

Environmental Review Tribunal File Nos.
00-119, 00-120, 00-121, 00-122, 00-123 and
00-124

MINISTER OF ENVIRONMENT

IN THE MATTER OF an appeal to the Minister under section 144(3) of the *Environmental Protection Act* R.S.O.1990 c.E.19 as amended, from a Decision of the Environmental Review Tribunal issued February 19, 2002.

AND IN THE MATTER OF Permit to Take Water No. 00-P-4096, dated August 24, 2000 issued by the Director to OMYA (Canada) Inc.

B E T W E E N

OMYA (CANADA) INC.

Appellant

-and-

THE DIRECTOR, MINISTRY OF ENVIRONMENT, CAROL and MELVYN DILLON, MICHAEL and MAUREEN CASSIDY, THE COUNCIL OF CANADIANS, KATHLEEN CORRIGAN, ANN GERMAN, EILEEN NABOZNAK and SULYN CEDAR

Respondents

PART I : EXECUTIVE SUMMARY

The Tay River Watershed is located west of Ottawa in eastern Ontario and forms part of the Great Lakes-St Lawrence watershed. The Tay Watershed is the largest contributor to the Rideau River and the Rideau Canal. The western portion of the watershed is a pristine cottage and recreational area; the eastern portion is a mix of rural residential, agricultural and recreational areas including the Town of Perth.

The 6,000 residents of Perth obtain their drinking water through a municipal system that draws water directly from the Tay River. The 6,000 rural residents in the watershed obtain their water from groundwater wells. Thus there is a public interest in the protection of both surface water and groundwater in the area.

OMYA Canada Inc. ("OMYA") operates a calcium carbonate ("calcite") processing facility on Highway #7 approximately five kilometres west of the Town of Perth. The process consists of crushing and grinding calcite for use in many industrial applications. OMYA, prior to its application for the Permit to Take Water ("PTTW") which is the subject of this appeal, had a PTTW for the taking of 872 m³ of water per day from nine wells on its premises.

On February 28, 2002, OMYA made an application to the Ministry of Environment ("MoE") for a further PTTW under section 34 of the *Ontario Water Resources Act*, ("OWRA"). OMYA's application was posted on the *Environmental Bill of Rights* Registry ("EBR Registry") for public notice and comments. In the 30-day comment period, some 283 submissions were made by individuals, agencies and organizations. According to Mr. Brian Kaye, the MoE's Director for purposes of section 34 of the *OWRA* ("the Director"), this level of public interest and concern was unprecedented.

The public comments during the *EBR* comment period included concerns about impacts to water levels which would result from the taking, impacts to aquatic habitat, as well as the inadequacy of OMYA's data and technical information filed in support of its application. The public concern was heightened by the severe drought conditions in the Tay River Watershed in recent years. The

drought had caused residents' wells to run dry and prevented farmers from irrigating crops and cattle from having access to watering holes.

The MoE decided to issue a phased permit to address the significant environmental concerns, which had been raised by the public during the public consultation process. Phase I allowed OMYA to take up to a maximum of 1,483 m³/day from the Tay River until January 1, 2004; in Phase II, OMYA was allowed to take up to a maximum of 4,500 m³/day subject to carrying out environmental studies of the Tay and to the Director's approval. A phased permit was issued because OMYA had not provided adequate information on the potential adverse environmental impacts which could result from taking 4,500 m³/day. In fact, the report prepared by OMYA's consultant to support its PTTW application was severely criticized by regulatory agencies which reviewed OMYA's application, including the Rideau Valley Conservation Authority.

Before OMYA could proceed with Phase II it was required to provide the Director with a draft terms of reference for a field investigation program to evaluate the aquatic environment of the Tay River. Upon receiving approval of the Director on the terms of reference, OMYA was required to hire a qualified consultant to conduct field investigations and prepare a scientific report. The Director's reason for requiring this report was to ensure that the MoE received and could assess proper scientific information on the ecology and water levels of the Tay River to determine the flow requirements needed to maintain the river's natural habitat and functions.

A critical condition in OMYA's PTTW was the requirement that it install and maintain a continuous recording streamflow gauge station on the Tay River. The purpose of this condition was to ensure that OMYA obtained real-time scientific streamflow information on the Tay River. OMYA did not appeal the Director's decision to limit its taking to 1,483 m³/day, presumably because it was satisfied with the terms and conditions imposed by the Director.

Soon after MoE issued the OMYA permit, Carol and Melvyn Dillon, Michael and Maureen Cassidy, Barbara and Ray Zents, Kathleen Corrigan, Ann German, Eileen Naboznak, Ken McRae, and the Council of Canadians filed applications for leave to appeal with the

Environmental Review Tribunal ("ERT") under the *Environmental Bill of Rights, 1994* ("EBR"). The residents expressed serious environmental concerns about the Director's decision.

Mr. Len Gertler, a Vice-Chair of the Environmental Review Tribunal ("ERT"), found that it was not reasonable for the Director to issue the PTTW in the absence of adequate streamflow information and data on the Tay River watershed. Mr. Gertler held that the absence of this information "creates a degree of uncertainty about impact on the aquatic habitat of the Tay River which raises the possibility of significant harm to the environment". Accordingly, Mr. Gertler granted the eight applicants leave to appeal OMYA's permit in its entirety to the ERT.

After leave had been granted and prior to the ERT hearing, OMYA retained a number of experts to prepare additional reports to justify its increased water taking of 4,500 m³/day. However, OMYA never prepared terms of reference and did not obtain the Director's approval before hiring its consultants and submitting its experts' reports. Nor were any of OMYA's reports circulated to the regulatory agencies for review, as the MOE phased permit had required, prior to the ERT hearing.

The Tribunal's hearing was chaired by Ms. Pauline Browes, a senior member and Vice-Chair of the ERT. At the ERT hearing, OMYA, which had previously not opposed the Director limiting its water taking in Phase I to 1, 483 m³/day, sought to justify a water taking of 4,500 m³/day starting immediately and before it had begun to collect hard data on streamflows in the Tay River.

However, the witnesses from the regulatory agencies, including the Director, remained unequivocal in their opinion that there was insufficient data to support OMYA's increased water taking in the amount of 4,500m³/day. The Director and the MoE's surface water scientist who had evaluated OMYA's application testified that after having reviewed the report of OMYA's hydrologist they remained of the view that the data was simply too inadequate to justify an increased water taking of 4,500 m³/day. The Water Management Coordinator for the Rideau Valley Conservation Authority and a biologist from the Ministry of Natural Resources also testified in support of the Director's position with regard to the inadequacy of OMYA's data.

OMYA never led any evidence to justify its need for such a large quantity of water for its operation and, in fact, never called any company witnesses to provide testimony at the ERT hearing. Indeed, the evidence at the ERT hearing indicated that OMYA was seeking to secure a permit well in excess of its production needs. OMYA reported to MoE and to the public that the projected maximum availability of groundwater would satisfy only 40% of its long-term needs. Based on its current groundwater PTTW for 872 m³/day, its long-term needs can be calculated as 2,180 m³/day. On the basis of these figures supplied by OMYA, the company's application for 4,500 m³/day. is more than double its projected long-term needs.

After the 35-day hearing, the Chair found that there was insufficient evidence to justify OMYA's request to take 4,500 m³/day of water from the Tay River. In reaching this finding, the Chair preferred the evidence provided by the witnesses from the regulatory agencies, including the Director, to the evidence provided by experts hired by OMYA. The Chair, therefore, only approved the first phase of the taking for 1,483 m³/day.

The Chair also recommended that regulatory agencies consider the use of a water budget in evaluating future PTTW applications. A water budget would allow MoE to accurately assess the impact a taking would have within a given watershed. The witnesses from the regulatory agencies were in agreement that the lack of a water budget was an important information gap which ought to be rectified.

The Chair was also of the view that the MoE had considered OMYA's PTTW in isolation from other demands on the Tay River water supply, and recommended that in future MoE take a more comprehensive approach in issuing PTTWs. It should be noted that Regulation 285/99 now mandates the Director to consider the "protection of the natural functions of the ecosystem" prior to issuing a PTTW. Thus, the Chair's decision is consistent with the environmental laws governing the issuance of PTTWs.

The *Part Two Report of the Walkerton Inquiry* also stressed the importance of water budgets as a minimum component of watershed-based source protection plans. Mr. Justice Dennis O'Connor, the Commissioner of the Walkerton Inquiry, noted in his report that a new approach

to the granting of PTTWs is needed in Ontario. The Commissioner recommended that the granting of PTTWs should embrace an ecosystem approach and be subject to watershed-based source protection plans. The Government of Ontario has made a public commitment to implement the recommendations of the Walkerton Inquiry, including the need for watershed-based source protection plans.

It is respectfully submitted that the Honourable Minister of Environment should uphold the ERT Chair's decision since it is clearly supported by the testimony provided by witnesses from the regulatory agencies including the MoE's own staff and experts. The Chair's decision was made in accordance with provincial legislation, regulations and policies governing the issuance of PTTWs. The Chair's decision is consistent with the annual Management Plans of MoE which identify conservation and environmental protection as the Ministry's core mandates. The Chair's report is also consistent with the recommendations made by the Commissioner of the Walkerton Inquiry that the cumulative ecological impacts for all actions in the watershed be considered by the provincial government before a PTTW is granted. The Chair's decision was thus made in accordance with the public interest and with a view to ensuring the wise use and management of Ontario's waters for the benefit of current and future generations.

PART II: GENERAL

1. OMYA is appealing the decision of Ms. Pauline Browes ("Chair"), dated February 19, 2002, to the Honourable Minister of Environment and requesting that the following findings be made:
 - (i) the Minister find that the ERT erred by shortening the PTTW issued by the Director from ten years to six years;
 - (ii) the Minister find that the ERT erred by incorporating additional special conditions 30, 31 and 32 into the Director's Permit; and
 - (iii) the Minister find that the ERT's decision, which required more information and analysis to be compiled to support the taking of 4,500 m³/day is incorrect.
2. Carol Dillon, Melvyn Dillon, Michael Cassidy, Maureen Cassidy, Kathleen Corrigan, Ann German, Eileen Naboznak and Sulyn Cedar ("the Citizen Respondents") strongly urge the Minister of Environment to uphold the Chair's decision because it ensures the wise use and management of Ontario's water resources, in particular the Tay River Watershed. The Chair's decision was made in accordance with Ontario's laws, policies and guidelines relating to PTTWs and thus the decision was made in accordance with the public interest and protects the natural environment.
3. The Citizen Respondents submit, for the reasons set out in more detail below, that the terms and conditions that the Chair attached to OMYA's PTTW are intended to protect the natural functions of the ecosystem of the Tay River Watershed and maintain the confidence of people in the Tay River area in the PTTW process while also allowing OMYA to continue to meet its ongoing production needs for its calcium carbonate mining operation. Accordingly, the Citizen Respondents request that the Minister of the Environment dismiss OMYA's appeal.

PART III: BACKGROUND

(A) THE TAY RIVER AND THE TAY RIVER WATERSHED

4. The Tay River flows east from Bobs Lake, one of a network of upstream recreational lakes, through Christie Lake, and then through the Town of Perth about 27 kilometres downstream and the Tay Canal to its discharge point at the Lower Rideau Lake and Rideau River. The flow of the Tay River is regulated by Parks Canada with a mandate to maintain the required water level in the Rideau Canal system. One of the control structures is at Bolingbroke at the outlet of Bobs Lake, where a gauging station records information on water levels, discharge flow and precipitation.¹ (See map attached as Appendix "A")
5. A publication by the Rideau Valley Conservation Authority entitled "*Existing Conditions and Trends in the Tay River Watershed*" provides the following description of the Tay River:

The Tay River is the most magnificent tributary in the entire Rideau Valley. The River flows in a northeasterly direction from the height of the land on the Carnahan, Scanlin and Leggat Lakes, through some of the best cottage country and headwater areas in Ontario. Beautiful lakes such as Bobs, Christie, Crow, Davern, Elbow, Farren and Long, all form part of the Tay watershed. Grant's Creek, the major tributary to the Tay from Crosby and Pike Lakes, joins the main stem just above the Town of Perth. The river continues on through the provincially significant Tay Marsh, tumbling, after a journey through six municipalities, into the Lower Rideau Lake at Port Elmsley. With a catchment area of about 865 square kilometres and an overall length of about 95 kilometres, it is the largest tributary in the Rideau River system....Approximately 2/3 of the watershed lies within the Frontenac Axis, a southern extension of the Canadian Shield, and contains a large forest-wetland complex. The abundance of this natural heritage should be regarded as a provincial asset. The extensive forest, wetlands, lakes and rivers support a wealth of diversity and other natural heritage functions that are in general decline throughout the rest of southern Ontario. The remaining two thirds of the watershed lies on the agriculturally dominated Smiths Falls Limestone Plain and contains isolated woodlots, important riparian corridors and several large provincially significant wetlands.²

¹ ERT decision dated February 19, 2002.

² Exhibit 39, Tab 47, *Existing Conditions and Trends in the Tay River Watershed*, June 2000, p. iii.

(B) OMYA S OPERATION

6. OMYA operates a calcium carbonate (“calcite”) processing facility at Tay Glen on Highway # 7 approximately five kilometres west of the Town of Perth. The process consists of crushing and grinding calcite, a form of limestone, for use in many industrial applications. Calcite for OMYA's operations is obtained from a quarry owned and operated by OMYA near Tatlock, in Lanark Highlands Township, located approximately 50 kilometres north of the plant site. The Ministry of Natural Resources (“MNR”) licenses the quarry under the Aggregate Resources Act. OMYA's processing requires water for its operations and its current PTTW No. 97-P-4018 issued under the *Ontario Water Resources Act* (“OWRA”) on April 17, 1997 allows for the taking of 872 m³/ day of water from nine wells. The product is ground and sold as a fine dry powder or mixed with water and sold in a slurry form and is shipped by tanker truck or rail.³ OMYA’s slurry product is presently sold at 25 percent water content and constitutes approximately 50 percent of production.⁴

(C) THE CITIZEN RESPONDENTS

7. The Citizen Respondents are permanent or seasonal residents in the Tay River Watershed or close to OMYA's quarry.
8. Carol and Melvyn Dillon have their permanent residence at Glen Tay on a property that includes 200 meters of shoreline on the Tay River. The property is located downstream from OMYA's proposed intake and pumping station. The Citizen Respondent, Carol Dillon has demonstrated a long term interest in the Tay River Watershed and is an executive member of the Tay River Watershed Plan: a group of community volunteers" ...with the purpose of protecting the Tay River ecosystem." Melvyn Dillon has assisted with the objectives of the

³ ERT decision dated February 19, 2002, p. 3.

⁴ OMYA counsel submissions during evidence of Bruce Reid, Vol. 21, pp. 10-11 and pp. 12-13.

Tay River Watershed Plan by volunteering for various activities and objectives of the Tay River Watershed Plan over the past number five years.⁵

9. Maureen and Michael Cassidy live in Ottawa and own a seasonal cottage at Tatlock.

Although not in the Tay River Watershed, their cottage is located about two miles from the OMYA quarry. The Cassidy's concerns about the OMYA water taking relate to the Director's failure to consider the wider ecosystem impacts from the water taking, and the Director's failure to follow provincial legislation and policies with respect to environmental protection and public participation.⁶

10. Ann German has spent summers on Bobs Lake for the past 80 years on a family property that her parents acquired in 1917.⁷ Ms. German testified that in the 1920s and 1930s there was a gradual decline in the water levels in the lake, caused by a slow leak in the dam at Bolingbroke. The dam was fixed, thus allowing the water levels to rise again.⁸ The water at Bobs Lake receded again in the 1950s causing adverse impacts and resulting in the death of wildlife. Frogs and other shallow water creatures were left without a shoreline shelter, becoming an easy target for herons and other predators.⁹ For several years up to about 1999, Ms. German noted they had enjoyed good water levels but since 1999 the water levels have dropped again.¹⁰ Ms. German testified that once a part of the lake has been altered by building too many cottages in one area or by taking too much water, it is very hard, if not impossible, to reverse the effects of poor planning and decision making.¹¹

⁵ Exhibit 3(a), Notice of Appeal of Carol and Melvyn Dillon

⁶ Exhibit 3(b), Notice of Appeal of Michael and Maureen Cassidy.

⁷ Evidence of Ann German, Volume 31, p. 4.

⁸ Evidence of Ann German, Volume 31, p. 5.

⁹ Evidence of Ann German, Volume 31, and p.6.

¹⁰ Evidence of Ann German, Volume 31, p.8.

¹¹ Evidence of Ann German, Volume 31, p.8.

11. Kathleen Corrigan has been coming to Bobs Lake since 1949 and recalls the water levels being low in the 1950s.¹² Ms. Corrigan also expressed concerns about the cottages and development in the lakes using greater quantities of water.¹³ She anticipated that this would increase in the future placing even greater demand on the lake.¹⁴ Ms. Corrigan recalled that in 1999, water levels in Bobs Lake were "very low to the point that there were concerns raised about the fish habitat" and amphibians along the shoreline.¹⁵ Ms. Corrigan was very concerned that given the demands on the Rideau Canal system to maintain water levels within the canal, there was no comprehensive watershed plan to address how to deal with water levels in unusual situations like drought or due to other irregularities which may occur as a result of greater growth in the area.¹⁶

12. Eileen Naboznak has owned a cottage on Bobs Lake for forty years and her long-standing connection to the area has given her an overview of the water levels and its impacts on wildlife in the lake. Ms. Naboznak testified that she had seen the negative impacts to the aquatic wildlife and to plant life and birds when water levels were too low.¹⁷ She expressed concerns that the data used to justify issuing the OMYA PTTW was old and was not an accurate reflection of the water levels today.¹⁸ Ms. Naboznak testified that Bobs Lake feeds the Tay River, which is the headwater of the Rideau System.¹⁹ She expressed very serious concerns about the adverse impact to wildlife and to large and important wetlands in the area.²⁰ Ms. Naboznak advised the ERT that there have been 475 signatures by concerned

¹² Evidence of Kathleen Corrigan, Volume 32, pp.1-2.

¹³ Evidence of Kathleen Corrigan, Volume 32, and p.3.

¹⁴ Evidence of Kathleen Corrigan, Volume 32, and p.4.

¹⁵ Evidence of Kathleen Corrigan, Volume 32, and p.3.

¹⁶ Evidence of Kathleen Corrigan, Volume 32, and p.3.

¹⁷ Evidence of Eileen Naboznak, Volume 33, and p.1.

¹⁸ Evidence of Eileen Naboznak, Volume 33, and p.1.

¹⁹ Evidence of Eileen Naboznak, Volume 33, and p.1.

