received March 29, 2001 indicting that party status should not be granted for the following reasons:

> All of the AAFNA's concerns that fall within the jurisdiction of the Tribunal are being advanced by other appellants;
> The AAFNA's concerns regarding Aboriginal or Treaty Rights are beyond the jurisdiction of the Tribunal.
> The AAFN has failed to comply with the mandatory requirements of the *Environmental Bill of Rights*, 1993, S.O. 1993, c 28 (the "*EBR*") respecting leave to appeal.

In a previous Environmental Review Tribunal Order, dated April 6, 2001 concerning this hearing, I ruled that Ms. S. Cedar be granted party status although she had not applied for leave to grant appeal under the *EBR*. The reasons for extending party status are included in that Order and the same reasons apply in this request for party status.

When the application from OMYA for a PTTW was first made known, the AAFNA wrote to the MOE opposing the application. However, the AAFNA did not apply for leave to appeal. Mr. Lovelace has now requested party status, following the preliminary hearing but prior to the hearing of evidence.

Mr. Watters and Mr. Bryant both indicated that some of the issues that Mr.Lovelace brings forth are also issues that overlap with other parties. Notwithstanding that situation, I believe that Mr.

Lovelace should make his own contribution to the hearing of his environmental concerns as they relate to the issues established by this Order as attached in Appendix "B".

Issues concerning treaties, Royal Proclamation of 1763 and the *Canadian Constitution Act*, 1982 will not form part of this hearing as I believe it is beyond the Tribunal's scope in this application of PTTW and indeed it was not mentioned as an item in the leave application or in the appellants submissions for this hearing. Therefore Issue # 8 is excluded from the Joint Issues List.

Mr. Lovelace is granted party status under the proviso that only those issues in Appendix "B" of this Order will form the basis of his submissions. It is expected that Mr. Lovelace will co-ordinate his efforts with the other parties for an efficient presentation of the evidence.

Conclusion

The appellants at the preliminary hearing prepared and endorsed a Joint Issue List (Exhibit 6). I am prepared to accept that list as the issues (with the exceptions of issues #8. #11 and #13[7]) for the hearing. The Joint Issue List captured and scoped[8] the appellants issues in preparation for an expected efficient hearing. Issues # 8, # 11 and #13 were added to the list of issues and were not previously included in those appeals as submitted by the eight appellants that were granted leave to appeal by Mr. Gertler.

It is my view that the Tribunal has the discretion to allow an Appellant to amend a Notice of Appeal to expand the list of grounds. This authority is derived by the combined operation os section 45 of the *EBR* and s. 100(8) of the *Ontario Water Resources Act*. Section 45 of the *EBR*, in effect, provides that the Tribunal has similar powers on an appeal under the *EBR* as it would have on an appeal by an instrument holder under the *OWRA*. Under s. 100(3) the Tribunal may,

[7]Issue # 8
The Director failed to consult with, and otherwise have regard to the interests of First nations in exercising his authority under this Act.
Issue # 11
The proponent failed to consider alternatives to this undertaking, or otherwise plan its endeavours with due regard to the environment.
Issue # 13
The Director failed to have proper regard to those matters delineated pursuant to Reg. 285/99 *Ontario Water Resources Act*, concerning the impact of this taking on agricultural uses in the watershed.

[8]Rule 45 (f) of the ERT Rules of Practice recommends "identifying, defining, simplifying and scoping issues".

if it is proper to do so in the circumstances, grant leave to allow a party to rely on a ground not stated in the Notice of Appeal.

However, I am of the opinion that added issues # 8 and # 11 of the Joint Issue List are beyond the jurisdiction of the Tribunal to deal with these matters in this hearing. Further, Ms Cedar brought forth issue # 13 of the Joint Issues List and since she is not an Appellant who was granted leave to appeal, I have not allowed this issue to be included. Accordingly, Issues #8 , #11 and #13 will be removed from the Joint Issues List.