²⁰ Evidence of Eileen Naboznak, Volume 33, p. 1-2.

citizens to a petition opposing OMYA's proposed water taking. Prior to OMYA's PTTW being issued there were over 280 signatures from local residents opposing the granting of the permit. In total, there have been over 775 signatures.²¹

13. Sulyn Cedar resides in Tay Valley Township (formerly Bathurst, Burgess Sherbrooke Township) and is employed as a social worker. She requested party status at the ERT preliminary hearing on February 6, 2001, in accordance with ERT rules and procedures. Ms. Cedar was granted party status on behalf of Lanark County Citizen's Action Group (LCCAG), an ad hoc group formed to formalize community support for the leave to appeal OMYA's PTTW under the *EBR*.²²
14. The Tay River, from which OMYA is seeking to take water, is identified by the Perth Community Strategic Plan of 1995 as one of the most important economic and social features of the Region. The Tay River Watershed Plan was created soon afterwards in order to protect and improve the watershed environment. A community-based group, the Tay River Watershed Round Table, was formed from the diverse interest groups within the watershed including landowners, farmers, tourist operations, regulatory agencies, business people, industries, municipal representatives, and concerned citizens. The Round Table, now 75 strong, assists in the watershed planning process with the cooperation of a Technical Advisory Group and the Rideau Valley Conservation Authority.²³
15. OMYA was a participant in the Tay River Watershed Roundtable, a two-year initiative to prepare a management plan for the Tay River Watershed. The plan outlines what needs to be done to determine the health, water supply, fish and wildlife habitat, and sustainability of the watershed. The Tay River Watershed Management Plan is intended to provide a comprehensive and integrated watershed management system.²⁴

²¹ Evidence of Eileen Naboznak, Volume 33, pp. 2-3.

²² Exhibit 10C dated February 28, 2001 for first 100 member signatures.

²³ Exhibit 39, Tab 47, *Existing Conditions and Trends in the Tay River Watershed*, June 2000, at p. iii.

²⁴ Exhibit 71, Tab 5, Letter from Bruce Reid, Water Management Coordinator, RVCA to Supervisor, Water Resources Unit, MoE, dated March 30, 2000.

16. However, OMYA sought to make its application for a PTTW before the Tay River Watershed Plan was finalized. The Tay River Watershed planning process recommended that a more detailed water budget is required to reduce uncertainty in the evapotranspiration figures. It was recognized that a water budget would be easier to undertake once "more comprehensive flow data is available and efforts have been made to evaluate the precipitation data for the watershed".²⁵

(D) OMYA'S APPLICATION FOR A PTTW

17. On February 28, 2000, Simmering and Associates made an application on OMYA's behalf to the Director, Ministry of Environment ("MoE") for a further PTTW under ss.34 (3) of the OWRA. The location of the proposed water taking is from the Tay River at Lot 18, Concession 2, Township of Bathurst, Burgess and Sherbrooke (now known as the Tay Valley Township). The intake location for the proposed location is approximately 1,500 metres south of OMYA's plant site.²⁶

18. The application sought a maximum of 4,500 m³/day. This amount is approximately equivalent to the amount of water taken daily by the Town of Perth. For this amount of water, the Town of Perth supplies water for all commercial, civic and industrial purposes combined which includes 6,000 residents, and 2,686 jobs. For a similar amount of water, OMYA creates 120 jobs at its plant.²⁷

19. OMYA provided the following summary of the proposed water taking with its February 28, 2000 application:²⁸

²⁵ Exhibit 39, Tab 47, Existing Conditions and Trends in the Tay River Watershed, p. 32.

²⁶ ERT decision dated February 19, 2002 Appendix F. See Appendix "A" attached.

²⁷ Exhibit 128, Heritage Perth: Community Profile 2001, pp. 2 and 5; Exhibit 15, Tab 1, Statement of the Director, MoE, Brian Kaye and Victor Castro, MoE Technical Advisor, paragraph 34.

²⁸ Exhibit 15, Tab 6, p. 5, Application for a Permit to Take Water from the Tay River, Simmering & Associates Ltd., February 28, 2000.

Table 1:

Year	Maximum Daily Water Taking (m ³ /day)
Present	864
End of 2000	1,152
End of 2001	1,210
End of 2002	1,440
End of 2003	1,483
End of 2004	2,333
End of 2009	4,500

20. The water was proposed to be taken from the Tay River immediately downstream of the Bowes Road Bridge, and pumped approximately 1,500 metres north, via a pipeline to the main plant site.²⁹

21. It should be noted that OMYA's maximum daily water taking in Table 1 was to be taken in incremental amounts over a 10 year period and the ultimate taking of 4,500 m³/day was not contemplated for another decade. The Director confirmed this in a presentation to the Minister on August 2, 2000.³⁰

22. OMYA provided no explanation for how the demand for water in its PTTW had been calculated. It presented no evidence on this question either in testimony, in expert studies or in other exhibits. OMYA's need for water is addressed in paragraphs 109 and 123 below.

(E) POSTING ON THE EBR REGISTRY

23. OMYA's application for a PTTW was posted on the *EBR* Registry for public notice and comment on March 8, 2000.³¹ In the 30-day public comment period, which ended on April 9,

²⁹ Exhibit 16, Tab 21 Letter from Victor Castro, Surface Water Scientist, Water Resources Unit, Technical Support Unit to Gail McFall, Senior Environmental Officer, Ground Water Unit, Technical Support Section dated June 27, 2000; Exhibit 16, Tab 22, Letter from Clyde Hammond, Director, Ministry of Environment to Rideau Valley Conservation Authority dated July 5, 2000.

³⁰ See Exhibit 40, Tab 8, MoE Director's Public File, Presentation to the Minister and ADM, August 2, 2000, p. 4.: "Concerns raised regarding the volume of water taking generally focused on the proposed maximum daily water taking of 4,500 m³/day at the end of 10 years. The fact that the largest proposed withdrawals of water are still years away provides considerable flexibility in dealing with issues and concerns surrounding this permit."

³¹ Exhibit 15, Tab 7.

2000, some 283 submissions were received from individuals, agencies and organizations.³² Brian Kaye, the MoE Director for purposes of section 34 of the *OWRA*, testified that he was not aware of any PTTW that had generated this level of interest and concern among the public.³³

24. The main concerns during the EBR notice period focused on:

- i) impacts to water levels in Bobs and Crow Lake;
- ii) impacts to aquatic habitat in the Tay River downstream of the taking;
- iii) the inadequacy of the supporting technical information and data available; and
- iv) the establishment of a minimum in-stream flow to be maintained at all times.³⁴

25. The Citizen Respondents tabled an analysis of the 283 public comments submitted to the Ministry in response to the posting of OMYA's proposal in March 2000. They reported that:

Water: Of the 283 submissions, 273 raised concerns with respect to the impacts of the proposed water-taking on the Tay River, impact on fish hatching and the aquatic environment, impact on lakes in the Tay Watershed, and the potential for further stress on the Tay system stemming from OMYA's project.

Environment: Of the 283 submissions, some 250 raised broader concerns relating to the impact of the proposed water-taking on the environment and on ecosystems affected by OMYA's water-taking. The vast majority of these submissions requested that the OMYA permit be delayed to allow time for the environmental impact of OMYA's proposal to be reviewed, or called for a full environmental assessment. A smaller number asked for delay pending the collection of further information about the Tay River and environmental effects of the water-taking.³⁵

³² ERT decision dated February 19, 2002, p. 5.

³³ Evidence of Brian Kaye, Volume 23, p. 71.

³⁴ Exhibit 16, Tab 22, Letter from Clyde Hammond, Director, Ministry of Environment to Rideau Valley Conservation Authority dated July 5, 2000.

³⁵ Exhibit 67, Annex E – OMYA Motion Hearing – Notes on Public Response.

(F) COMMENTS FROM REGULATORY AGENCIES

26. The MoE circulated OMYA's application report to the MNR, RVCA, Parks Canada, and DFO for additional technical comments. The regulatory agencies, which reviewed OMYA's documents in support of its application for a PTTW, were extremely critical about the lack of information provided by OMYA. The ERT's decision dated November 6, 2000, granting leave to appeal highlights many of the serious deficiencies with the information supplied by OMYA. The ERT's decision notes that Mr. Kaye, a hydrogeologist, and Mr. Victor Castro, a surface water scientist with the MoE, made the following direct observations about the river flow information:

At these meetings [of MoE with the Ministry of Natural Resources, the Rideau Valley Conservation Authority, Parks Canada and the Department of Fisheries and Oceans on April 4, and May 10, 2002], *several concerns* were discussed. Among these was the lack of data on which to draw conclusions regarding the potential impacts due to the proposed undertaking. *It was felt by all the parties that a limited amount of data prevented an accurate definition of the low flow characteristics of the Tay River, necessary for assessing the impact of the proposed taking (emphasis added).*³⁶

27. The RVCA staff expressed very serious concerns about the report prepared by OMYA's consultant, Simmering and Associates. Mr. Bruce A. Reid, a professional engineer and the Water Management Coordinator for RVCA sent a letter dated March 30, 2000 to the Supervisor of the MoE's Water Resources Unit, and made the following observations about the technical report:

a) The report suggests that the 12 years of flow data at Glen Tay (1915-27) are sufficient upon which to obtain a reliable value for the 7Q12 flow in the river for present day conditions in the watershed. There is no analysis to justify the use of data, which is more than 75 years old as a basis for this important flow statistic. We question the reliability of streamflow data of that vintage (in terms of the flow measurement techniques used at the time), and whether they can be considered representative of the present day hydrology of the watershed. Significant changes to land use and drainage patterns throughout the watershed, and water management practice at Bobs Lake will have occurred since 1927.³⁷

³⁶ Exhibit 1, ERT decision on leave to appeal dated, November 6, 2000, p.12.

³⁷ Exhibit 71, Tab 5, Letter dated from Bruce Reid to Supervisor, Water Resources Unit, MoE dated March 30, 2000 p. 3.

28. In his letter, Mr. Reid notes that there are at least four significant human demands on water in the Tay River during the dry summer months: water for the Rideau Canal management purposes; water for recreation and fisheries management purposes on Bobs Lake; water for municipal water supply purposes in the Town of Perth; and water for industrial process purposes. Mr. Reid observed that there were "undoubtedly other water demands." Mr. Reid states that establishing "a fair and equitable system of sharing of the resources amongst these human needs while ensuring that the aquatic habitat needs of the river are met first, calls for a comprehensive and integrated watershed management system which does not exist at the present time. The Tay River Watershed planning process which is now underway is a step in that direction." Mr. Reid, therefore, initially recommended against approving OMYA's application on grounds that "it is premature" and because the supporting information and analysis were insufficient.³⁸

(G) MOE'S DECISION TO ISSUE A PTTW TO OMYA

29. After receiving and reviewing the comments from the regulatory agencies, the MoE decided to issue a PTTW to OMYA but limited the amount of water that could be taken. According to Mr. Kaye this "decision puts the environment first, but takes into consideration the needs of the company along with the concerns of the stakeholder." The MoE reviewed all comments and those relevant to the PTTW approval process were considered in the decision as well as the development of terms and special conditions imposed on the PTTW.³⁹

30. The MoE decided to issue a phased permit to address the significant environmental concerns and issues identified during the public consultation process. The initial phase of the permit allows OMYA to take up to a maximum of 1,483 m³/day from the Tay River until January 1, 2004; in Phase II, OMYA is allowed to proceed to take up a maximum of 4,500 m³/day.

³⁸ Exhibit 71, Tab 5, Letter dated from Bruce Reid to Supervisor, Water Resources Unit, MoE dated March 30, 2000 pp.4-5.

³⁹ Exhibit 20, Letter from Brian Kaye, Section 34 Director, OWRA, MoE to Mr. Ray McCarthy, dated October 24, 2000, attaching PTTW No. 00-P-4096, p. 2.

However, the Director imposed a number of special conditions on OMYA regarding the increased taking.

31. Special Condition 21 of OMYA's PTTW requires OMYA to provide by January 21, 2001 draft terms of reference to the Director for a field investigation program to evaluate the aquatic environment of the Tay River. These draft terms were also to be submitted to the Rideau Valley Conservation Authority ("RVCA"), the Department of Fisheries and Oceans ("DFO"), Parks Canada, and the Ministry of Natural Resources ("MNR") for review.⁴⁰ During the hearing and discussion of the draft permit, the list of organizations to be consulted concerning the terms of reference and the review of OMYA's consultant reports was expanded to include the Friends of the Tay, three other watershed community groups, and the six lower-tier municipalities located in the Tay River Watershed.

32. Special Condition 21 states that draft terms of reference are to include but not be limited to a description and scheduling of investigation of the Tay River related to:
 - (a) the aquatic habitat;
 - (b) the presence of fish and other aquatic life;
 - (c) the identification of fish spawning areas;
 - (d) the range of minimum in stream flows, critical flows and water levels that must be maintained in order to protect the aquatic life, maintain aquatic habitat and maintain the natural function of the Tay River; and
 - (e) the area of the Tay River which is proposed for investigation.⁴¹

33. Special Condition 23 of the PTTW requires OMYA immediately upon receiving the written acceptance from the Director on the draft terms of reference, to hire a qualified consultant to conduct the investigations and prepare a scientific report on the findings of the approved field investigation program.⁴²

⁴⁰ Exhibit 2, PTTW No. 00-P-4096, p. 5.

⁴¹ Exhibit 2, PTTW No. 00-P-4096, p. 5.

⁴² Exhibit 2, PTTW No. 00-P-4096 p.5.

34. Special Condition 24 states that OMYA is required to submit the report for review to the Director and the review agencies. OMYA was prohibited from proceeding with Phase II until the scientific report had been reviewed and assessed by the Director and OMYA had received official written notification from the Director authorizing the increase in taking.⁴³
35. The Director's reasons for imposing Special Conditions 20, 21, 22, 23 and 24 were to ensure he received and assessed proper scientific information on the ecology of the Tay River and the water level of the Tay River and to determine the flow requirements needed to maintain the natural habitat and function of the Tay River.⁴⁴

(H) SPECIAL CONDITIONS TO ADDRESS DROUGHT

36. The Director added a number of Special Conditions to the permit, including General Condition 11. The Director added General Condition 11 because it had been brought to his attention that the area might experience drought or water shortage conditions. General Condition 11 was added to ensure "equitable access to the water supply and to provide protection of the natural resources".⁴⁵
37. General Condition 11 allows the Director at times of drought or water shortage to give notice to the Permit Holder to suspend or reduce the amount or threshold specified by the Director and the suspension or reduction in the taking is to be effective immediately.⁴⁶

⁴³ Exhibit 2, PTTW No. 00-P-4096 pp.5-6.

⁴⁴ Exhibit 2, PTTW No 00-P-4096 p.6.

⁴⁵ Exhibit 2, PTTW No. 00-P-4096, p. 3.

⁴⁶ Exhibit 2, PTTW No. 00-P-4096 at p. 3.

(I) DROUGHT CONDITIONS

38. The Tay River Watershed has experienced severe drought conditions over the past three years⁴⁷ causing the water table to drop. There was also evidence that residents' wells had gone dry, that cattle did not have access to watering holes and farmers did not have sufficient water for crop irrigation.
39. Prior to the issuance of the PTTW, MoE staff and OMYA's consultant met to discuss OMYA's application for a PTTW.⁴⁸ The MoE required that OMYA, prior to the taking of water, install and calibrate a flow meter and totalizer on the pumping system that takes water from the Tay River and to measure and record the amount of water taken. In addition, the MoE also required OMYA to install and maintain a continuous recording streamflow gauge station in the Tay River at the Bowes Road bridge.⁴⁹
40. OMYA was also required to immediately stop the taking of water if the amount of water flow measured in the Tay River at the Bowes Road bridge gauging station fell to 1 cubic metre per second or less.⁵⁰ In addition, the Director also included a condition indicating that he may at times of "drought or water shortage" give notice to OMYA to suspend or reduce its taking immediately.⁵¹
41. On August 24, 2000, the Director issued a PTTW to OMYA. The PTTW states that OMYA could appeal the PTTW by written notice served on the Director and the Environmental

⁴⁷ Evidence of Victor Castro, Volume 16, and p.192.

⁴⁸ Evidence of Victor Castro, Volume 15, pp. 16-17

⁴⁹ Exhibit 2, PTTW No. 00-P-4096, p. 4.

⁵⁰ Exhibit 2, PTTW, No. 00-P-4096, p. 4, Special Condition 18.

⁵¹ Exhibit 2, PTTW, No.00-P-4096, p. 3, Condition 11.

Appeal Board [now known as the ERT] within 15 days after receipt of the Notice. However, OMYA did not appeal the PTTW presumably because it was satisfied with the terms and conditions imposed by the Director in the PTTW.⁵²

(J) THE PHASED PERMIT

42. Mr. Kaye testified that out of more than 1,000 PTTW that he had reviewed, he had never previously seen a Phased Permit. The normal process for an Applicant wanting to increase water taking is to apply for a new PTTW.⁵³ The issuance of a new PTTW requires posting on the *EBR* registry, which ensures public notification and provides an opportunity for public comment. More importantly, it provides the public with the opportunity to seek leave to appeal the PTTW in the event they have concerns that the issuance of the PTTW may cause significant environmental harm.
43. The Phased Permit that was issued in this case, however, exempts OMYA from having to apply for a new PTTW if it decides to significantly increase its water taking. Consequently, an increase in water taking to 4,500m³/day by OMYA in 2004 would be exempt from the *EBR* notice and comment requirements. Thus, in the event the Director decided to increase the water taking to 4,500m³/day, the public would be denied their right to comment on the increased water-taking or to seek leave to appeal the Director's decision.
44. The MoE rationale for issuing the Phased Permit was because the Director did not have sufficient information to immediately justify the full taking of 4,500m³/day. Accordingly, the Director decided to issue OMYA's PTTW in two phases.⁵⁴ However, the MoE did indicate to the Chair during the hearing that it was not opposed to the Chair exercising her discretion to disallow the second phase of the permit.⁵⁵

⁵² Exhibit 2, PTTW No.00-P-4096, pp. 7-8.

⁵³ Exhibit 71, Tab 4, Witness Statement of Brian Kaye, paragraph 119.

⁵⁴ Opening Statement of MoE counsel, Volume 12, p. 23.

⁵⁵ Opening Statement of MoE counsel, Volume, 12, p.25.

45. Mr. Gordon Miller, the Environmental Commissioner of Ontario ("Environmental Commissioner"), was qualified to provide opinion evidence on the *Environmental Bill of Rights, 1994* ("*EBR*") and the MoE's Permit to Take Water Program. The Environmental Commissioner testified that his office regularly reviews PTTWs but was unaware of the MoE ever having previously issued a Phased Permit. A report prepared by the Environmental Commissioner's Office for the Walkerton Inquiry entitled "*Ontario's Permit to Take Water Program and the Protection of Ontario's Water Resources Act*" states that "Proponents who are refused PTTWs can appeal to the ERT and request the denial be overturned. For this reason, MoE staff are often reluctant to deny permits to proponents."⁵⁶
46. The Environmental Commissioner expressed serious concerns about the MoE's decision to issue a Phased Permit since it allows the MoE to circumvent the *EBR* notice and comment period to allow for public participation in the environmental decision making process. The Environmental Commissioner stated that any significant decisions are required to be posted on the *EBR* Registry for public notification and public comment.⁵⁷ The *EBR* also makes instruments such as PTTWs subject to the leave to appeal provisions. According to the Environmental Commissioner, the Phased Permit approach does not comply with the intent and spirit of the *EBR*.⁵⁸
47. Section 34 (6) of the *OWRA* gives the Director authority in his or her discretion to issue, refuse to issue, or cancel a permit, and to impose such terms and conditions in a permit, as he or she considers proper. The Director may also alter the terms and conditions of a permit after it is issued. However, there are no provisions in the *OWRA* that provide the Director with authority to issue a Phased Permit. It is submitted, in the event the Director is of the view that there is insufficient information to issue a PTTW for water taking, the Director's

⁵⁶ Exhibit 76, *Ontario's Permit to Take Water Program and the Protection of Ontario's Resources, Brief to the Walkerton Inquiry*, January 2001.

⁵⁷ Evidence of Gordon Miller, Volume 9, p. 72.

⁵⁸ Evidence of Gordon Miller, Volume 9, p. 72.

only recourse is to refuse to issue a PTTW. Mr. Kaye was emphatic in his evidence that there was insufficient information to justify the larger taking sought by OMYA.

48. It is submitted that the MoE by issuing a Phased Permit has circumvented the legislative requirements imposed by the *EBR*. It is further submitted that the MoE denied the public's right to participate in the environmental decision making process in regard to the major projected increase in OMYA's water taking, and that the proposed Phased Permit is not in the public interest.

49. It is further submitted that there is no statutory authority in any environmental legislation or regulation which provides the Director with authority to issue a Phased Permit. It is submitted, therefore, that the Director exceeded his jurisdiction by issuing a Phased Permit.

(K) THE UNPRECEDENTED LEVEL OF PUBLIC CONCERNS ABOUT OMYA S PTTW

50. The public demonstrated an extremely high degree of concern about OMYA's proposed water taking. Mr. Castro testified that the MoE knew OMYA's application would be "very controversial" because of the numerous concerns being raised in the media and the concerns raised by the public.⁵⁹

51. There were approximately 283 comments provided on the *EBR* posting of OMYA's proposal to take water from the Tay River.⁶⁰ Mr. Kaye testified that he was unaware of any application for a PTTW which had generated as many public comments as OMYA's. Mr. Kaye admitted that the number of public comments received was unique and reflected the level of public concerns about the proposed water taking.⁶¹

⁵⁹ Evidence of Victor Castro, Volume 15 p. 20.

⁶⁰ Evidence of Brian Kaye, Volume 23, and p.70.

⁶¹ Evidence of Brian Kaye, Volume 23, p. 71.

52. The Environmental Commissioner, in his report to the Walkerton Inquiry, cited OMYA's water taking in the Tay River as an example of an area where there had been conflict and public fears of water shortages.⁶²
53. The Chair also commented that "... the number of persons responding to the EBR registry and the number of persons attending the sessions for the hearing was a demonstration that the community had a high degree of interest and concern with the process."⁶³

(L) LEAVE TO APPEAL UNDER THE EBR

54. There were eight applications for leave to appeal the PTTW issued to OMYA by the Director, including Carol and Melvyn Dillon, Michael and Maureen Cassidy, Eileen Naboznak, Barbara and Ray Zents, Kathleen Corrigan, Ann German, Ken McCrae, and the Council of Canadians.
55. Mr. Len Gertler, who is now retired but was a senior member of the ERT and its former Vice-Chair, heard the application for leave to appeal. On page 6 of his decision, Mr. Gertler states:

The issue of whether the Director's decision on the OMYA application for a PTTW was based on sufficient, pertinent data on the Tay River Watershed is one, which has been identified, in somewhat critical terms, by all the Applicants. While other grounds for the application have been cited, both related to the details of the Permit and to general questions, this is basic and inclusive. If the information is inadequate, or in a serious way, flawed, it would clearly be unreasonable for the Director to issue a Permit. And by the same token, if there are such information gaps, for example, if the Director would have reason to be uncertain about the consequences of the water taking, then his decision could result in significant harm to the environment. From this perspective it is essential to review the evidence on this issue first. In this sense, information is a threshold issue.⁶⁴

⁶² Evidence of Gordon Miller, Volume 9, p. 13, Exhibit 76, *Ontario's Permit to Take Water Program and the Protection of Ontario's Water Resources: Brief to the Walkerton Inquiry*, p. 7.

⁶³ ERT decision dated February 19, 2002, p. 51.

⁶⁴ Exhibit 1, ERT decision on leave to appeal, dated November 6, 2000, pp.6-7.

56. Mr. Gertler was critical of the MoE's decision to issue the PTTW without the reliable stream flow date. On page 15 of his decision he states:

[T]he time required to obtain reliable streamflow data, and the expectation of meaningful data within a few years by (January 1, 2004); and between the professed confidence in the 1,483 cubic metres per day, and the initiation of a field investigation program to obtain the most fundamental information on the aquatic environment only after the Permit is issued - these contradictions do not inspire confidence. In fact, this is the kind of uncertainty about a critical consideration-the very information base of the Director's decision that dictates precaution in deference to the importance of protection of the environment.⁶⁵

57. Mr. Gertler found 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 many years." Accordingly, Mr. Gertler granted the applicants leave to appeal OMYA's PTTW in its entirety."⁶⁶

(M) THE HEARING BEFORE THE ERT AND THE ERT S DECISION

58. After leave to appeal the permit was granted and prior the ERT hearing OMYA hired Dr. Edgar Watt, a hydrologist, and Mr. Thomas McIelwain, a hydrogeologist, and two environmental consulting firms, ESG International and Beak International to prepare additional reports.⁶⁷ However, the Appellant did not prepare terms of reference nor seek the approval of the Director for a field investigation program, as required by conditions in the MoE Permit, prior to having its consultants prepare reports which were tendered into evidence at the ERT hearing.

⁶⁵ Exhibit 1, ERT decision on leave to appeal, dated November 6, 2000, p.15.

⁶⁶ Exhibit 1, ERT decision on leave to appeal, dated November 6, 2000, p.17.

⁶⁷ See OMYA's submission, pp. 13-14.

59. Moreover, OMYA did not submit its experts' reports to the MoE, or any other regulatory agency, for review and comment prior to the ERT hearing.⁶⁸ At the ERT hearing, OMYA, which had previously accepted the Phase I limits placed by the MoE on its PTTW, namely a taking of 1,483 m³/day up to 2004, sought instead to justify a maximum taking of 4,500 m³/day beginning immediately.⁶⁹ OMYA attempted to justify the increased taking prior to installing the gauging station in the Tay River and obtaining data on water levels and streamflows in the Tay River as required in the PTTW issued by the Director.

60. Messrs. Castro and Kaye, the MoE expert witnesses, and Mr. Reid from RVCA testified that they had reviewed Dr. Watt's report. However, after having reviewed his report they remained unequivocal in their view that OMYA should only be allowed to take 1,483 m³/day.⁷⁰ The regulatory agency witnesses did not support the taking of 4,500 m³/day and stated that additional studies were required before OMYA could proceed to increase its taking to 4,500 m³/day.

61. Mr. Reid testified that he expected RVCA would be involved in reviewing additional studies done by OMYA before it could proceed to take 4,500 m³/day and expected that it would be asked to do a peer review. Mr. Reid was of the view that it would be of assistance to the MoE to have the benefit of the RVCA's local knowledge of the watershed before it made a determination whether to allow an increase in water taking.⁷¹

(N) THE ERT S DECISION

62. The Chair's decision endorsed the position of the Director that additional assessments needed to be completed before taking the full amount of water (i.e. 4,500 m³/day). The Chair agreed with the Director that there was not sufficient information gathered and tabulated to approve

⁶⁸ Evidence of Brian Kaye, Volume 23, p.169; Evidence of Bruce Reid, Volume 21, pp.22-23.

⁶⁹ See OMYA's submission, p.12, paragraph 23.

⁷⁰ Evidence of Victor Castro, Volume15, p.109; Evidence of Brian Kaye, Volume 23, p 169; Evidence of Bruce Reid, Volume 21, pp.22-23.

⁷¹ Evidence of Bruce Reid, Volume 19, pp. 37-39.

the full amount of water that had been requested by OMYA. Accordingly, the Chair approved only Phase I of the permit (i.e. 1,483 m³/day).⁷²

63. The Chair, however, disagreed with the MoE's decision to allow a Phased Permit and instead required that any taking in excess of the amount permitted by the ERT decision should be the subject of a new PTTW application.⁷³

64. The Chair also included the following three conditions to ensure transparency, maintain public confidence and improve public participation in relation to OMYA's PTTW:

i) Condition 30 requires the permit holder to retain the services of an independent environmental auditor to review water-taking data and confirm compliance or non-compliance with the permit. The auditor can also provide recommendations for conservation, protection and wise use and management of the water for the taking.

ii) Condition 31 requires the Permit Holder to convene at least two meetings a year with representatives from government agencies, municipalities and selected community groups, to allow the Permit Holder to inform the representatives of the environmental auditor's report and to hear submissions from the representatives and to answer questions concerning the water taking.

iii) Condition 32 requires the Permit Holder in consultation with specified government agencies and municipalities to convene one public meeting a year in order to allow the public to ask questions and receive answers from the Permit Holder and to allow the public to be informed of the permit

65. It is important to note that the Chair's comments regarding a water budget were in the nature of recommendations regarding any future application by OMYA to increase its taking. On page 2 of the ERT decision, the Chair observed that "various levels of government and agencies *may* wish to discuss this initiative of a water budget for the Tay River in evaluating a future proposed water taking application. The Chair states that in her opinion, "a water budget, however rudimentary, would be helpful in determining the extent of the availability of water within the watershed and the consumptive uses that presently exist." Accordingly, the

⁷² ERT decision dated February 19, 2002 at p. 37.

⁷³ ERT decision dated February 19, 2002, at p.50.

Chair stated that "a more comprehensive approach for a water budget *is recommended* (emphasis added)."

66. It is also important to note that the Chair did not preclude OMYA from seeking an increase of its water taking up to a maximum of 4,500 m³/day in the future. Rather the Chair was of the view that the information, which had been provided at the hearing, was not adequate to satisfy a taking of this magnitude.

67. OMYA now seeks to have the Minister of Environment approve a water taking of 4,500 m³/day, despite the fact that the expert witnesses from the regulatory agencies, including the MoE and RVCA as well as the Chair found that OMYA had failed to provide adequate data to justify a water taking of 4,500 m³/day.

PART IV: THE ISSUES RAISED BY OMYA

68. OMYA has raised a number of issues on appeal which can be summarized as follows⁷⁴:

- 1) Did the ERT err in finding that there was insufficient water data to support the taking of 4,500 m³/day?
- 2) Did the ERT err in finding that there was insufficient consideration given to other permits in the Tay River Watershed?
- 3) Did the ERT err in finding that Dr. Watt's analysis did not constitute a water budget and that a comprehensive watershed budget is required before a determination can be made whether a taking in the magnitude of 4,500 m³/day should be granted?
- 4) Did the ERT err in finding there was insufficient evidence to determine whether the taking of 4,500 m³/day would cause harm to the ecosystem of the Tay River Watershed?
- 5) Did the ERT err in finding that a further study into the potential increase in chemical concentration should be explored before OMYA submits a further application for a permit?

⁷⁴ OMYA's Submissions, pp. 20-21, paragraph 43.

- 6) Did the ERT err in finding that further study on the impacts of the groundwater needs to be conducted to support a taking of 4,500 m³/day?
- 7) Did the ERT err in shortening the term of the permit from ten years to six years?
- 8) Did the ERT err by adding Conditions 30, 31 and 32 to the Permit?
- 9) Does the public interest require that the decision of the ERT be altered?

PART V: THE TEST ON A MINISTER'S APPEAL

(A) THE LAW

69. Subsection 144(3) of the *Environmental Protection Act* states:

144(3) A party to the hearing before the Tribunal may, within thirty days after receipt of a decision of the Tribunal or within thirty days after disposition of an appeal, if any under subsection (2) appeal in writing to the Minister on any matter other than a question of law and the Minister shall confirm, alter or revoke the decision of the Tribunal as to the matter in appeal *as the Minister considers in the public interest* (emphasis added).

(B) THE PROTOCOL ON APPEAL

70. The *Procedural Protocol for Appeals to the Minister of Environment and Energy from Decisions of the Environmental Appeal Board*, concerning appeals of decisions from the ERT to the Minister states:

Submissions should clearly set out each ground of appeal followed by supporting argument. They should assist the Minister in determining whether the appeal is in the public interest, and should deal with the matter that were in dispute before the Board... Grounds of appeal should raise factual issues and those involving interpretation of policies and guidelines. They should not raise questions of law.

(C) PUBLIC INTEREST CONSIDERATIONS

71. It is submitted that the Minister, when assessing whether the appeal is in the public interest, should consider whether the ERT decision reflects the intent and spirit of MoE's laws, polices

and guidelines as it relates to PTTWs. Furthermore, the Minister should also have regard for the public interest. It is submitted that an important indicator of the "public interest" is the degree and extent of the public's concerns about a proposed undertaking and the grounds for their concerns.

72. It is submitted for the reasons outlined in more detail in Part IV, the Chair's decision was made in accordance with Ontario's regulatory framework governing water-taking, including the *OWRA*, the MoE's Statement of Environmental Values and Regulation 285/99.

Furthermore, it should be noted that OMYA's submissions have failed to disclose a single instance of how the Chair's decision conflicts with Ontario's laws, policies and guidelines as they relate to PTTWs.

73. The Chair found that the MoE should adopt an "ecosystem approach" regarding the issuance of PTTWs. The Chair found that there had not been a sufficient evaluation to be "assured that the ecosystem, the Tay River Watershed, would not be harmed by a taking of 4,500 m³/day of water from the Tay River." According to the Chair "more detailed and comprehensive work needs to be done in order to assess the impacts of the much larger taking."

74. It is submitted that the Chair's findings regarding the need for the MoE to consider environmental impacts to the watershed and the importance of a watershed budget were subsequently echoed in the recommendations made by Mr. Justice Dennis O'Connor, Commissioner of the Walkerton Inquiry ("the Commissioner"). The Government of Ontario has committed itself to implementing the recommendation of the Walkerton Inquiry. Accordingly, it is submitted that overturning the Chair's decision would be fundamentally at odds with the recommendations of *Part Two Report of the Walkerton Inquiry* and the government's public commitment to implementing watershed-based source protection plans.

75. It is submitted for the reasons set out in paragraphs 50 to 53 of the Citizen Respondents' submissions, that the comments and concerns provided by citizens regarding the proposed water taking were unprecedented. It is submitted that this level of public concern about the

proposed taking is also an important indicator of the public interest in this matter which the Minister needs to take into account.

76. The ERT is a specialized tribunal with considerable expertise in matters related to environmental law and policy. It is submitted, therefore, that the Minister should afford considerable deference to decisions made by the ERT. In this case the Chair of the ERT hearing, who is also the Vice-Chair of the ERT, made her decision after having the benefit of listening to testimony from 25 witnesses and 29 presenters and reviewing 158 exhibits.
77. It is submitted that much of OMYA's grounds for appeal are based on concerns that the Chair preferred the evidence of witnesses called by the Council of Canadians, the Citizen Respondents and the MoE over that of OMYA's own experts. It is submitted in response that the Chair as the trier of fact had the benefit of hearing the *viva voce* evidence and is thus in the best position to make findings of fact particularly those that turn on credibility. It is submitted that findings of credibility, particularly the credibility of expert witnesses, are for the Chair to make, and warrant considerable deference on appeal.

PART VI : OMYA'S APPLICATION FOR LEAVE TO ADDUCE NEW EVIDENCE

78. OMYA is seeking leave to adduce the following six documents as new evidence on this appeal:

- (1) Environmental Assessment Screening Report of the Tay River Water Intake Project ("DFO October 2001 Screening Report");
- (2) Environmental Assessment Report for the Tay River Intake Project ("DFO March 2002 Screening Report");
- (3) e-mail correspondence from counsel for OMYA to the ERT Secretary, dated November 9, 2001 requesting that the DFO October 2001 Screening Report be made an exhibit;
- (4) e-mail of Ms. Sulyn Cedar, dated November 10, 2001;
- (5) DFO Authorization, dated April 5, 2002; and

(6) Data Collection Protocol by Dr. Watt, dated June 25, 2002.

79. The *Procedural Protocol for Appeals to the Minister of Environment and Energy from Decisions of the Environmental Appeal Board* states:

No new evidence will be considered by the Minister which was not admitted during the Board hearing. Exceptions will be made only where the party seeking to adduce the evidence can show that: the evidence could only be obtained after the Board hearing; the evidence is credible; and had the evidence been available at the hearing, it may have affected the outcome.⁷⁵

80. It is respectfully submitted that the evidence does not meet the four-part test set out in the *Procedural Protocol for Appeals to the Minister of Environment and Energy from Decisions of the Environmental Appeal Board* for the reasons set out in paragraphs 81 to 88 below.

81. As OMYA notes in paragraph 44 of its submission, DFO determined that the construction of OMYA's intake facility would cause harmful disruption to fish habitat. Accordingly, DFO was required to undertake a review under the *Canadian Environmental Assessment Act* (CEAA), prior to issuing an authorization under the *Fisheries Act* to determine the environmental impacts of the construction, the water taking intake and the need to mitigate the harmful effects.⁷⁶

82. Mr. Brent Valere, a Habitat Impact Assessment Biologist employed by the DFO's Great Lakes Areas (OGLA), testified at length about DFO involvement with OMYA's PTTW. Mr. Valere also prepared the *CEAA* Screening Report on the Tay River Water Intake Project which OMYA wishes to introduce as new evidence.⁷⁷ On July 6, 2002, DFO-OGLA received a letter from the MoE requesting DFO review and comment on the MoE's draft PTTW. On July 21, 2000, DFO sent a reply letter to the MoE with comments. Mr. Valere testified that in

⁷⁵ Procedural Protocol for Appeals to the Minister of Environment and Energy from Decisions of the Environmental Appeal Board, p.1 paragraph 4.

⁷⁶ Evidence of Brent Valere, Volume 13, p. 66 and p. 70.

⁷⁷ Evidence of Brent Valere, Volume 13, p. 57.

general DFO was supportive of the position that MoE had taken with regard to OMYA's PTTW.⁷⁸

83. Mr. Valere admitted under cross-examination that the federal government's process under *CEAA*, and the provincial government's process under the environmental legislation for issuing PTTW, have a number of significant differences. For example, the DFO would not consider Regulation 285/99 or any MoE policies and guidelines which govern the issuance of PTTW. Thus, DFO would not consider the hierarchy of uses, or existing and future uses including, municipal, agricultural and the domestic uses of water. Mr. Valere also conceded under cross-examination that the *CEAA* would not determine the sustainable water taking capacity of the Tay River.⁷⁹

84. Mr. Valere also testified at length about the *CEAA* process and said that to assist in the *CEAA* Screening Process, DFO had retained consultants to determine the impacts of water taking and to consider the requirements of the Fisheries Act and *CEAA*. The final report prepared by the consultants entitled "*Initial Review of the Proposed OMYA (Canada) Inc. Water Taking from the Tay River Upstream from Perth, Ontario*" was filed as Exhibit 39 at the ERT hearing.⁸⁰ The report states that its objective was to review OMYA's water taking from the standpoint of meeting the "no net loss of fish productive capacity" policy of DFO.⁸¹

85. The DFO Screening Reports, which OMYA now seeks to file as "new evidence", essentially contains the same conclusions as the one filed at the ERT hearing. (Indeed, with respect to the March 2002 Screening Report, OMYA states in paragraph 59 of its submissions that this report simply mirrors the conclusions in the DFO October 2001 Screening Report.) The

⁷⁸ Exhibit 71, Tab 11, Witness Statement of Brent Valere; Evidence of Brent Valere, Volume 13, p. 1.