I find it acceptable to consider the issues as outlined by the appellants in their notices of appeal and further delineated in the revised Joint Issues List (Appendix B of this Order).

Order

The motion brought by OMYA (Canada) Inc. for an order quashing certain grounds of appeal set out in the respondents' Notices of Appeal is dismissed.

The motion brought by the Director, Ministry of the Environment for an order striking out certain grounds raised in the respondents' Notices of Appeals is dismissed.

Motions Dismissed

The motion brought by the Director, Ministry of the Environment, for an order refusing leave to add proposed grounds of appeal as set out in the Joint Issues List is granted in part.

Motion Granted

The issues to be discussed at the hearing are those contained in the Notices of Appeal and delineated in Appendix "B".

"Original Signed By"

Pauline Browes, Vice-Chair

Attachment:

Appendix "A" - List of Parties and Participants
Appendix "B" - Revised Joint Issues List
Appendix "C" - Grounds of Appeal as Set out in Respondents' Notices of Appeal

Appendix A

List of Parties

Applicant:	OMYA (Canada) Inc.	
Counsel for Applicant:	Alan W. Bryant McCarthy Tetrault One London Place Suite 2000 255 Queens Avenue London, ON N6A 5R8	Fax: (519) 660-3599 E-mail: abryant@mccarthy.ca
Counsel for Director, Ministry of the Environment:	Doug Watters Legal Services Branch Ministry of the Environment 135 St. Clair Avenue West 10th Floor Toronto, ON M4V 1P5	Fax: (416) 314-6579 E-mail: doug.watters@ene.gov.on.ca
Appellant:	Carol and Melvyn Dillon R.R. #4 Perth, ON K7H 3C6	Fax: (613) 264-9070 E-mail: dillon@perth.igs.net
Appellant:	Michael and Maureen Cassidy 1-301 First Avenue Ottawa, ON K1S 2G7	Fax: (819) 994-6693 E-mail: mkcassidy@sympatico.ca
Appellant:	The Council of Canadians	
Counsel for the Council of Canadians:	Steven Shrybman Sack, Goldblatt and Mitchell 20 Dundas Street West Suite 1130, P.O. Box 180 Toronto, ON M5G 2G8	Fax: (613) 237-3359 E-mail: shrybman@gattlaw.com

Appellant:	Kathleen Corrigan 17 Tipperary Place Guelph, ON N1H 2A2	Fax: (519) 442-1526
Appellant:	Ann German 4000 Yonge Street, #101 Toronto, ON M4N 2N9	
Appellant:	Eileen Naboznak 123 King Street Weston, ON M9N 1L6	
Appellant:	Ken McRae 6 Ralph Street Stittsville, ON K2S 1N4	Fax: (613) 836-2011
	Sulyn Cedar R.R. #1 McDonalds Corners, ON K0G 1M0	Tel: (613) 278-0422 E-mail: sced@superaje.com
	Robert Lovelace R.R.# 1 Hartington, ON K0H 1W0	Tel : (613) 540-3642

List of Participants

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Jim Ronson, Chair
Perth Community Association
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Appendix B

Revised Joint Issues List

1. The Director based his Decision on insufficient and out of date information.

2. The Director's Decision could cause significant harm to the environment.

3. The Director failed to apply a watershed approach to decision making as mandated by the *Ontario Water Resources Act*, Regulation 285/99 and by MOE's Statement of Environmental Values.

4. The Director failed to apply an ecosystem approach to decision making as mandated by the *Environmental Bill of Rights*, the *Ontario Water Resources Act*, Regulation 285/99 and by MOE's Statement of Environmental Values.

5. The Director fails to apply sufficient conditions of independence in the permit's conditions for monitoring, recording and further study.

6. The Director failed to have proper regard to conservation and caution as mandated by the *Ontario Water Resources Act*, Regulation 285/99 and by the MOE's Statement of Environmental Values.

7. The Director failed to have regard to Canada and Ontario's obligations under the Canada-Wide Accord Concerning Bulk Water Removals, the requirements of Reg. 285/99 concerning water exports, and the requirements of the Great Lakes Charter.

8.The staged nature of the approval at issue in these proceedings fails to comply with the requirements of the *Ontario Water Resources Act*, and the *Environmental Bill of Rights*.

9. The Director failed to have proper regard to Ontario's obligations under the North American Free Trade Agreement and the World Trade Organization.

10.The Director failed to have proper regard to those matters delineated pursuant to s.2(3) of Reg. 285/99 *Ontario Water Resources Act*, including the impact of this water taking on existing and planned developments in the watershed.

11. There are discrepancies and technical irregularities in the permitting process.

12. The Director failed to have regard to the applicant's record of environmental performance.

13. Terms and Conditions.

Appendix C

Grounds of Appeal as Set out in Respondents' Notices of Appeal

Carol and Melvyn Dillon Grounds of Appeal:

1. The Director failed to obtain valuable river and watershed data before granting permission to take water.
2. The Director failed to protect the quality of the natural environment and foster the efficient use and conservation of resource by granting more water than the proponent asked for.
3. The Director failed to apply conditions of independence by directing the use of consultants and employees hired by the proponent for the environmental study and monitoring of stream flow data and water use.
4. The Director failed to follow the Ministry of the Environment's Statement of Environmental Values and the need to apply the ecosystem principle in issuing the Permit to Take Water.
5. The Director failed to use a watershed approach in his decision.(Exhibit 3A)

Maureen and Michael Cassidy Grounds of Appeal:

1. The Director's decision fails to follow relevant government and Ministry of the Environment policies with respect to environmental protection, the ecosystem approach, and public participation.
2. Application and the Director's decision failed to give any consideration to the broader ecosystem in Lanark County, that is the natural and human environment. and how it would be affected by the expansion of calcium carbonate production at Glen Tay for which OMYA was seeking a large new water source.
3. The Director's decision was premature and should not have been made until adequate studies had been made to respond to environmental questions....
4. By granting permission to take more water than OMYA had requested for each year until 2009, the Director failed to protect the quality of the natural environment, and foster the efficient use and conservation of resources.
5. The Director failed to obtain valuable river, watershed, and ecological data before granting OMYA a permit to take water from the Tay River.
6. The Director did not show regard for the cumulative effects of the decision either on the Tay watershed or on the natural and human ecosystems affected by OMYA's project, including the Highway 511 corridor and Tatlock.
7. The Director's decision failed to consider sustainability of the environment, as required in the *Environmental Bill of Rights.*
8. The Director failed to honour the Ministry's commitment to public participation and an open and consultative process in making environmental decisions by excluding the public from having input into whether to allow OMYA to triple its water-taking from the Tay in Phase II of the permit.
9. In making his decision the Director failed to consider important examples of adverse environmental impacts from OMYA's current operations, such as the ecological destruction of Murray Lake near the company's quarry at Tatlock.