⁷⁹ Evidence of Brent Valere, Volume 13, p. 164.

⁸⁰ Exhibit 39, *Initial Review for the Proposed OMYA (Canada) Inc. Water Taking from the Tay River Upstream from Perth, Ontario*, prepared by Bill Blackport et al.

⁸¹ Exhibit 39, *Initial Review for the Proposed OMYA (Canada) Inc. Water Taking from the Tay River Upstream from Perth, Ontario*, prepared by Bill Blackport et al at p. i.

conclusions in the DFO Screening Reports, therefore, do not differ from the conclusions of the report prepared by DFO consultants which was filed as an exhibit at the ERT hearing.

86. It is submitted that the Chair had the benefit of hearing Mr. Valere's evidence and considering the CEAA process. The Chair also had the benefit of reviewing the report prepared by DFO consultants which dealt with the potential impact that OMYA's water taking would have on fish habitat. It is submitted that the conclusions in the DFO Screening Reports are not different from the evidence that was provided to the Chair at the ERT hearing. The DFO reports do not deal with the need for water budgets or the need for a comprehensive review of PTTWs in the Tay River Watershed. The DFO reports thus fail to address the issues that had to be considered under Regulation 285/99 and MoE policies and guidelines which govern PTTWs. It is respectfully submitted, that if the Chair had determined at the conclusion of the hearing that the DFO October 2001 Screening Report would have affected the result of the ERT hearing, the Chair would presumably have allowed OMYA to introduce the document into evidence at that time.

87. Furthermore, the DFO Authorization dated April 5, 2002 and the Data Collection protocol, dated June 25, 2002, are related to meeting the federal DFO requirements and are therefore not germane to the issues in this appeal which is a provincial matter.

88. It is submitted that the reason OMYA was not allowed leave to file new evidence by the Chair was because these documents were clearly not determinative of the issues before the ERT and would not have had any impact on the outcome of the hearing. Accordingly, it is respectfully submitted that OMYA be denied its application for leave to introduce new evidence.

PART VII : SUBMISSIONS BY THE CITIZEN RESPONDENTS

GROUND # 1: Did the ERT err in finding that insufficient data had been gathered and tabulated to support the taking of 4,500 m³ of water per day?

89. OMYA contends in paragraph 71 of its submission that the Chair erred in finding that insufficient data had been collected to support a taking of 4,500 m³/day.

(A) ADEQUACY OF WATER DATA NEEDS TO BE CONSIDERED IN CONTEXT OF REGULATORY REQUIREMENTS

90. Section 34(3) of the Ontario Water Resources Act states that “no person shall take more than a total of 50,000 litres of water in a day...without a permit issued by the Director.” Thus 50,000 litres has been established as a threshold amount for government interest in and control of water through PTTW. OMYA’s proposed water taking is for 4,500,000 litres a day. This amount is 90 times the threshold and, it is submitted, would require proportionately more information and data than would be required for permits for a lesser amount.

91. The Environmental Commissioner provided testimony at the ERT hearing about the deficiencies in the MoE's PTTW program. The Environmental Commissioner is an independent officer of the Ontario Legislature who oversees the workings of 13 government ministries as their activities relate to the environment and provides annual reports to the Legislature on issues about the government's decision-making process as it affects the environment.⁸² As such it is submitted that his testimony should be afforded considerable weight.

⁸² Evidence of Gordon Miller, Volume 9, p. 7.

92. The Environmental Commissioner, who has a Masters of Science in Ecology from the University of Guelph, testified that Regulation 285/99 as well as the MoE's Statement of Environmental Values required the MoE to take an ecosystem approach to issuing PTTW.
93. Subsection 2 of Regulation 285/99 states that the Director who is considering an application for a PTTW shall consider the "protection of the natural functions of the ecosystem" in accordance with the procedures set out in the Ministry's publication entitled "Permits to Take Water, Guidelines and Procedures Manual 1999" ("the Manual").
94. In assessing the adequacy of water data, the Director has to assess the impact that the PTTW will have on the natural functions of the ecosystem. Consequently, it is not appropriate for an Applicant for a PTTW to merely provide information about a particular water-taking in isolation from its impacts on the ecosystem.

(B) GENERAL COMMENTS ABOUT LACK OF WATER DATA FOR PTTW.

95. The Environmental Commissioner testified that his office had submitted a report to the Walkerton Inquiry entitled *Ontario's Permit to Take Water Program and the Protection of Ontario's Water Resources* which highlighted deficiencies in the data provided to the MoE in relation to PTTWs. The report makes the following conclusions:
...[E]cosystem protection may be threatened because MoE staff are issuing permits for new water takings without access to fully complete or accurate information on existing water takings.

Beyond process issues, MoE's poor administration of the PTTW system poses real implications for ecosystem protection. It is unclear how relevant information about existing water takings is being factored into decisions about issuing permits for new water takings. MoE has admitted that it does not know how much water is available in the province for taking purposes. These information gaps may have already resulted in the permitting of an excessive level of water taking for some systems and watersheds. The overuse of a water resource can and has resulted in habitat loss, impairment of other uses and conflict between competing use.⁸³

⁸³ Ex. 76, *Ontario's Permit to Take Water Program and the Protection of Ontario's Water Resources, Brief of the Walkerton Inquiry*, January 2001, Environmental Commissioner of Ontario, p. 25.

96. The report also notes that takings were permitted that did not appear to take into account the quantity of water available in a particular watershed.⁸⁴ The Commissioner testified that it was important to have a water budget for the watershed, so that information is available about the number of takings within a given watershed.
97. The Environmental Commissioner also testified that the Ministry policy on PTTW is a "first come first served basis", however, there are some water takings which are not required to obtain a PTTW.⁸⁵ The Environmental Commissioner noted that although the MoE may have a listing of the permits that are issued, it does not have a comprehensive listing of the actual takings because in most cases there is no requirement to measure and report. There is no consideration under the current PTTW program for projections of future needs within a watershed to ensure that capacity is reserved to meet municipal growth, or industrial or agricultural uses. Consequently, it was not possible under the current regime to ensure the long term sustainable needs of the watershed.⁸⁶

(C) THE PART TWO REPORT OF THE WALKERTON INQUIRY

98. It should be noted that the concerns raised by the Environmental Commissioner in his report to the Walkerton Inquiry were addressed by the Commissioner of the Walkerton Inquiry in his *Part Two Report of the Walkerton Inquiry*.⁸⁷ A key recommendation flowing from the Inquiry's report was the requirement that the Provincial Government develop watershed-based source protection plans. The *Part Two Report of the Walkerton Inquiry* states that at "a minimum, watershed source protection plans should include a water-budget, or a plan for developing a water budget where sufficient data is not yet

⁸⁴ Ex. 76, *Ontario's Permit to Take Water Program and the Protection of Ontario's Water Resources: Brief of the Walkerton Inquiry*, January 2001, p.i

⁸⁵ Under Section 34 of the OWRA, a PTTW is required for most takings of 50,000 liters per day or greater in Ontario. There are however, a number of types of takings, which are exempted from the permit requirements such as water for use for domestic or farm purpose or for fire fighting.

⁸⁶ Evidence of Gordon Miller, Volume 9, pp. 62 -63.

⁸⁷ *Part Two Report of the Walkerton Inquiry*, p. 107. See Appendix "B" attached.

available, and the identification of all significant water withdrawals, including municipal intakes".⁸⁸

99. The *Part Two Report of the Walkerton Inquiry* also recommended that PTTWs should be consistent with the source protection plan. The report envisages that the total amount of water allocated under the combined PTTW should not exceed the amount of water sustainably available in the watershed.⁸⁹
100. The Commissioner of the Walkerton Inquiry states in his report that "the development of this framework should not be used as reason to delay the implementation of watershed source protection planning. Excellent watershed planning models already exist in Ontario, and in my opinion adapting them to suit this purpose would not be an overly onerous task". The Commissioner recommended MoE try and establish the framework for watershed-based source protection plans within six to eight months after the release of his report.⁹⁰

(d) Specific concerns about inadequacy of Appellant's water data

101. It is submitted that general criticism made by the Environmental Commissioner regarding the collection of data for PTTW are applicable to this particular case. Dr. Watt, who had been hired by OMYA, prepared the following three reports in relation to this case:

- An analysis of Tay River Stream flows: Bobs Lake to Glen Tay⁹¹
- Note on the Impact of Water Taking on Tay River Water Levels⁹²
- Note on the Impacts of Water Taking on Bobs Lake Water Levels⁹³

⁸⁸ *Part Two Report of the Walkerton Inquiry*, p. 104.

⁸⁹ *Part Two Report of the Walkerton Inquiry*, pp. 105-106.

⁹⁰ *Part Two Report of the Walkerton Inquiry* at p. 104.

⁹¹ Exhibit 39, Tab 73.

⁹² Exhibit 39, Tab 74.

⁹³ Exhibit 39, Tab 75.

102. Mr. Bruce Reid who had reviewed Dr. Watt's report described his analysis of the stream flows as a "simplistic modeling exercise" because it did not require the application of a sophisticated computer-based modeling and failed to take into account the many elements of the hydrogeologic cycle and the watershed characteristics.⁹⁴ Mr. Reid testified that he agreed with the MoE approach to require follow-up work to reduce the uncertainty of whether a taking of 4,500 m³/day is acceptable and to eliminate the uncertainty about the hydrogeology of the river and the basis of the flow threshold.⁹⁵
103. Under cross-examination, Dr. Watt conceded that he was not competent to discuss the ecosystem approach.⁹⁶ He admitted that he had only looked at OMYA's taking in isolation, and did not consider other withdrawals from the Tay River Watershed.⁹⁷ Mr. Watt admitted that he was unaware of the precautionary principle.⁹⁸
104. Mr. Joe Slater, a civil engineer who worked in the environmental field with the Canadian Government and the United Nations as a specialist in Water Resource Data collection, testified on behalf of the Citizen Respondents. Mr. Slater stated that in making any decision concerning the water resources of a watershed, it is necessary to analyze all of the hydrological factors (some 27 parameters), which currently, or could in the future, impact on the flow regime.⁹⁹

⁹⁴ Evidence of Bruce Reid, Volume 20, pp. 6-7; Evidence of Bruce Reid, Volume 21, p.22-23.

⁹⁵ Evidence of Bruce Reid, Volume 21, p.32; Evidence of Bruce Reid, Volume 20, pp. 174-175.

⁹⁶ Evidence of Dr. W. Edgar Watt, Volume 26, p.159.

⁹⁷ Evidence of Dr. W. Edgar Watt, Volume 26, p. 184.

⁹⁸ Evidence of Dr. W. Edgar Watt, Volume 27, p. 30.

⁹⁹ Response of Carol and Melvyn Dillon to MoE Interrogatories. Revised Joint Issues List, ERT Procedural Order dated May 2, 2001, Appendix B, p. 27.

105. Dr. Watt admitted under cross-examination that he agreed with Mr. Slater that in analyzing the watershed it was important to review the 27 parameters but said he did not consider it necessary to do this since he had not been required to do so.¹⁰⁰
106. The Chair considered Dr. Watt's evidence and much of his evidence is discussed in detail on pages 28 to 33 of the Chair's decision. However, after providing a detailed review of Dr. Watt's evidence the Chair made the following findings:

Dr. Watt on behalf of OMYA used basically numbers from the original application submitted by Simmering and Associates as well as the data from the adjacent geographic areas to carry out a detailed analysis of the stream flows in the Tay River as well the impact of the proposed water taking to the Tay River and to Bobs Lake. Dr. Watt based his calculations on water taking of 4,500 m³/day. I do not doubt the accuracy of his calculation but I find that the exercise has been too limiting in evaluating the impacts on Bobs Lake and the Tay River. This PTTW can not be viewed in isolation. If this proposed water taking were the only water taking in the watershed, Dr. Watt's conclusions could be acceptable but because of the complexity of the regulated Tay River system by Parks Canada and the number of permits (sixteen at this time) to take water already in existence within the watershed a more comprehensive approach is recommended. There are many factors that need to be taken into consideration...

I am not satisfied there has been sufficient information gathered and tabulated for the approval of the permit for the full amount of water that has been requested by the instrument holder. Only the first phase is approved.¹⁰¹

107. It is submitted that the Chair comments about the insufficiency of data to allow a water taking in the amount of 4,500m³/day is supported by the evidence of Mr. Slater, who stated that the Glen Tay data set and analysis did not provide sufficient basis upon which to issue the permit.¹⁰²
108. It is submitted that the Minister should not interfere with the findings made by the Chair regarding the adequacy of the water data as her findings in this regard are based on the

¹⁰⁰ Evidence of Dr. W. Edgar Watt, Volume 26, pp. 230-231.

¹⁰¹ ERT decision dated February 19, 2002 at p. 37.

¹⁰² Evidence of Mr. Joe Slater, Volume 5, p. 136.

testimony of a number of expert witnesses, including Mr. Slater and witnesses from a number of regulatory agencies, including the MoE.

(E) OMYA S FAILURE TO JUSTIFY A NEED FOR ITS INCREASED WATER TAKING.

109. The MoE 2000-2001 Business Plan lists ‘Environmental Protection’ and ‘Conservation and Stewardship’ as the Ministry’s core mandate and states that the Ministry’s Statement of Environment Values (SEV) influences every aspect of the MoE’s decision-making process.¹⁰³ The MoE’s SEV, in turn, also emphasises the conservation and the wise management of Ontario’s natural resources.¹⁰⁴
110. Ms. Catherine Clarke, the former manager of the MoE’s EBR office, testified that the instruments issued by the MoE, including PTTWs should be reflective of the SEVs.¹⁰⁵
111. OMYA’s initial permit application¹⁰⁶ contained a table forecasting its water requirements but provided no information on its production needs to support this forecast. During the 35-day ERT hearing, OMYA failed to call any company witnesses to address why its production process required such a large increase in water. Furthermore, none of the expert witnesses called by OMYA were qualified or able to speak to this issue.
112. During the hearing OMYA indicated that it intended to present both its senior executive in Canada, vice-president Olivier Chatillon, and the consultant who prepared OMYA’s original application for the PTTW, Stephen Simmering and provided witnesses statements

¹⁰³ Exhibit 72, Tab 43, MoE 2000-2001 Business Plan

¹⁰⁴ Exhibit 16, Tab 39, MoE’s Statement of Environmental Values.

¹⁰⁵ Evidence of Catherine Clarke, Volume 21, p. 84.

¹⁰⁶ Exhibit 39, Tab 53, Application for a Permit to Take Water from the Tay River, dated February 28, 2000, by Simmering & Associates Consulting Engineers.

of its intent. However, OMYA failed to call either of these witnesses to testify at the ERT hearing.¹⁰⁷

113. Neither the MOE nor the RVCA, had asked that OMYA justify the 4.5 million litres of water per day of water it sought in its original PTTW application¹⁰⁸
114. Mr. Reid testified that the RVCA, had never assessed OMYA's need to increase its water-taking. Mr. Reid testified: “Basically we just understood there was an industrial enterprise that wanted to take water from the river and beyond that it really didn’t matter what it was being used for . . . We had the application documents in front of us. That’s what we reviewed.”¹⁰⁹
115. Victor Castro, who headed MoE's technical review of OMYA's application for a PTTW, testified that he was not aware if the number of tonnes of calcite from OMYA’s quarry was adequate to supply their future needs.¹¹⁰ Furthermore, he was not aware of OMYA's permit for production at the quarry¹¹¹ and did not evaluate OMYA’s needs for water relative to its future production.¹¹²
116. The Director indicated in his witness statement that the Director generally accepts at face value that the amount applied for is what is required, but that “the Director may ask for certain clarification if the amounts of water seem unreasonable”. Mr. Kaye indicated that matters such as this are at the Director’s discretion since the MOE regulations and guidelines do not provide practical guidance.¹¹³

¹⁰⁷ Volume 12, Proceedings at Hearing, pp. 2-3

¹⁰⁹ Evidence of Bruce Reid, Volume 20, p.177.

¹¹⁰ Evidence of Victor Castro, Volume 15, and p.155.

¹¹¹ Evidence of Victor Castro, Volume 15, p.155.

¹¹² Evidence of Victor Castro, Volume 15, p.159.

¹¹³These conclusions are based on Page 18, Paragraphs 105 and 106 of the Witness Statement of the Director, which state as follows:

117. OMYA's application involved the first totally consumptive use of water in the Tay watershed - none of the water it proposed to take from the Tay would be returned to the local environment.¹¹⁴ The application was also unusual because of quantity: OMYA's proposal to take 4.5 million litres/day from the Tay River was equal in size to the average daily consumption of the 6,000 residents and many industries and businesses in the Town of Perth combined.
118. On March 15, 2000, OMYA published an Information Bulletin in the *Perth Courier* which included discussion of other water supply alternatives. This bulletin indicated that some additional groundwater could be available to OMYA, but that “the projected maximum availability of groundwater would satisfy only 40% of long term needs”. This estimate is also contained in the report supporting OMYA’s Feb. 28, 2000 PTTW application. OMYA’s present limit on available groundwater is the PTTW limit of 872 cm/day on production from its wells at Glen Tay. Taking this figure as a base, its long-term needs can be calculated as 2,180 cu m/day.¹¹⁵
119. It is submitted that on the basis of these figures supplied by OMYA, the company’s application for 4,500 cm/day is more than double its actual long-term needs and cannot be justified either as being in the public interest or in light of the Ministry’s mandates for conservation and a precautionary approach.

105: “It is generally not the practice of the director to conduct an audit or assessment of the Applicant’s water uses and thus (he) accepts at face value that the amount applied for is what is required. For instance, the Director has no practical knowledge of industrial process water requirements. In some cases, however, the Director may ask for certain clarification if the amounts of water requested seem unreasonable, based on the experience of the Director and Ministry staff.”

106. “A Director may also require that water saving systems are in place, such as computerised irrigation systems at golf courses, to minimise water wastage. Such activities however are generally at the discretion of the Director since the regulation and the manual do not clarify how the Director may address conservative (conservation?) issues in a practical manner.”

¹¹⁴In Paragraph 107 of his witness statement, the Director states: “With regard to OMYA, it is understood that all of the water taken (from the Tay) will be used in the production of the calcite slurry.”