10. The Director has effectively endorsed OMYA's lack of foresight at the expense of the public and affected organizations and municipalities, by granting the company its permit to take water from the Tay long before the necessary studies have been made to allow appropriate evaluation of the company's plans.
11. When the information provided by OMYA (The Director) shows that the average depth of the Tay River can be as little as 7 inches at low flow periods of the year, the Director should not have issued a permit until further study demonstrated that the river could supply OMYA's requirements without adverse environmental impacts.
12. It is unwise to allow OMYA to take large quantities of water before the environmental impacts of its expanded water-taking and production have been adequately reviewed because of the difficulty or reversing this decision if the environmental reviews are negative.
13. The Director should not have accepted a major water-taking by OMYA at Glen Tay, with unknown consequences, at a time that the Ontario government and its citizens are becoming increasingly concerned about water quality and supply issues as a consequence of the tragic deaths caused by contaminated water in Walkerton.
14. Even though he may have lacked the power to apply the regulation to OMYA's proposed shipments to water mixed with calcium carbonate out of the Great Lakes - St. Lawrence basin, the Director should have highlighted the enormous loophole in Regulation 285/99 that allows OMYA to plan such shipments. It was unreasonable for the Director to have determined this matter without confirmation when OMYA's shipments of water could be as much as ten million times the maximum amount of water that can be shipped under that regulation.
15. The Director's acceptance of OMYA's plan to set a management plan for beaver control poses an added environmental threat both to the affected beaver, and to fish that rely on beaver ponds for survival at times of low water flow on the Tay.
16. The Director's decision to issue the permit was unreasonable by the definition used in section 41 of the *Environmental Bill of Rights,* 1993 (*EBR*) in that no reasonable person, having regard to the relevant law and to any government policies developed to guide such decisions, could have made the decision and the decision could result in significant harm to the environment. (Exhibit 3B)

Council of Canadians Grounds of Appeal:

1. That the issuance of a permit to take water from the Tay River, including for the purposes of exporting water from the Canadian portion of a major drainage basin is inconsistent with provisions and principles of the *Accord For the Prohibition of Bulk Water Removal From Drainage Basins* endorsed by both the federal government and the Province of Ontario in November 1999.
2. The Accord explicitly prohibits the removal of water from the Canadian portions of major drainage basins. While certain exemptions are contemplated by the Accord, in our submission none apply in the present case. For example, the Accord stipulates that it will not apply to "smaller scale removals such as water packaged in small portable containers." Yet in the instant case, substantial quantities of water would be permanently removed from the water basin as a "product slurry" in large bulk vessels transported either by rail car or transport trailer.
3. In addition, the issuance of a permit to take water from the Tay River, including for the purposes of exporting water from the water basin is in breach of the prohibition against such bulk transfers as set out in s. 3.(2) of Regulation 285/99 *Water Taking and Transfer*

to the *Ontario Water Resources Act* which provides that *"No person shall use water by transferring it out of a water basin."*

4. While s.3(3) of Reg. 285/99 allows an exception for water "*... used in the water basis to manufacture or produce a product that is then transferred out of the water basin,"* it is unclear whether, if at all, the water takings at issue would fall within the parameters of this proviso.
5. Even so, it is clear that under the Accord, the rationale for prohibiting bulk water removals from Canadian drainage basins has to do with the environmental impacts associated with bulk water removals. Accordingly it is the quantity of water being removed, and the timing of those withdrawals that would be the most important considerations, not the particular purpose of those water removals. To conclude otherwise, would be to betray the conservation rationale which both the federal government and the province has stated is at the core of their respective policy commitments to prohibit bulk water removals.
6. Pursuant to the provisions of the international trade agreements to which Canada is a party, Canadian governments are required to provide *National Treatment* to foreign investors and service providers. For example, as et out by Article 1102 and 1202 of the North American Free Trade Agreement this requires Canada to provide treatment of such investors no less favorable that it accords, in like circumstances, to its own investors and service providers. Article 1103 and 1203: *Most Favoured Nation Treatment* similarly precludes such discrimination among the foreign investors and service providers of other NAFTA parties. There are analogous requirements set out in various agreements housed within the framework of the World Trade Organization.
7. A number of recent trade disputes have revealed how onerous these obligations may be. For example, a decision by Tribunal established pursuant to NAFTA investment rules - S.D. Myers vs. The Government of Canada - recently ruled that Canada is liable for damages to a US based hazardous waste disposal company for having closed Canada's borders to hazardous waste exports, even temporarily. That Tribunal concluded that Canada must provide National Treatment even to companies located in the United States but operating in the same sector as their Canadian counterparts.
8. In another recent case, Metalclad vs. The Government of Mexico, a Tribunal has found that the refusal by a local government to issue a permit to allow for the establishment of a hazardous waste disposal facility, rendered the Mexican national government liable to pay damages to a US based waste company seeking that approval.
9. It is clear from these and other cases that the extent of Canada's and Ontario's obligations arising under these international regimes and concerning approvals such as the present one, is highly uncertain. This raises the specter of Canada and/or Ontario being confronted with claims arising under NAFTA and/or WTO rules, if the latter issues an approval to OMYA, but denies other and similar applications, or seeks at some future date to withdraw the approval it has issued.
10. For these reasons we believe that it would be imprudent to issue water takings permits that may give rise to such claims, until much greater certainty is available about the full implications of such regulatory approvals in the context of Canadian obligations under these international trade regimes.
11. The absence of an adequate and prior assessment the environmental and other implications of this approval has denied the Director any meaningful opportunity to fully assess the matters set out in Reg. 285/99. Accordingly, in our view his decision is not consistent with the requirements of this regulation.
12. Furthermore, we believe the issuance of a permit to take water, when so little is known about the potential environmental impact of that taking, is fundamentally incompatible