¹¹⁵ Exhibit 16 Tab 17, OMYA (Canada) Inc., Report on Public Consultation Process, April 27 1000, Appendix 4, p. 2; Exhibit 15, Tab 6, OMYA (Canada) Inc.: Application for a Permit to Take Water From the Tay River. Simmering & Associates. February 28, 2000 p. 12

120. It is submitted that the given the relatively large quantity of water involved in this matter, the Director should have exercised his discretion and examined the reasonableness of OMYA's submitted need for water for its production process.
121. It is submitted that it would be unfair to other users and potential users of water from the Tay to allow OMYA to take such a large quantity of water when it has failed to demonstrate a need for such a large quantity of water. It is submitted that the MoE should have assessed OMYA's need for water given that there are other domestic, municipal, commercial and industrial users in the Tay River to reduce the potential for competition and conflicts over water use.
122. It is submitted a key component for conserving and wisely managing Ontario's waters is to ensure a proponent provides information regarding their need for water taking and the MoE reviews and assesses this information prior to issuing a PTTW. It is submitted that allowing OMYA to take such a large quantity of water without justifying the need for the taking violates the MoE's mandate for ensuring the conservation and wise use of natural resources.
123. The ERT ruling indicated clearly that if OMYA required additional water, it could in future submit a new PTTW application based on information that provides assurance concerning the environmental and ecosystem impact of its proposal. It is submitted that any such new application should reflect the amount of calcite available to OMYA from its quarry or other sources and that any new PTTW granted to OMYA should be related to demonstrated need.

GROUND # 2: Did the ERT err in finding that there had been insufficient consideration of other permits to take water in the Tay River Watershed?

124. Section 34 of Regulation 285/99 states that a Director considering an application under section 34 of the Act for a permit to take water must consider:

- 2.(1) Protection of the natural functions of the ecosystem.
- 2.(2) Ground water that may affect or be affected by the proposed surface water taking, if the application is for a permit to take surface water.
- 2.(3) Surface water that may affect or be affected by the proposed ground water taking, if the application is for a permit to take ground water.

125. The Environmental Commissioner testified that the MoE's Permit to Take Water Manual does not offer guidance on the procedures required to interpret section 285/99.¹¹⁶ Mr. Miller stated that his office was concerned that ecosystem protection may be threatened because the MoE is proceeding to issue permits for new water takings without access to complete and accurate information on existing water takings.¹¹⁷
126. The MoE witnesses agreed with the Environmental Commissioner's comments about the lack of operational guidance on how the ecosystem approach should be implemented. Mr. Kaye, for example admitted that there was no MoE document which provided guidance to staff on what factors need to be considered in implementing the ecosystem approach. Rather the MoE staff was to use an "intuitive and iterative process". The staff were forced to take this approach given that there was an "absence of a clear, defined road map that spells out step by step what Ministry staff are supposed to do in evaluating" the ecosystem approach.¹¹⁸
127. Mr. Kaye testified that the MoE was not aware of the maximum amount of water that could be taken from the Tay River because there was no comprehensive information regarding a water budget in the watershed.¹¹⁹
128. Mr. Castro testified that the MoE had a list of the number of Permits that had been issued by the MoE for water taking in the Tay River Watershed. However, the MoE did not have

¹¹⁶ Evidence of Gordon Miller, Volume 9, pp.34-35.

¹¹⁷ Evidence of Gordon Miller, Volume 9, p.60.

¹¹⁸ Evidence of Brian Kaye, Volume 23, and p.69.

¹¹⁹ Evidence of Brian Kaye, Volume 22, pp.77-78.

any idea of the amount of total water that could be taken from the Tay River Watershed due to the lack of a water budget.¹²⁰ Mr. Kaye testified that MoE was aware of the amount of water that goes back to the watershed from the existing PTTWs in the Tay River Watershed (i.e. non-consumptive use). However, the MoE had no ability to assess the maximum amount of water which could be taken from the Tay River Watershed without a comprehensive water budget.¹²¹

129. The Chair notes in her decision that there are sixteen other PTTWs currently in force in the Tay River Watershed. Some of these permits have no expiry date. The Chair found that there was no evidence that indicated that the Director had taken into consideration the other PTTWs in the evaluation of this permit. Further work within the watershed needs to be undertaken to take into consideration the impacts of these existing permits on subsequent PTTW applications.¹²²
130. It is respectfully submitted that the Chair's findings that there had been insufficient consideration of other permits in the Tay River Watershed is supported by the evidence from MoE witnesses. While the MoE was aware of the number of PTTWs in the Tay River Watershed, and had some information of consumptive versus non-consumptive use, it had no information on the amount of taking that could ensure the sustainability of the natural functions of the ecosystem of the Tay River Watershed. Accordingly, it was entirely appropriate and indeed necessary for the Chair to require further work on the impact of the existing permits on subsequent PTTW applications, including OMYA's proposed future taking of 4,500 m³/day.

¹²⁰ Evidence of Victor Castro, Volume 16, and p.206.

¹²¹ Evidence of Brian Kaye, Volume 22, and p.63.

¹²² ERT decision dated February 19, 2002, p. 23.

GROUND # 3: Did the ERT err in finding that Dr. Watt's analysis was not a water budget and by finding a more comprehensive watershed budget is needed to determine the extent of the available water within the watershed before granting a permit for 4,500 m³/day?

(A) WATER BUDGET

131. OMYA contends in paragraph 203 of its submission that the ERT's findings that a comprehensive water budget needed to be done on the availability of water and the consumptive uses in the Tay River Watershed before a taking of 4,500 m³/day could be authorized, was "contrary to the public interest because it is " vague, unreasonable and unfair." OMYA also contends that despite the Chair's findings to the contrary, that the analysis conducted by Dr. Watt constitutes a "water budget."
132. It is important to note that the Chair did not specify that the water budget had to be a "comprehensive million dollar water budget" as OMYA speculates on paragraph 204 of its submissions. Nor did the Chair imply that a water budget had to be undertaken for the Town of Perth as OMYA erroneously suggests in paragraph 205 of its submissions. Rather the Chair simply noted that the various levels of government *may* wish to discuss this initiative of water budget for the Tay River Watershed in evaluating a further proposed water taking application. According to the Chair, a water budget however rudimentary, would be helpful in determining the extent of the availability of water within the watershed and the consumptive uses that presently exist. The Chair recommended that in the future a more comprehensive water budget be prepared.
133. The Chair's findings with regard to the importance of having a water budget prior to issuing PTTWs is supported by the testimony of the Environmental Commissioner and MoE witnesses. The Environmental Commissioner testified that implementing an ecosystem approach with respect to PTTWs requires that a water budget be prepared for the watershed to ensure that there is information about the nature and behavior of the watershed and the impact of other water-takings in the watershed. The Environmental Commissioner also noted that over the past few years his office had found that there was a heightened concern about water takings in Ontario.

134. Mr. Castro was qualified as an expert in the areas of fluvial geomorphology, water quality and quantity assessment, environment and land use planning, and surface water modeling assessments.¹²³ Mr. Castro testified that a water budget is a "tally sheet of inputs of water to a system" He said that a water budget would look at inputs into the system of water and would look at outputs of water, which would include discharge from the river, evaporation and transpiration as well as quantifying users.¹²⁴ It would also take into account both PTTW users as well as takers who were not required to obtain a PTTW.¹²⁵
135. Mr. Castro testified that to ensure that water taking is sustainable the amount of water taken must not impact on downstream users and the existing functions of the ecosystem. According to Mr. Castro a water budget would assist in determining whether there was additional capacity in the watershed to sustain further takings.¹²⁶
136. Mr. Castro conceded that the MoE did not have a detailed water budget for the Tay River Watershed and that this was a gap that had to be addressed for all watersheds.¹²⁷ Mr. Castro stated that a water budget would provide a lot of "up front information that could be used in an assessment like this (OMYA's application for a PTTW), and that would provide "very good information" that could be used by resource managers to make their decisions".¹²⁸
137. Mr. Bruce Reid, who had worked for the last 21 years for the RVCA as a Water Management Coordinator, was qualified as an expert in the area of watershed management, and as having general familiarity with the other disciplines involved in the

¹²³ Evidence of Victor Castro, Volume 15, pp. 8-9.

¹²⁴ Evidence of Victor Castro, Volume 16, pp.80-81.

¹²⁵ Evidence of Victor Castro, Volume 16, and pp.81.

¹²⁶ Evidence of Victor Castro, Volume 16, and p.191.

¹²⁷ Evidence of Victor Castro, Volume 16, and p.206.

¹²⁸ Evidence of Victor Castro, Volume 16, and p.213.

ecosystem approach. Mr. Reid testified that water budgets can involve simple analyses of the inputs and outflows from a hydrogeologic system or can be a very sophisticated analysis that tries to account for a number of different facts in great detail.¹²⁹ According to Mr. Reid a water budget is typically done for a watershed management study. He testified that the ecosystem approach now requires that water budgets be done to account for the entire water cycle and to deal with the different components of watershed management, whether it be flood control, water quality or pollution control.¹³⁰

138. Mr. Reid testified that water budgets are predictive tools and investments had been made in water budget analysis in other watersheds like the Credit Valley and the Grand River, as well as the other watersheds in the Province. He described water budgets as "very useful tools"¹³¹ Mr. Reid noted that the Conservation Authority would take the leadership role in water budgets with coordination with other regulatory agencies.¹³² The Environmental Commissioner of Ontario also recommended to the Walkerton Inquiry that Conservation Authorities play a formal role in preparing a water budget and monitoring water flows on a watershed basis.¹³³
139. It should be noted that the Environmental Commissioner's comments about the role of Conservation Authorities regarding the preparation of water budgets was endorsed in the recommendations of the *Part Two Report of the Walkerton Inquiry*. The *Part Two Report of the Walkerton Inquiry* states that "Conservation Authorities are well positioned to manage the development of draft watershed-based source protection plans. They have the

¹²⁹ Evidence of Bruce Reid, Volume 19, and p.76.

¹³⁰ Evidence of Bruce Reid, Volume 19, and p.76.

¹³¹ Evidence of Bruce Reid, Volume 19, and p.78.

¹³² Evidence of Bruce Reid, Volume 19, pp. 82- 83.

¹³³ Evidence of Gordon Miller, Volume 9, pp.19-20.

mandate and, in many cases, the experience and the respect of affected local groups that will be required to coordinate the development of plans."¹³⁴

140. Mr. Reid was also of the opinion that if there had been an investment in water budget analysis, it may have avoided the lengthy hearing process and to some extent the expense of some of the consultant's reports and the review of the consultants' reports.¹³⁵
141. As noted in paragraph 98 above, the *Part Two Report of the Walkerton Inquiry* has called upon the Provincial government to undertake watershed-based source protection plans, which at a minimum must include a water budget. The *Part Two Report on the Walkerton Inquiry* recommends that the provincial government must be bound by the plans if the plans are to be effective, because some of its decisions, such as the issuance of PTTWs and Certificates of Approvals for discharges, may have significant effects on drinking water sources. On page 112 of the report, the Commissioner of the Walkerton Inquiry states:

No Permits to Take Water or Certificates of Approval should therefore be granted for activities that exceed the limits set by or otherwise violate the provisions of the relevant watershed-based source protection plan...

This approach will force a consideration of the cumulative ecological impacts of all actions of the watershed before a PTTW or a Certificate of Approval is granted, rather than allowing such permits or certificates to be granted strictly on the basis of a individual application.¹³⁶

142. Dr. Watt's analysis, which OMYA has sought to characterize as a "water budget," was done in isolation without considering the impact of other takings in the Tay River Watershed. Dr. Watt admitted that he did not have any knowledge of an ecosystem approach, and had not heard of the precautionary principle. Moreover, Dr. Watt also admitted on cross-examination that he did not have any information about the amount of

¹³⁴ *Part Two Report of the Walkerton Inquiry*, p.100.

¹³⁵ Evidence of Bruce Reid, Volume 19, and p.88.

¹³⁶ *Part Two Report on the Walkerton Inquiry*, p.112.

water required in the Tay River Watershed to ensure its long-term sustainability. Indeed, Dr. Watt admitted under cross-examination that he had not done a water-budget to assess the impact of other takings on the Tay River Watershed and had not been asked by OMYA to do so. However, Dr. Watt did admit that a water-budget could be done but he did not consider it necessary to do so in this case. It is submitted that Dr. Watt's analysis can not under these circumstances be construed to meet the requirements of a water budget.

143. It is submitted that under these circumstances Dr. Watt's analysis, at best, can be described as a "simplistic modeling exercise" which hypothesized about the potential impacts that a taking of 4,500 m³/day would have on stream flows and water levels in the Tay River. Accordingly it was quite appropriate for the Chair to dismiss Dr. Watt's analysis as "not even coming close to what is considered a water-budget."
144. It is submitted that the Chair's comments about the need for water budget were in the nature of "recommendations" for future water takings. It is submitted that overruling the Chair's recommendations on the need for a water budget before OMYA can increase its taking to 4,500 m³/day would be contrary to the evidence provided by the Environmental Commissioner of Ontario and Messrs. Kaye, Castro and Reid, all of whom recommended that a water budget be prepared. It is further submitted that the Chair's recommendations regarding a water budget were reasonable and feasible, given that water budgets have been undertaken in other parts of the Province, including Credit Valley and the Grand River.
145. It is submitted that the Chair's recommendation regarding water budgets and their importance in ensuring an ecosystem approach when issuing PTTWs have been endorsed by the recommendations from the Walkerton Inquiry, which required that a water budget be included as a minimum component for watershed-based source protection plans. The Walkerton Inquiry also recommended that all PTTWs issued by the MoE should not exceed the limits imposed by such plans.

146. It is submitted that overturning the Chair's recommendations on the need for water budgets for future water taking would be fundamentally at odds with the assurances made by the Premier, namely that the Government of Ontario is committed to fulfilling the recommendations from the Walkerton Inquiry.
147. It is respectfully submitted that the Minster should uphold the Chair's findings regarding the need for a water budget as it is consistent with the current regulatory framework that requires the Director to take an ecosystem approach with regard to the issuance of PTTWs. It is further submitted that the Chair's findings on the need for a water budget are also consistent with the recommendations of the Walkerton Inquiry and thus should be upheld as a matter of public interest.

(B) REAL-TIME DATA

148. Dr Watt's calculations present a theoretical or predictive view of the Tay River as opposed to one based on current and appropriate real-time data. At the present time, such data does not exist for the Tay River. Real-time data takes into account the many small and large interconnected effects present in a watershed and provides an accurate record of water-taking and streamflow rates.
149. The intent of the Director in issuing a two-phased Permit was to provide time to collect some real-time data before considering the larger amount of water in Phase 2. Special Condition 15 of the Permit issued to OMYA in August 2000, requires the proponent to "install, maintain and operate...a continuous recording streamflow gauge station." The reasons for collecting real-time data are described as to "allow the permit Holder to obtain and record *proper scientific records* of streamflow" and "to establish *an accurate record* of water taking and streamflow rates" (Emphasis added).¹³⁷
150. The need for real-time data was also brought to OMYA's attention by hydrologist Joe Slater in a letter to OMYA in October 2000. He urged the company "to take steps to

¹³⁷ Exhibit 16, Tab 41: PTTW 00-P-4096, pp.4 & 6.

undertake the installation of the automatic streamflow gauge at the earliest opportunity” and “[A]ny delays in establishing this station will result in the loss of another year’s worth of data. However, this was not done.¹³⁸

GROUND # 4: Did the ERT err in finding that there was insufficient evidence to determine whether the water taking of 4,500 m³/day would cause harm to the ecosystem of the Tay River?

(A) THE EFFECTS OF THE RIDEAU CANAL AND PARKS CANADA

151. The Tay River is a regulated river and its flows reflect the management practices of the Rideau Canal Office rather than natural phenomena. The Rideau Canal Office of Parks Canada has primary control over the water in Bobs Lake which flows through the Tay River to meet mandated responsibilities to maintain navigational levels in the Rideau Canal. This historic responsibility is met by controlling the amount of water released from the upper lake by a dam at Bolingbroke where Bobs Lake enters the Tay River. Parks Canada has stated that it will not alter its management policy to accommodate any large water takings between Bobs Lake (its reservoir lake) and the canal (at the end of the Tay River). It is submitted that the effects of the management of the water in the Tay River by the Rideau Canal Office have not been sufficiently considered in this water taking.¹³⁹

(B) THE EVIDENCE OF THE MINISTRY OF NATURAL RESOURCES (MNR) EXPERT

152. Ross Cholmondeley, who holds a Bachelor of Science Degree from the University of Guelph and is the MNR's Area Biologist for the Kemptville and Peterborough Districts,

¹³⁸ Exhibit 40, Tab 2: Disclosed as part of witness statement of Mr. J. Slater.

¹³⁹ Evidence of David Ballinger, Superintendent of the Rideau Canal, Parks Canada. Vol 34, p.48

was qualified to provide expert testimony in the areas of fisheries and aquatic habitat and the MNR's Review of the Permit.¹⁴⁰

153. Mr. Cholmondeley had reviewed the report prepared by OMYA's biologist, Dr. Schiefer. Mr. Cholmondeley was critical of Dr. Schiefer's report because it had only examined the fish community in the Tay River at a specific time, and had failed to look at seasonal variances that could be occurring to the fish community.¹⁴¹
154. Mr. Cholmondeley testified that he had assessed the impact that a taking of 1,483 m³/day would have on the Tay Marsh and the Blueberry Marsh, both of which are in the Tay Watershed and classified as Class 1 wetlands, which are considered to be the most valuable wetlands under the MNR's classification program. In addition Mr. Cholmondeley had also assessed the impact that the Phase I taking would have on the Perth Long Swamp.¹⁴²
155. Mr. Cholmondeley testified that he was satisfied that the taking of 1,483 m³/day during Phase I would not have a significant impact on fish habitat in the Tay River. However, Mr. Cholmondeley stated that more information was required before he could be assured that a taking of 4,500 m³/day would not adversely impact the aquatic ecosystem.¹⁴³
156. Mr. Cholmondeley stated that it was appropriate that monitoring and real time data be collected to assess the nature of the changes which will result from OMYA's water taking.¹⁴⁴

¹⁴⁰ Evidence of Ross Cholmondeley, Volume 18, pp. 6-11.

¹⁴¹ Evidence of Ross Cholmondeley, Volume 19, p. 4.

¹⁴² Evidence of Ross Cholmondeley, Volume 18, p. 25.

¹⁴³ Evidence of Ross Cholmondeley, Volume 18, pp. 63-64.

¹⁴⁴ Evidence of Ross Cholmondeley, Volume 18, pp 63 -64.

(C) THE PRECAUTIONARY PRINCIPLE

157. Dr. Nancy Doubleday, a lawyer with a Ph.D. in biological science and the Associate Chair of the Department of Geography and Environmental Studies at Carleton University, testified about the importance of applying the precautionary principle due to the fact that there will never be perfect scientific knowledge on which to base a decision.¹⁴⁵
158. The Ministry of the Environment has already endorsed the precautionary principle in its Statement of Environmental Values, where it states under the heading ‘Environmental Protection’ that “The Ministry will exercise a precautionary approach in its decision-making.”¹⁴⁶
159. The *Part Two Report of the Walkerton Inquiry* endorsed the precautionary principle, as a guide in environmental decision making. The report notes that the precautionary principle has been recognized in international law and cited with approval in a Supreme Court of Canada decision.¹⁴⁷ The report provided the following definition of the precautionary principle:

This principle, which has been formulated in many ways, says that the absence of scientific certainty about a risk should not bar the taking of precautionary measures in the face of irreversible harm. It addresses situations in which risk cannot be estimated with any reliability and in which uncertainty prevails regarding the relationship, if any, between cause and supposed effect...

The precautionary approach is inherent in risk management, and the need for precaution rises where uncertainties about specific hazards are expected to persist and where the suspected adverse effects may be serious or irreversible.¹⁴⁸

¹⁴⁵ Evidence of Nancy Doubleday, Volume 8, p. 19.

¹⁴⁶ MoE's Statement of Environmental Values Exhibit 16, Tab 39.

¹⁴⁷ *Part Two Report of the Walkerton Inquiry*, pp. 76-777.

¹⁴⁸ *Part Two Report of the Walkerton Inquiry*, p.76-77.

160. Mr. Castro stated that the requirement for OMYA to collect more data, conduct detailed studies and monitor flows reflected a prudent and cautionary approach.¹⁴⁹ Mr. Kaye also emphasized the need for caution and stated that further information was required before OMYA should be allowed the full taking of 4,500 m³/day.¹⁵⁰ OMYA relies primarily on the evidence of Dr. Schiefer in support of its contention that the taking of 4,500 m³/day would not cause harm to the ecosystem of the Tay River. In providing his testimony, Dr. Schiefer (as OMYA notes in paragraph 242, of its submissions) relied on Dr. Watt's testimony that the taking of 4,500 m³/day would not impact water flows and water levels in the Tay River Watershed. Dr. Watt, it should be recalled, was unfamiliar with the ecosystem approach and was not even aware of the precautionary principle, which was relied upon by the MoE witnesses in refusing to allow OMYA the full taking.¹⁵¹

161. It is submitted that a basic element in applying the precautionary principle and the principles of conservation is ensuring that natural resources such as water are not committed or made available in excess of reasonably demonstrated need. If this approach is not applied, then users will have no incentive to make efficient use of the resource. In the present case, this means that OMYA should have tailored its PTTW application and its appeal to the amounts of water reasonably required. It is submitted OMYA provided no evidence at the hearing and presented no argument in its Appeal submission to show that this has been done.

(D) THE DEFICIENCIES WITH OMYA S BIOLOGISTS REPORTS

162. The Chair was critical of Dr. Watt's analysis because it was made in isolation without looking at the cumulative impact of other takings in Tay River Watershed and without the benefit of a water budget. It is submitted that for the reasons provided in paragraphs 142 - 143 above, Dr. Watt's attempts to justify a taking of 4,500 m³/day were rejected by the

¹⁴⁹ ERT decision dated February 19, 2002 p.26.

¹⁵⁰ ERT decision dated February 19, 2002 p.26.

¹⁵¹ Evidence of Dr. W. Edgar Watt, Volume 27, p.30.

Chair. It is submitted that Dr. Schiefer's testimony that the water taking of 4,500 m³/day would not impact the ecosystem is also flawed, as he relied on Dr. Watt's analysis, which was found to be inadequate by the Chair.

163. OMYA contends in paragraph 248 of its submissions that Dr. Schiefer's evidence established that 1.0 m³/second flow is a "key ecological safety factor in the permit under appeal." It is important to note that the report prepared for the DFO regarding OMYA's proposed water taking states that the 1.0 m³/s is merely "a reasonable approximation" for establishing flow criteria for the protection of fish habitat. However, the report contemplates that "this number can be refined, as additional flow data becomes available."¹⁵²
164. The DFO report also notes that "there is risk to the aquatic ecosystem and its users if the flow criteria that are established do not provide adequate protection. There is a risk to the proponent if monitoring reveals that this is the case and the management regime must be altered."¹⁵³ The DFO report thus recommends a "precautionary approach" be proposed to minimize risk to the aquatic ecosystem.¹⁵⁴

(E) CHAIR'S FINDING FOR A NEED FOR ADDITIONAL WORK

165. It is submitted that the Chair accepted the testimony given by academics, experts and regulatory agencies, including that of Mr. Cholmondeley, that detailed and comprehensive work had to be undertaken before an accurate assessment could be made of the impact of the taking of 4,500 m³/day of water. It is submitted that the Chair, as the trier of fact, was

¹⁵² Exhibit 39, Tab 48, Initial Review of the Proposed OMYA (Canada) Inc Water Taking from the Tay River Upstream from Perth, Ontario, p. 35.

¹⁵³ Exhibit 39, Tab 48, Initial Review of the Proposed OMYA (Canada) Inc Water Taking from the Tay River Upstream from Perth, Ontario, p. 48.

¹⁵⁴ Exhibit 39, Tab 48, Initial Review of the Proposed OMYA (Canada) Inc. Water Taking from the Tay River Upstream from Perth, Ontario, p. 48.

entitled to prefer the evidence of experts from the provincial ministries and regulatory agencies, to that of the testimony provided by the experts hired by OMYA.

166. It is submitted that there was extensive expert evidence at the ERT hearing to support the Chair's conclusion that she "was not satisfied that there had been sufficient evaluation completed to be assured that the ecosystem, the Tay River Watershed, would not be harmed with the taking of 4,500 m³/day of water taken from the Tay River."¹⁵⁵

Ground # 5: Did the ERT err in suggesting that further study into the potential increase in chemical concentration is required before the taking of 4,500 m³/day is approved?

167. The Chair did not order OMYA to take a further study into the potential increase in chemical concentration. Rather the Chair simply stated that this was an issue that "*could* be further explored if a further application for a PTTW is submitted (emphasis added)."¹⁵⁶
168. The Chair continued by stating: "It is not possible for me to determine from the evidence that there will be harm or significant harm to the environment without further evaluation of the ecosystem and the cumulative effect. Mr. Kaye was only able to give assurances of no risk to the environment with the granting of the Phase I portion of the permit. I have taken the advice of the MoE and therefore agree with his position."¹⁵⁷
169. It is submitted that OMYA's contention that the Chair relied on Dr. Mosquin's evidence to require further studies of potential chemical concentration is incorrect. The Chair correctly notes that Dr. Mosquin's evidence was in the nature of a "supposition" which seemed to be based "on common sense without any scientific evidence. " Accordingly, the Chair's comments about exploring the potential increase for chemical concentration was more along the line of a suggestion, should OMYA seek to increase its water taking.

¹⁵⁵ ERT decision dated February 19, 2002, p. 23.

¹⁵⁶ ERT decision dated February 19, 2002, p. 42.

¹⁵⁷ ERT decision dated February 19, 2002, p.42.

Ground # 6: Did the ERT err in finding that further study on the impacts of the groundwater taking needs to be conducted to support a taking of 4,500 m³/day?

170. The 6,000 residents of Perth obtain their drinking water through a municipal system that draws water directly from the Tay River. The 6,000 rural residents in the watershed obtain their water from groundwater wells. Thus there is a public interest in the protection of water for both surface water and groundwater in the area.¹⁵⁸

(A) THE NEED TO CONSIDER GROUNDWATER IMPACTS

171. Ontario Regulation 285/99 requires a Director who in considering an application under section 34 for a permit to take water to consider "groundwater that may affect or be affected by the proposed surface water taking if the application is for a permit to take surface water."¹⁵⁹

172. The Progress Report of the Groundwater Study for the Tay River Watershed states that groundwater levels have always followed the surface water fluctuations, and that there a perfect correlation (correlation coefficient of 99%) between the two. The report further states that from the hydraulic gradients, it can be said that the Tay River system is being replenished by groundwater almost all the time.¹⁶⁰

¹⁵⁸ Exhibit 39, Tab 47: Existing Conditions and Trends in the Tay River Watershed, RVCA. Table 1,p.1 and Table 2, p.3

¹⁵⁹ Ontario Regulation 285/99 Subsection 2. (1) 3.

¹⁶⁰ Exhibit 15, Tab 15, Progress Report - Groundwater Study, Tay River Watershed, prepared for the Rideau Valley Conservation Authority, pp. 16-17.

(B) DROUGHT CONDITIONS

173. Mr. Castro testified that the neighbouring watersheds to the Tay River Watershed were experiencing drought conditions.¹⁶¹ At low flow conditions a person can walk across portions of the Tay River.¹⁶²
174. There were photographs filed in evidence at the hearing that showed the low water levels in the summer and the fall of 1999.¹⁶³ (See Appendix "E" attached). According to Mr. Castro, one of the photographs, which depicted rocks exposed in the Tay River, indicated that there were no flows in the Tay River.¹⁶⁴ (See Appendix E attached).
175. Mr. Castro testified that the concerns regarding drought conditions in the watershed are valid because the water table drops during drought conditions and people's wells go dry. Cattle do not have access to watering holes and farmers do not have water for crop irrigation. Although Mr. Castro testified that it was surface water from the reservoir lakes which is impacted by drought, he acknowledged that groundwater would be contributing to the reservoir lakes. Mr. Castro testified that repercussions from the water taking are unknown because there were no groundwater studies of the Tay River Watershed.¹⁶⁵
176. Mr. Reid testified that because of the drought conditions the Conservation authority in accordance with the Ontario Low Water Response Plan, set up a local Water Response Team.¹⁶⁶ The document indicated that the purpose of the Ontario Water Response Plan was to establish a "response plan to deal with low water conditions in Ontario." As of January 2001, the MNR had not posted a decision with regard to this proposal. Further,

¹⁶¹ Evidence of Victor Castro, Volume 16, and p.192.

¹⁶² Evidence of Victor Castro, Volume 16, p. 193.

¹⁶³ See attached Appendix E.

¹⁶⁴ Evidence of Victor Castro, Volume 16, p. 197.

¹⁶⁵ Evidence of Victor Castro, Volume 16, and p. pp 204 -205.

¹⁶⁶ See also Exhibit 76, Tab1, *Ontario Permit to Take Water Program and the Protection of Ontario's Water Resources: Brief to the Walkerton Inquiry*, p. 9.

one senior MoE official stated at a public meeting in November 2000 that the proposal is not likely to be treated as high priority in the immediate future.

177. In the summer of 2001, the Conservation Authority was advised that the Rideau Valley was perceived to be a Level 1 situation. By August of 2001 things had progressed to Level 2 and stream flows had dropped even further. At Level 2, the Ontario Water Response Plan required taking voluntary conservation measures to prevent or minimize adverse impact from drought conditions. Mr. Reid noted that the stream flows and rainfall indicators in fact confirmed that the Rideau Valley was at Level 3, which required a mandatory reduction in water use. However, although Level 3 was reached it was never declared.¹⁶⁷
178. The Conservation Authority was aware, from anecdotal reports, that some water supply systems had failed. These systems tended to be private water supplies where people were using shallow wells or dug wells and the groundwater table had dropped below their depth. There were also instances of livestock operators, who ordinarily would draw water from local streams, no longer having access to this source of water and being forced to search for alternative supplies.¹⁶⁸
179. During the drought conditions, the MoE issued letters to all permit holders requesting that they voluntarily reduce their water consumption.¹⁶⁹ Mr. Reid testified that there had been some discussion about the imposition of mandatory restrictions. However, it was considered that imposing mandatory restrictions would be of little benefit given the severity of the drought. According to Mr. Reid, the time to impose mandatory restriction was when there was still stream flow in the river, not after the riverbeds had dried.¹⁷⁰

¹⁶⁷ Evidence of Victor Castro. Volume 17, p. 16.

¹⁶⁸ Evidence of Bruce Reid, Volume 19, and p.93.

¹⁶⁹ Evidence of Victor Castro, Volume 16, p.211; Evidence of Bruce Reid, Volume 20, p.135.

¹⁷⁰ Evidence of Bruce Reid, Volume 20, and p.136.

180. Mr. Castro noted that the installation of a new gauging station, as required by OMYA's PTTW would continuously record flows in the Tay River and would provide information to MoE in future about the amount of water flowing into the Tay River during drought conditions.¹⁷¹

(C) THE USE OF GROUNDWATER AS PART OF OMYA S CONTINGENCY PLAN

181. OMYA's contingency plan stipulates that OMYA will retain its groundwater wells for use when pumping from the Tay River is not allowed because of low flows. However, the amount of water sought by OMYA for its production is much higher than the amount currently allowed by the PTTW for its wells. OMYA's contingency plan also states that "no interruption to production can be tolerated."¹⁷²

182. The calculations done by Mr. Slater indicated that for a 24-year data set, the average number of days per year when OMYA would have to switch to a groundwater supply is 33.75 days due to low flows in the Tay River.¹⁷³ In other words, in those 33 days, OMYA would have to rely on groundwater, which according to the company can only provide 40% of its need.¹⁷⁴

183. It is submitted that OMYA is most likely to revert to its groundwater source in time of drought when the flows in the Tay River would be low and the groundwater levels would also be low. Accordingly OMYA's plans to revert to groundwater would be at the time

¹⁷¹ Evidence of Victor Castro, Volume 16, p. 212.

¹⁷² Exhibit 40, Tab 7, OMYA (Canada) Inc. Proposal to Take Water from the Tay River: Contingency Measures for Emergency Water Supply dated November 6, 2000, pp.6-7.

¹⁷³ Exhibit 78a and 78b, Bobs Lake-Number of days when discharge amount is less than 1cms, daily basis for 24 years (1977-2000).

¹⁷⁴ Exhibit 15, Tab 6, OMYA (Canada) Inc.: Application for a Permit to Take Water from the Tay River, Simmering & Associates, February 28, 2000, p. 12.

when there may well be the greatest environmental risks to the groundwater and surface water flows.

184. It is submitted that the Chair's findings that further groundwater studies were required before OMYA could proceed to withdraw 4,500 m³/day is entirely reasonable and is supported by evidence at the ERT hearing. It is submitted that the Chair's recommendations regarding further groundwater studies were necessary, given the reliance by Dr. Schiefer on Dr. Watt's "simplistic modeling study," and the fact that OMYA's contingency plans, which contemplate reliance on groundwater, did not adequately address the potential impacts that may result from the larger amount of taking.

(d) The deficiencies in OMYA's Hydrogeologist's Report

185. Mr. Thomas McElwain, a hydrogeologist and a principal with Golder Associates, testified on OMYA's behalf on the impacts that the proposed surface water taking of 4,500 m³/day would have on groundwater. In preparing his report Mr. McElwain simply reviewed existing reports and data but failed to undertake any new studies to assess groundwater impacts which may result from OMYA's water taking.¹⁷⁵ Mr. McElwain admitted that 6,000 people in the Tay River Watershed rely on well water and that drought conditions would lower the water table, causing wells to dry up.¹⁷⁶ Mr. McElwain also conceded that the preparation of a water budget would help account for the large quantities of water that are withdrawn from wells.¹⁷⁷ However, as noted by the Chair, a proper water budget had not yet been prepared for the Tay River Watershed.¹⁷⁸

186. The Chair stated: "I am concerned that the broad scope of the water takings in the watershed, including groundwater, has not been taken into consideration." The Chair,

¹⁷⁵ Evidence of Thomas McElwain, Volume 27, pp.210-121.

¹⁷⁶ Evidence of Thomas McElwain, Volume 27, p. 188.

¹⁷⁷ Evidence of Thomas McElwain, Volume 27, pp.195-196.

¹⁷⁸ ERT decision dated February 19, 2002, p.37-38.

therefore, stated that a further study was appropriate regarding the impacts of surface and groundwater taking within the Tay River Watershed.¹⁷⁹

(E) THE CHAIR'S FINDING ON GROUNDWATER IMPACT

187. It is submitted that the Chair's recommendations regarding a further study to assess the impact the proposed taking on groundwater are appropriate and supported by the evidence presented at the hearing. There was evidence at the hearing that the Tay River Watershed was experiencing drought conditions, wells were growing dry and farmers were forced to seek alternative water supplies for their livestock. There was evidence that neither the MoE nor OMYA had information about the number of non-permitted withdrawals in the watershed that could have potential impacts on groundwater. Accordingly it was entirely appropriate for the Chair to recommend a further study on potential groundwater impacts before OMYA increased its water taking.

188. At the hearing, there was evidence that the Conservation Authority was involved in undertaking a Tay River Watershed Study.¹⁸⁰ Their staff hydrogeologist, Mr. Mezure Haile-Neskale, had compiled information about the groundwater conditions in the watershed. Mr. Reid testified that the final report would be released later in the year.¹⁸¹ It is submitted that it is possible that the Tay River Watershed Study might contain sufficient information regarding impacts of surface and groundwater takings in the watershed. In the event that the Director is not satisfied with the information in this study, or believes that additional information is required, the Director may require OMYA to do further study on this issue.

189. It should be noted that the Chair did not impose the obligation to undertake a groundwater study on OMYA, but simply indicated that further study would be appropriate. It is

¹⁷⁹ ERT decision dated February 19, 2002, p. 41.

¹⁸⁰ Evidence of Bruce Reid, Volume 21, p. 18.

¹⁸¹ Evidence of Bruce Reid, Volume 20, P. 9.

submitted that had the Chair wanted to impose this requirement on OMYA, the Chair could have simply amended the terms and conditions of the PTTW for the Phase I portion. The Chair chose not to do so and stated instead that she "had not found it necessary to revise the conditions regarding groundwater and contingency plans with the granting of the Phase I portion of the PTTW."¹⁸² It is submitted, therefore, that the Chair's comments about the need for an additional study regarding the impacts of surface and groundwater takings were in the nature of recommendations in the event OMYA decided to apply for an increase of its water taking to 4,500 m³/day.

Ground # 7: Did the ERT err in shortening the term of the permit from 10 years to six years?

(A) RATIONALE FOR LIMITING THE LENGTH OF OMYA S PTTW

190. The MoE found that there was not sufficient information to support the full taking of 4,500 m³/day so it staged the permit and imposed conditions requiring OMYA to undertake further studies to demonstrate that the additional taking could be sustained by the ecosystem of the Tay River Watershed.¹⁸³
191. The Chair extended the first phase of the Permit from four years to six years, to allow OMYA additional time to "gather specific information concerning the waterflow at the new proposed gauging station." According to the Chair this time "offers the opportunity for analysis of the cumulative effects within the watershed, ecosystem approach analyses and an opportunity to expand on the present information prepared for this Tribunal hearing, before a future application could be submitted by OMYA to the Director for the Phase II portion."¹⁸⁴

¹⁸² ERT decision dated February 19, 2002, p 42.

¹⁸³ Evidence of Brian Kay, Volume 01, and p.6.

¹⁸⁴ ERT decision dated February 19, 2002, p.53.

192. It is submitted that given the serious deficiencies in the data submitted by OMYA as identified by Mr. Gertler in his decision on the application for leave to appeal as well as the information gaps noted by the Chair in her decision, it was appropriate and prudent for the Chair to limit OMYA's permit to six years.