with the Ministry's core mandate to protect the environment and conserve water resources as set out in its Statement of Environmental Values.

13. Finally, by proceeding to issue an approval in such an informational vacuum, the rights of the people of Ontario to informed participation in environmental decision-making, is directly undermined.

14. For the purposes of fully delineating the grounds upon which we intend to rely in this appeal, we also attach our submissions in the matter of seeking leave to appeal in this matter. (Exhibit 3C)

Kathleen Corrigan, Ann German and Eileen Naboznak Grounds of Appeal:

i. There is considerable potential for an adverse effect on te environment with possible harm to animal, bird, fish and even human life.

ii. The proposed water taking could have negative effects on waters upstream of the taking site, specifically on Bob's Lake, Michael's Creek, Mud Bay, Mill Bay, Crow Lake, and Buck Bay, all of which are connected and feed the Tay River.

iii. The bodies of water mentioned in (2) feed into the Rideau Canal system; this system is designated as a heritage site and the waters that feed it should be given special consideration as heritage areas as well.

iv. There is no adequate baseline data on streamflow in the Tay River on which to base the decision to grant the permit.

v. Information on critical flow periods is lacking.

vi. There is inadequate information on the flow requirements needed to maintain the natural habitat and function of the Tay.

vii. Information on the Tay River Watershed is insufficient to adequately project what the environmental effects of the proposed water taking would be.

viii. Information on the impact of the proposed water taking on domestic wells and groundwater recharge is insufficient.

ix. The ecosystem approach outlined in the MOE's Water Management Policy was not fully adhered to in the granting of the Permit.

x. OMYA's proposal to "manage" beaver populations in the Tay threatens not only the beaver but the small ponds they create and thus the fish in the ponds.

xi. In-flows of water into Bob's Lake need to be monitored, not just outflows.

xii. there is need for greater independence in the monitoring of water flows, i.e. the MOE should not be entirely of Appeal reliant on OMYA for information. (Exhibit 3D)

Ken McRae[9] Grounds of Appeal:

1. At some point in the future it's possible that the amount of water usage from the Tay River watershed may reach a point where Park's Canada might look to increase the amount of water the Rideau River receives from the Jock River. Parks Canada exercises significant control of water flows in the Tay River watershed for navigation purposes on the Rideau. Adverse effects upon the Jock River could result.

2. MOE has not given any consideration to the environmental effects that may be generated on lands OMYA would mine if given more water for expansion of it's manufacturing plant at Glen Tay. OMYA's application to take water from the Tay was not considered in relation to OMYA's existing groundwater taking permit. These two water takings should be considered jointly as indicated in the regulation, from the start, not at the half way mark or later.

3. In looking at both the "Proposal" and the "Decision" for this permit they state "Purpose of Taking: Commercial". In OMYA's application for the permit they list the said purpose as being "Industrial". The "Decision" for the existing permit OMYA uses to draw groundwater from the wells at it's Glen Tay facility states the purposes as being "Industrial". What is the explanation for this difference?