(B) DIFFERENCE BETWEEN OMYA S PTTW AND OTHER PTTWS

193. OMYA contends in paragraph 300 of its submission that there are other PTTWs that were issued in the Tay River Watershed for a lengthy duration. OMYA notes that the PTTW for the Town of Perth was for ten years. The MoE's Guidelines and Manual states that the taking of water for domestic use, farm purposes and fire protection are considered the most important, followed by takings for municipal supply, then the taking of water for industrial, commercial and irrigation purposes. It is submitted that the Town of Perth's PTTW which is being used to supply water to residents, is a higher priority use than that of OMYA, which is an industrial and commercial use.

194. The Environmental Commissioner testified that in his opinion he regarded a ten year permit as a long period of time for a PTTW.¹⁸⁵ The Environmental Commissioner noted that there were inconsistencies in the duration of PTTWs issued by MoE, and the length of PTTW issuance was a matter of great concern because it related to sustainability.¹⁸⁶

195. The Environmental Commissioner stated that a PTTW that was issued in perpetuity would be highly problematic.¹⁸⁷ He recommended that the MoE's Guidelines and Procedures Manual for PTTW should address issues relating to the duration of PTTWs.¹⁸⁸

¹⁸⁵ Evidence of Gordon Miller, Volume 9, p. 39.

¹⁸⁶ Evidence of Gordon Miller, Volume 9, p. 40.

¹⁸⁷ Evidence of Gordon Miller, Volume 09, and p.40.

¹⁸⁸ Evidence of Gordon Miller, Volume 09, and p.40.

196. The Environmental Commissioner notes in his report to the Walkerton Inquiry that the MoE has stated that it has updated its procedures to include strictly defined time limits or expiry dates on permits.¹⁸⁹ The Links O'Tay Golf and Country Club's PTTW, which OMYA cites at paragraph 300 of its submission as an example of a PTTW without an expiry date, is, therefore, troubling, and ought to be amended by the Director to specify an expiry date.
197. It should be noted that the Chair, in fact extended the Phase I portion of the permit by an additional two years to ensure that OMYA had sufficient time to collect data before it proceeded with another application for the full taking.¹⁹⁰ It is submitted that this was done for OMYA's benefit to ensure that it had sufficient time to collect data to support its proposed increased water taking.
198. It is submitted that the Chair, as the trier of fact, had the benefit of hearing testimony from 25 witnesses, including the Environmental Commissioner who testified that a ten year permit would be a long period of time for a PTTW. It is submitted that given the drought conditions and degree of public concern about the environmental impacts from the proposed taking it was appropriate for the Chair to impose a more limited duration for OMYA's PTTW.
199. It is submitted that in the event OMYA finds that it is unable to collect data to assess the environmental impacts from its water taking within the six-year period, OMYA can apply to the Director for a renewal of its PTTW. It is submitted that it is premature to assess whether this will, in fact, be necessary. It is submitted that the Chair's determination of an appropriate time limit for OMYA's permit was fair and reasonable and is supported by the evidence at the hearing. Accordingly, it is respectfully submitted that it would not be appropriate for the Minister to reinstate a ten year period for OMYA's PTTW.

¹⁸⁹ Exhibit 76, Tab 1, *Ontario's Permit to Take Water Program and the Protection of Ontario's Water Resources: Brief to the Walkerton Inquiry*, p. 22.

¹⁹⁰ ERT decision dated February 19, 2002, p.53.

Ground # 8: Did the ERT err by adding Conditions 30, 31 and 32 to the Permit?

200. OMYA is requesting that the Minister remove Conditions 30, 31 and 32. OMYA asserts in paragraph 306 of its submission that it was not included as a participant in drafting new conditions. This assertion is incorrect. The new draft terms and conditions imposed by the Chair were in fact, prepared as result of negotiations among OMYA, the MoE and the Citizen Respondents. In fact, OMYA filed a draft permit with the ERT which envisaged a role for “an independent and appropriately qualified environmental auditor” to detail and certify to the Director OMYA's compliance or non-compliance with the PTTW. Thus, the evidence at the ERT hearing clearly indicates that OMYA was an active participant with respect to drafting new terms and conditions for its PTTW. .¹⁹¹

(A) A SUMMARY OF THE CONDITIONS 30, 31 AND 32

201. Condition 30 states:

The Permit Holder shall engage the services of an independent and appropriately qualified environmental auditor, satisfactory to the Director. The auditor shall detail and certify in writing to the Director and those listed on "Schedule A" on January 31 of each year, a report on water taking. The environmental auditor, at a minimum will receive and analyze water -taking data, confirm compliance and non-compliance with the terms and conditions of the permit, all of which shall be included in the report. The auditor can further provide recommendations for conservation, protection and wise use and management of the water for this water taking. A copy of the environmental auditor's report shall be placed in the Perth Union Library by the Permit Holder. The Permit Holder shall place an advertisement in a newspaper or newspapers circulating in Perth and Lanark County indicating the availability of the auditor's report and the means by which a copy can be obtained. The auditor's report shall be made available by the Permit Holder to the public on request.¹⁹²

202. Condition 31 states:

The Permit Holder shall convene at least two meetings in a calendar year, at a convenient time so that the Director can attend the meeting with the representatives listed on Schedule "A". Representatives on "Schedule A" shall be limited to not more than two

¹⁹¹ Exhibit 157(a) and 157(b): Draft permits submitted by OMYA (Canada) Inc.

¹⁹² ERT decision dated February 19, 2002, Appendix A-7.

persons each to attend the meetings. One of the meetings, which the Permit Holder shall convene, with the environmental auditor in attendance, shall be held within thirty days of the environmental auditor's report becoming available to the Director and the "Schedule A" representatives. The meeting will provide an opportunity for the Permit Holder to inform the representatives and to answer questions concerning the water taking. The Permit Holder shall make all records of water taking and all discharges and stage data available to the representatives at all these meeting. The Permit Holder shall have minutes of these meetings prepared and circulated to the Director and representatives on "Schedule A" A copy of the minutes of the meeting shall be placed in the Perth Union Library by the Permit Holder.¹⁹³

203. Condition 32 states:

The Permit Holder shall, in consultation with the representatives on "Schedule A" convene at least one public meeting in a calendar year in Perth, Ontario, at a convenient time so that the Director can attend the meeting, in order that the public can be informed of the Permit by the Permit Holder, the public can make submissions to the Permit Holder, the public can ask questions and receive answers from the Permit Holder, concerning the water taking. The Permit Holder shall place an advertisement for the meeting in a newspaper circulating in Perth and Lanark County, at least one week prior to the meeting indicating the date, location and time of the public meeting.¹⁹⁴

(B) OMYA S ENVIRONMENTAL PERFORMANCE RECORD

204. OMYA contends in paragraph 305 of its submission that the Citizen Respondents' "improper tactic of tainting the character of OMYA led to the incorporation of these three conditions." It is submitted nowhere in the Chair's decision is it stated that the reasons for imposing conditions 30, 31 and 32 were due to OMYA's character or its non-compliance with environmental laws.

205. It is submitted, however, that it was entirely appropriate for the Chair to hear evidence of OMYA's record of environmental performance, including any charges laid by the Crown as this evidence is important for assessing a company's environmental performance. Unlike the situation of prior convictions in criminal proceedings, evidence of prior

¹⁹³ ERT decision dated February 19, 2002, Appendix A-7.

¹⁹⁴ ERT decision dated February 19, 2002, Appendix A-7-8.

convictions and matters related to the environmental record of a proponent is admissible before administrative tribunals, provided it is relevant. In previous decisions of the ERT, which dealt with the issue of whether to issue licenses, or to revoke or amend licenses, the ERT has allowed the past environmental record of companies and individuals to be introduced into evidence.¹⁹⁵

206. However, it does not appear that the evidence of OMYA's environmental record had any bearing on the Chair's reasons for imposing Conditions 30, 31 and 32. In fact, the Chair found that the environmental performance of OMYA did not indicate to her that OMYA had knowingly caused degradation to the environment.¹⁹⁶ Therefore, it is submitted that OMYA's submission that the Chair considered improper allegations about the environmental record of the company as a rationale for imposing Conditions 30, 31 and 32 is unfounded and should be disregarded.

(C) OMYA S CONCERNS ABOUT THE USE OF AN INDEPENDENT ENVIRONMENTAL AUDITOR

207. OMYA's main contention about having to retain an environmental auditor appears to be based on an assumption that it may be required to disclose proprietary information and that it is being treated differently from other Applicants for PTTW.
208. The independent environmental auditor's report will address the quantity of water flowing in the Tay River and being withdrawn from it. The environmental auditor's report would also deal with groundwater withdrawals whenever the Tay River flow was equal to or less than 1 cubic meter per second. However, at no time is the environmental auditor required to report on how the water is used in OMYA's processing technology or its product.

¹⁹⁵ See *Ellis v. Ontario (Ministry of Environment and Energy)*[1994] O.E.A.B No. 20 and *Lootawan v. Director (Ministry of Environment and Energy)*, [1994] O.E.A.B. No. 65. Attached as Appendix "C" and "D."

¹⁹⁶ ERT decision dated February 19, 2002,p.49.

209. There is no evidence to suggest that OMYA expressed any concerns that Condition 30 would require it to release proprietary information at the ERT hearing, as it now alleges in its submissions. It is submitted the wording of Condition 30 does not indicate either directly or by inference that OMYA has to reveal proprietary information in order for the environmental auditor to make recommendations regarding the conservation and wise use and management of water. It is submitted that contrary to OMYA's suggestion in paragraph 313, the Chair never imposed a requirement that proprietary information regarding OMYA's reclamation facilities had to be disclosed. It is submitted that OMYA's submission, therefore, in this regard has no merit.
210. It should also be noted that the Chair simply recommended that the environmental auditor "*can* provide recommendations for the conservation, protection and wise use and management of water." Unlike the other provisions in Condition 30, the Chair's use of the word "can" as opposed to "shall" suggests that this provision is discretionary. All other provisions relating to Conditions 30-32 use the word "shall" and thus should be interpreted as mandatory.

(D) COMPARISON OF OMYA S PTTW WITH OTHER PTTWS

211. On page 110, paragraph 314 of its submissions, OMYA questions the need for an environmental auditor because the PTTWs issued to Links O' Tay Golf Club ("Country Club") and the Town of Perth did not contain similar conditions. Mr. Kaye testified under cross-examination that the environmental risks associated with this taking were low. The water taking for the Country Club is only 527 m³/day and is thus significantly less than that proposed by OMYA.¹⁹⁷ Furthermore, Mr. Kaye testified that most of the Town of Perth's, and some the Country Club's water taking would be returned to the watershed. However, OMYA's taking is a consumptive use as it is used in the production of slurry.¹⁹⁸ It is submitted that OMYA's PTTW is in fact significantly different from other PTTW

¹⁹⁷ Exhibit 126,

¹⁹⁸ Evidence of Brian Kaye, Volume 22, and p.140.

since it is for a consumptive use and none of the water taken will return to the Tay River Watershed.

(E) DROUGHT CONDITIONS IN THE TAY RIVER WATERSHED

212. The Tay River Watershed as noted in paragraphs 173-179 above, has recently experienced severe drought conditions, which has understandably increased public concerns over water takings. The Environmental Commissioner in his report to the Walkerton Inquiry made the following observations about public concerns over water taking:

Concerns about water shortages have increased in Ontario. As reported in the ECO annual report for 1999/2000, business and rural residents in some parts of Ontario who once had unrestricted access to abundant supplies of groundwater have found themselves sharing existing resources with a growing number of new users, including commercial interests, new housing development and more intensive farm operations. In some cases serious disputes have erupted. Exacerbating these conflicts, southern Ontario experienced lower than average levels of precipitation and higher than average temperatures in the latter 1990s ...Several surface water bodies have also been the subject of fierce competition and feared shortages.

(F) THE NEED FOR AN ENVIRONMENTAL AUDITOR

213. The Director stated that the MoE does not undertake an actual monitoring of the water takings granted under PTTWs.¹⁹⁹ It is submitted that it was entirely appropriate for the Chair to require OMYA to retain an environmental auditor, given the acute public concern over the magnitude of the water taking, the heightened public concerns about water shortages and increased competition over water in an area recently stricken drought.
214. It is submitted that use of an environmental auditor will be of benefit to the MoE as it will ensure that its limited resources will not have to be devoted to verifying compliance or non-compliance of OMYA's PTTW. It is submitted that in the event the environmental auditor report reveals non-compliance with the PTTW the MoE can determine the appropriate action to be taken. Thus Condition 30 does not diminish MoE's ability to ensure continued regulatory oversight over OMYA's operations as OMYA suggests in paragraph 311 of its submission. It should be noted that the MoE was not opposed to

¹⁹⁹ Evidence of Brian Kaye, Volume 22, and p.113.

having a condition in OMYA's PTTW that required OMYA to retain the services of an independent qualified environmental auditor.²⁰⁰

215. It is further submitted that the use of an independent qualified environmental auditor has been used in other instruments issued by the MoE, particularly in cases where there is extensive public concern regarding the environmental impacts of an undertaking. The use of an independent qualified environmental auditor is thus an ideal mechanism for bolstering public confidence in the permit process and can serve to reduce and alleviate public concerns about the water taking.
216. It should be noted that the use of an environmental auditor is limited to the six year time limit of OMYA's PTTW. The Director can assess the continued need for an environmental auditor when the Appellant seeks a renewal of its PTTW or applies for a new PTTW.

(G) PUBLIC PARTICIPATION ENSURED BY CONDITIONS 31 AND 32

217. The Chair included Conditions 31 and 32 in order to involve the public in an ongoing process with OMYA's PTTW. The Chair states at page 51 of her decision that: "With the number of persons responding to the *EBR* registry and the number of persons attending the sessions for this hearing, I believe the community has demonstrated a high degree of interest and concern with this process. It is important to involve the public in the consultation, monitoring results, progress reports, and operational aspects of this permit. During the course of this hearing, I referred the parties to other decision of the Tribunal where public participation has been included. I informed the parties that if the permit was to be approved that I was interested in including conditions that would provide an opportunity for the public to be involved in the ongoing process of the life the permit. Therefore, I have set out the following conditions that I believe would be reasonable." The Chair, therefore, included Conditions 31 and 32 to "involve the public in an ongoing process."

²⁰⁰ Evidence of Brian Kaye, Volume 22, p. 14.

218. The *Part Two Report of the Walkerton Inquiry*, subsequently echoed the Chair's comments about the importance of public participation in the watershed planning process. Mr. Justice O'Connor states the following on page 9 of his report: "To ensure that local considerations are fully taken into account, and to develop goodwill within and acceptance by local by local communities, source protection planning should be done as much as possible at a local (watershed) level, by those who will be most directly affected."²⁰¹
219. Condition 31 simply creates a formal binding arrangement to ensure that public consultation and public participation will occur with respect to the PTTW. The need for public involvement in the environmental decision making process is a hallmark of environmental legislation and has been codified in the *EBR*. Dr. Nancy Doubleday testified about the importance of public participation in implementing an ecosystem approach.²⁰² Dr. Doubleday recommended that additional conditions, which ensured public participation of all stakeholders, be added to the permit. According to Dr. Doubleday public participation and transparency are integral components of an ecosystem approach.²⁰³
220. Further, as noted in paragraphs 50 to 53, OMYA's application has been a matter of great public interest, in contrast to other PTTWs. OMYA's application is also unique given that the quantity of water it was seeking is equivalent to the water taking for the entire Town of Perth, and the water taking is being sought at a time when the Tay River Watershed and neighboring watersheds have recently experienced drought conditions.
221. It is submitted that OMYA's application is in fact different from other PTTWs, given the magnitude of the amount of water taking which was sought, the recent drought in the area

²⁰¹ *Part Two Report of the Walkerton Inquiry*, p. 9.

²⁰² Evidence of Dr. Nancy Doubleday, Volume 8, and p.32.

²⁰³ Evidence of Dr. Nancy Doubleday, Volume 8, pp.52-56.

of the water-taking, and the numerous concerns raised by the public and the media.²⁰⁴ OMYA's PTTW is also unusual because of the number of regulatory agencies which had involvement with reviewing the PTTW. For example, Mr. Castro testified that on many occasions when the MoE is dealing with a "more straight forward permit" it does not contact technical agencies. The fact that it held a meeting with a number of technical agencies regarding OMYA's permit was unusual.²⁰⁵

222. Furthermore, as the Chair noted, conditions relating to public participation and independent monitoring have been imposed in other instruments where there have been acute public concerns about the environmental impacts of a proposed undertaking. Accordingly, these conditions cannot be construed by any means to be unique.²⁰⁶
223. Mr. George Samuel Kingdon, Chair of the Township's Industrial Advisory Committee, testified about the committee's dealings with OMYA. Mr. Kingdon testified that the Industrial Advisory Committee is a standing advisory committee of the Township of Bathurst, Burgess and Sherbrooke, which was established in January 1997. Under its terms of reference, which were approved by council, the Industrial Advisory Committee provides a forum for discussion between industry and the public on "matters related to compliance and to provide recommendations to council on questions concerning industry in the community." The membership of the Committee includes the Reeve, the township consulting engineers, and representatives from the MoE, the county and industry.
224. Mr. Kingdon expressed concerns about the "poor communication" with OMYA in regard to its application for a PTTW. For example, OMYA had been asked to provide the Industrial Advisory Committee with an update on its water supply. OMYA simply responded that it "needs more water and was looking at various ways to acquire it." Three days later after making this statement, OMYA submitted its application for a PTTW.

²⁰⁴ Evidence of Victor Castro, Volume 15, p.20; Evidence of Brian Kaye, Volume 23, p.71.

²⁰⁵ Evidence of Victor Castro, Volume 15 p. 20.

²⁰⁶ Evidence of Samuel Kingdon, Volume, Volume 4, pp. 17-19.

Approximately one week later the application was posted on the EBR Registry for public notice and comment. Mr. Kingdon expressed concern that the failure of OMYA to provide timely information about the proposed water taking curtailed the amount of time that citizens had for expressing their concerns with the proposed taking to the MoE. The evidence of Mr. David Taylor, Chair of the Tay Watershed Roundtable and a member of the Industrial Advisory Committee, corroborates Mr. Kingdon's evidence about the lack of communication by OMYA with the public.²⁰⁷

225. According to Mr. Kingdon, OMYA did not address issues of concern unless there was pressure from the citizens and the township.²⁰⁸ OMYA states in paragraph 324 and 325 of its submission that it has worked with municipalities and regulatory agencies and community groups over its activities and provides assurances that it will continue to do in the future. It is submitted that the evidence from the witnesses from the Industrial Advisory Committee suggests the contrary.
226. It is submitted that there was considerable evidence at the ERT hearing to support the imposition of Conditions 31 and 32 by the Chair. It is submitted that similar conditions have been imposed in other instruments issued by the MoE where the proponent's undertaking has generated an intense level of public concern and comment. It is submitted that Conditions 31 and 32 are necessary given that OMYA prior conduct indicates that it is reluctant to disclose information to the public about its plans to take water from the Tay River. Accordingly, it is submitted that the Chair's decision to include Conditions 31 and 32 in order to ensure greater public participation in the permit process was fair and reasonable.
227. It is submitted that these conditions are of benefit to all parties, including OMYA as it ensures regulatory agencies and community groups have access to information and also

²⁰⁷ Evidence of Samuel Kingdon, Volume 4, p. 29-30; Evidence of David Taylor, Volume 3, pp. 64-65.