4. OMYA is presently operating both its Glen Tay manufacturing facility and it's Tatlock area mine operation under water taking permits issued for each to the former owner "Steep Rock Resources Inc." Under "General Condition 7" of the permit issued by the MOE it states "The Permit Holder shall not assign his rights under this Permit to another person without the written consent of the Director." Did Steep Rock Resources Inc. receive written consent from the Director to assign it's water taking permits' rights to OMYA?

5. In looking at the "Proposal" posted on MOE's *EBR* Registry for OMYA's Tay River taking, in the "Description" section's last paragraph it ends by stating "The proposed water taking will have no significant impact on the river or on the upstream watershed". It is both totally inappropriate and completely outrageous for MOE to have allowed such a statement to be made in part of a "Proposal" it posted on it's registry. The statement indicates that MOE prejudged what it's decision would be as to whether or not to issue the permit, before it had received any input at all from the public. This makes a mockery of the public consultation process and indicates that said process is just a sham and not taken seriously by MOE.

6. MOE acknowledges that there are "relevant environmental questions" and states work to be carried out by the proponent to obtain information to answer questions. However, the MOE isn't requiring the proponent to obtain this information up front, before OMYA starts taking any water. This means there would be no baseline data collected that wouldn't be affected by OMYA's initial taking amount.

[9]Since Ken McRae's grounds for appeal were interspersed with substantiation for the grounds, the grounds for appeal have been captured in summary from his submission.

7. MOE based the amount of water allowed to be taken, during Phase 1, upon OMYA's needs and not the environment's needs before knowing what the environment's needs are.

8. OMYA's own consultant stated that OMYA's groundwater wells could satisfy 40% of the 4,500 cubic metres/day it applied for. In the proposed initial phase of water taking, to the end of 2003, the amount OMYA has indicated it requires is 1,483 cubic metres/day or 33% of the longer term projected requirement of 4,500 cubic metres/day. 1,483 cubic metres/day is 7% less than the taking capacity of OMYA's wells. Why not have OMYA rely solely upon it's wells for water until the end of 2003, by which time it's consultants are supposed to have completed their studies regarding the Tay taking?

9. In looking at flow data from Parks Canada's gauge below Bob's Lake and others, one can see that there are times when the equipment breaks down and no flow data is available. Should OMYA be allowed to take water from the Tay during such events? Parks Canada gauge has sometimes gone for months without recording flow data. If and when OMYA actually starts to take water from the Tay it should not be permitted to take water from the Tay during any time when the gauge isn't functioning.

10. There should be a condition that if the flow metre, totalizer or any other equipment malfunctions so as to halt recordings of the amounts of water being taken from the Tay all takings from the Tay must cease until the problem is fixed.

11. Parks Canada's control of the Tay system is limited by the weather and it's obligations. Therefore, MOE and OMYA should not think that everything runs smoothly at all times, in all parts of the Tay River watershed. This supports the need for baseline data up front, before OMYA starts taking any water from the Tay.

12. (1st)In MOE's "Permit to Take Water Program Guidelines and Procedures Manual", it suggests that when MOE evaluates the relative importance of various water uses that environmental needs rank the lowest.

13. (1st)How many other large water users are there within the watershed, that should have water permits, but don't, is MOE unaware of? How many cement making plants, berry farms, orchards, commercial vegetable farms, quarries, campgrounds, lodges etc. are there in the watershed that perhaps should have a PTTW?

14. (2nd)MOE has no idea as to what the sustainable water taking capacity amount of water is from either the surface or groundwater in the Tay River watershed.

15. (2nd)Given the knowledge of the record of wetland evaluations done in Goulbourn Township by Ecological Services, my concerns regarding proper management of the Tay River[10] watershed are heightened further.(Exhibit 3E)

[10]Ecological Services provided documentation concerning the Tay River watershed.