²⁰⁸ Evidence of Samuel Kingdon, Volume 4, p. 31.

allows any public questions and concerns regarding OMYA's PTTW to be raised on a timely basis.

228. It is submitted that the public participation in the permit process ultimately fosters greater understanding of the issues by all parties and can be a great benefit in reducing conflicts between the various stakeholders. It is further submitted these conditions contribute to the implementation of an ecosystem approach and are not unique to OMYA's PTTW and should, therefore, be upheld by the Minister.
229. OMYA submits in paragraph 328 of its submissions that certain conditions imposed by the Chair should be revised. In particular, OMYA wants to be able to continue production indefinitely even if its continuous recording equipment ceases to operate, provided it could obtain readings from the staff gauge.
230. It is submitted that limiting the number of days OMYA can operate without continuous recording equipment ensures that OMYA takes timely steps to repair the equipment in the event it ceases to operate.
231. It is submitted that the Chair recognized that OMYA might have to operate for longer than the prescribed number of days, due to unforeseen circumstances. Accordingly, the Chair states in Special Condition 21 that "The Permit Holder shall not take water in accordance with Special Condition 19 for a period exceeding 14 continuous days without pre-authorized written notice from the Director."²⁰⁹
232. It is submitted, therefore, there is no need to revise OMYA's permit since Special Condition 21 allows OMYA to continue to take water for more than 14 days, even if the continuous recording equipment ceases to operate, provided OMYA receives a pre-authorized written notice from the Director.²¹⁰

²⁰⁹ ERT decision dated February 19, 2002 Appendix A, p. A-6.

²¹⁰ ERT decision dated February 19, 2002 Appendix A, p. A-8.

233. It is submitted that the revisions OMYA is recommending would allow OMYA to operate indefinitely without obtaining the benefit of accurate electronic data on stream flows in the Tay River. It is submitted that such a revision would hardly be in the public interest.

GROUND # 9: Does the public interest require that the decision of the ERT be altered?

234. In paragraphs 329 to 354 OMYA makes a number of allegations about the ERT hearing process and alleges that the Chair:

- a. failed to scope the proceedings adequately;
- b. enacted and relied upon new policies in lieu of the existing laws, regulations and MoE policies;
- c. accepted and relied upon evidence of which OMYA had no prior notice;
- d. communicated with witnesses; and
- e. accepted a gift from a witness.

235. It is submitted that OMYA's allegations regarding the Chair and the ERT process are made without an evidentiary basis; are based on speculation and innuendo; and fail to accurately represent the evidence at the hearing for reasons set out in more detail below. It is submitted that criticism of administrative tribunals which is intemperate and unsupported by a *bona fide* belief in its real merit should be avoided, particularly since members of tribunals are often prohibited by law or custom from defending themselves. It is submitted that for the reasons provided below, OMYA's criticism of the Chair is grossly unjust and its allegations fundamentally undermine the administration of justice.

(a) The Proceedings Were Adequately Scoped

236. OMYA asserts in paragraphs 330 to 332 that the Chair failed to properly scope the proceedings. OMYA also asserts that the leave was only granted on the issue of

sufficiency of the data. It is submitted that OMYA's assertion regarding the scope of the leave is incorrect. Mr. Len Gertler in his decision granted leave to appeal OMYA's PTTW "in its entirety."²¹¹

237. It is a fundamental rule of administrative law that a tribunal has control over its own process.²¹² In this case the Chair sought to balance the need to conduct an expeditious hearing process with the need to ensure the hearing process was thorough, fair, and provided ample opportunity for public participation.
238. The ERT hearing was unique in a number of respects, as this was the first time that a matter for which leave to appeal had been granted under the *EBR* proceeded to a complete hearing. The MoE witnesses testified that OMYA's application was controversial and that there was an unprecedented level of public interest and concern about OMYA's water taking.²¹³ In addition, the public and witnesses from the regulatory agencies also expressed concerns about the potential adverse environmental impacts from OMYA's taking.²¹⁴ The case also raised a number of important legal issues, including the applicability of the MoE's Statement of Environmental Values (SEV) to instruments, and the need to consider the natural functions of the ecosystem prior to the issuance of a PTTW.²¹⁵
239. The scope of the issues canvassed at the hearing was expanded as a result of OMYA producing numerous studies in an attempt to support its application. These reports were prepared after the ERT had granted leave to appeal OMYA's PTTW. OMYA had also failed to provide regulatory agencies an opportunity to review these additional reports. It is submitted that all these factors contributed to a somewhat longer hearing process than

²¹¹ERT decision on leave to appeal dated November 6, 2000, p.16.

²¹² Statutory Power Procedure Act, R.S.O. 1990, c. S-22, section 25.01. See Appendix "F" attached.

²¹³ Evidence of Victor Castro, Volume 15, p. 20; Evidence of Brian Kaye, Volume 23, p. 70.

²¹⁴ Exhibit 71, Tab 5, Letter from Bruce Reid to Supervisor, Water Resources Unit, MoE, dated March 30, 2002, p.3.

²¹⁵ ERT decision dated February 19, 2002, pp. 17-23.

may have occurred with a routine PTTW application.

240. OMYA asserts that matters were raised outside of its application to take water, such as whether the permit, if granted, would infringe the North American Trade Agreement and an allegation that OMYA destroyed a lake near its quarry. The ERT had to consider these matters since they were clearly *prima facie* relevant to OMYA's water taking. It is submitted that it would have been premature for the Chair to make a ruling on the relevancy of these issues without having the benefit of hearing evidence. However, after hearing evidence on these issues the Chair properly exercised discretion in concluding that there was no connection between the condition of the lake and the PTTW and that the provisions of NAFTA would not be triggered by the PTTW, “in so far that water, in this case, is not in its natural state, but is included within a product.”²¹⁶
241. OMYA asserts in paragraph 332 of its submission that the Chair failed to consider the “scientific evidence of the impact of the actual water taking.” OMYA also asserts that the Chair makes no mention of Mr. Valere's evidence with regard to the taking. In fact, the Chair's 55-page decision in this case dealt extensively with the scientific evidence provided at the hearing. For example, from page 24 to page 38 the Chair reviews the water data and provides a detailed discussion of Dr. Watt's evidence and her findings on this issue. From page 38 to page 42, the Chair outlines the evidence of the impact on the Tay River and also cites the evidence of Mr. Valere in this regard. It is submitted that the Chair's decision provides a meticulous review of the evidence at the ERT hearing, and the Chair provided clear, cogent reasons for each of her findings.

(b) The Applicability of the MoE's Statement of Environmental Values

242. OMYA alleges in paragraph 335 that the SEV only applies to those Acts, regulations and

²¹⁶ ERT decision dated February 19, 2002, p. 48.

policies that incorporate the SEV, but does not apply to instruments. OMYA is alleging that the Chair misapplied the law, in making a finding that the SEV applied to PTTWs. It should be noted that the applicability of the SEV to a PTTW raises a legal issue that is beyond the scope of this appeal. However in the event the Minister decides to consider this issue, the Citizen Respondents submit the arguments in paragraphs 243 to 250 below should be considered.

243. The *EBR* states that the SEV should explain “how purposes of the Act are to be applied when decisions that might significantly affect the environment are made in the ministry.”²¹⁷ Section 11 of the *EBR* states that 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.”
244. Catherine Clarke testified that the SEV is considered to be of the "same level as policies, acts or regulations," and that the instruments should be reflective of the SEV.²¹⁸ Ms. Clarke expressly disagreed with OMYA's assertion that the MoE's SEV should not apply to its PTTW because it had not yet been incorporated into the relevant acts, regulations or policies.²¹⁹ Ms. Clarke was of the view that Regulation 285/99, in fact, had incorporated MoE's SEV into the environmental decision making process.²²⁰
245. The Environmental Commissioner also testified that the SEV “should be in the back of the mind of all staff of various ministries when they’re making decisions.” The Environmental Commissioner did not accept the MoE interpretation that its SEV did not apply until it had been incorporated into acts, regulation and polices.²²¹

²¹⁷ Environmental Bill of Rights, 1994, s. 7.

²¹⁸ Evidence of Catherine Clarke, Volume 21, p. 84.

²¹⁹ Evidence of Catherine Clarke, Volume 21, p. 107.

²²⁰ Evidence of Catherine Clarke, Volume 21, p. 106.

²²¹ Evidence of Gordon Miller, Volume 9, pp. 81-83.

²²² ERT decision dated February 19, 2002, pp. 21-22.

246. The Chair's findings in regard to the applicability of the SEV are as follows:

The SEV is an important document and it appears that it is not well understood in terms of its applicability. Most of the appellants, and the Environmental Commissioner of Ontario, indicated that the SEV should apply when decisions relating to 'instruments' are made. The Director submitted that the SEV is not directly applicable to instruments. Instead the Director submitted that the SEV is relevant to the issuance of a PTTW to the extent that it is incorporated within Acts, regulations and policies. Therefore the Director states that only those portions of the SEV that are incorporated within 285/99, OWRA and policies, such as the Manual, are applicable. While the SEV may on its face indicate that it does not apply to 'instruments' issued by the Ministry it is my view that this narrow interpretation is inconsistent with the EBR. As I have indicated previously in *Kolodziejcki v. Director, Ministry of the Environment*, February 14, 2000, the SEV should be considered each time an application for a PTTW is considered. In my view this conclusion is supported by s. 11 of the EBR which requires a Minister to take every reasonable step to ensure that the SEV is considered whenever decisions that might significantly affect the environment are made in the ministry. It is also supported by the wording of clause 67(2)(a) of the *EBR* which requires the Minister to consider the SEV when deciding whether to grant a public request for the review of an 'instrument'. If the SEV should be considered when the Minister decides whether to review a PTTW, then surely the SEV should be considered by the Director at the time the application for the PTTW is considered.

I also find that Regulation 285/99 has incorporated the 'ecosystem approach' described in the SEV. Unfortunately the MOE has provided little policy guidance on how the Director should implement this type of analysis in order to evaluate a PTTW in this respect.²²²

247. It is submitted that the Chair's interpretation of the applicability of SEV to instruments is also consistent with the interpretation of the Environmental Commissioner and the testimony provided by Ms. Clarke, the two witnesses with the most experience and knowledge about the applicability of the SEV to instruments.

248. The Chair's interpretation of the applicability of the SEV to instruments is also consistent with the statements made by the Ministry in its 2000-2001 Business Plan, the Ministry's annual priorities and planning document. That document states:

The ministry's mandate, articulated in the statement of environmental values (SEV) that underpins all its activities, is to protect the quality of the natural environment so as to safeguard the ecosystem and human health and to foster the efficient use and conservation of resources.

249. Under the heading "Key Commitments and Strategies", the Business Plan highlights MoE's key commitment:

To build a better, stronger, clearer environmental agenda in keeping with our statement of environmental values".²²³

250. It is submitted that the Chair's interpretation on the applicability of the SEV to instruments is also consistent with the MoE's policies and programs regarding the applicability of the SEV. It is submitted therefore that the Chair's interpretation regarding the applicability of SEV to instruments such as a PTTW is accurate and reasonable, and is supported by the EBR, MoE's statement of key policies and programs, and the testimony of witnesses at the hearing.

(c) Prior Notice of Submission of Evidence, Lengthy Sitting Days and the Public Meeting

251. In paragraphs 337 to 342 of its submissions, OMYA alleges that the ERT hearing process was unfair because its counsel did not get proper notice of witness statements; that its counsel was prevented from preparing for cross-examination because of the length of hearing days; and that the Chair directed OMYA and MoE counsels not to cross-examine individuals making presentations at the ERT Public Meeting.
252. As an example of inadequate disclosure, OMYA states that a witness statement was not submitted for the Environmental Commissioner. OMYA's assertion in this regard is once again incorrect. Counsel for the Council of Canadians had forwarded to OMYA's

²²³ Exhibit 72, Tab 43, Ministry of Environment 2000-2001 Business Plan.

counsel, a copy of the Environmental Commissioner's report, which was entitled "*Ontario's Permit to Take Water Program and the Protection of Ontario's Water Resources: Brief to the Walkerton Inquiry*."²²⁴ The following excerpts from the transcripts from the ERT hearing also reflect the fact that the Environmental Commissioner's evidence and curriculum vitae had been disclosed to OMYA's counsel.

Mr. Shrybman: I need to respond, Madam Chair, to the suggestion that there was some surprise in Mr. Miller's testimony. I produced for Mr. Bryant, in total, subject to those appendices, the report he [Mr. Miller] was giving evidence today about, in its entirety, so there's no surprises. I didn't provide too little information.

And the only other issue that I explored with him, which is identified in the summons, was the question of the staged character of the approvals process. So, all of his evidence, Mr. Bryant has been forewarned about. He understands very well the issue of the staged character of the approvals process. We had to argue for our right to keep that on your agenda, and he's had the Commissioner's report.²²⁵

Madam Chair, just for the record, I provided everyone in a timely manner with a copy of a C.V. that had been provided to me by the Commissioner. Along with it came one in error, which was old and outdated, which I didn't provide to people, and I haven't relied on, and no one has a copy of it but me.

So, the biography that the Commissioner provided has been supplied to everybody some two weeks ago. I didn't hear from Mr. Bryant that he needed more information or more detail until I overheard a conversation he was having with somebody else today. Just for the record.²²⁶

253. It should be noted that the Citizen Respondents were not represented by legal counsel at the hearing. However, they made diligent efforts to comply with the ERT's procedural order dated May 31, 2001 that required all parties to disclose witness statements and documents briefs prior to the hearing. Despite their best efforts, the Citizen Respondents

²²⁴ Exhibit 76, Tab 1 Ontario's Permit to Take Water Program and the Protection of Ontario's Water Resources: Brief to the Walkerton Inquiry.

²²⁵ Evidence of Gordon Miller, Volume 9, p. 106.

²²⁶ Transcript, Evidence of Gordon Miller, Volume 9, pp. 147-148.

were, on occasion, unable to meet strict timelines. For instance, the witness statements of Nancy Doubleday and Dr. Mosquin were provided, but without the full advance notice required.

254. The ERT's Procedural Order, dated May 3, 2001, allows the ERT the authority to dispense with compliance with procedural directions.²²⁷ In view of the fact that the Citizen Respondents were not represented by legal counsel and were not familiar with the hearing process, the Chair appropriately provided some latitude to them with respect to meeting timelines for disclosure. However, there is no evidence that any of the other parties, including OMYA, suffered any prejudice. It is submitted that the conduct of the ERT was both fair and appropriate under these circumstances.
255. OMYA alleges in paragraphs 339 and 340 of its submissions that it was required to sit for long hours each day during the hearing and that this made it difficult for counsel to prepare for cross-examination. It is surprising that OMYA would complain about the length of the hearing days, since OMYA had explicitly requested that the hearing be expedited in order to meet a window of opportunity for construction. In fact, when counsel for the Council of Canadians suggested that there be a shorter hearing day, counsel for OMYA voiced objection.²²⁸ OMYA's counsel in response stated, "I would ask that we complete this hearing in the time allotted, and that would include reply."²²⁹ "...So my submission would be that we complete the hearing in a timely manner."²³⁰ The respondents submit that the length of the daily hearings was reduced and evening hearings eliminated for five of the seven weeks of the ERT hearings.
256. In paragraph 341 of its submission, OMYA expresses concerns about the Public Evening Meeting in which the Chair heard presentations from concerned members of the public.

²²⁷ ERT's procedural order dated May 31, 2001, paragraph 23.

²²⁸ Proceedings at Hearing, Volume 12, pp. 4 -7.

²²⁹ Proceedings at Hearing, Volume 12, p. 6.

²³⁰ Proceedings at Hearing, Volume 12, p. 7 lines 4 - 5.

OMYA alleges that Chair of the Tribunal directed counsel not to cross-examine individuals making presentations at the public meeting.

257. It is a common practice of the ERT (and for other administrative tribunals such as the Ontario Municipal Board) to hold a public evening session where people can make presentations. These sessions are specifically designed as an open forum to allow members of the public to express their views. The public evening forum can be extremely useful in ensuring that the concerns of members of the public are heard.
258. The Rules of Practice for the Environmental Assessment Board and the Environmental Appeal Board, ("ERT Rules") which were in effect at the at the time of the hearing allow for the participation of persons other than parties at a hearing. The Rules recognize that there can be a "participant" and a "presenter" at ERT hearings.²³¹ A participant may be a witness at the hearing, be questioned by the Tribunal and by the parties, and make oral and written submissions to the tribunal at the beginning and at the end of the hearing. A presenter is allowed to give evidence at a pre-arranged time, either during a Hearing's regular day-time session or at a special evening session. A presenter may also give the tribunal a written statement as a supplement to oral testimony. However, while participants or presenters are afforded the opportunity to make presentations, they do not have the rights and liabilities of a party. For example, although they can make presentations they cannot cross-examine witnesses, bring motions, or call witnesses.
259. The Chair of the Tribunal complied with the ERT Rules and followed the ERT's usual practice, in holding a public forum to afford members of the public an opportunity to make presentations. At the Public Evening Meeting, 27 members of the public came forward to make presentations and voice their opinions about OMYA's water taking.
260. The allegation that "the Chair directed counsel for OMYA and the Director not to cross-examine individuals making presentations" is incorrect and not supported by the evidence. Although there is no transcript available for the evening session, respondents

²³¹ Rules of Practice for the Environmental Assessment Board and the Environmental Appeal Board, approved November 3, 1998, Rules 19-21 and Rules 22-24.

recall that the Chair specifically asked the parties after each presenter had spoken whether they had any questions. In fact, the Chair arranged the Town Hall Forum evening session to accommodate the parties' ability to undertake cross-examination of the presenters. OMYA and MoE each had one counsel present during the evening session, and both intervened with at least one presenter. It is submitted that under the circumstances, OMYA was provided ample opportunity to cross-examine and exercised its rights in this regard.

(d) Communicating with Witnesses

261. OMYA alleges in paragraphs 344 to 345 of its submission that the Chair engaged in private discussions “with hearing participants, some of their supporters, and at least one witness called by the EBR Appellants.”
262. The Chair took great care to ensure that members of the public were aware that it was inappropriate to attempt to have direct communication with the Chair. In her decision, the Chair states "I took many opportunities to announce at the hearing the inappropriateness of such exchanges and to share information with all the parties that had been incidentally been given to me."²³²
263. The transcripts also reflect the extreme caution the Chair took in ensuring that members of the public did not attempt to communicate directly with her. For example when the hearing reconvened on October 9, 2001, the Chair stated:

So if you have any particular questions concerning procedure, you will need to do that in a public session. Hopefully there will not be a lot of questions that come up in order to curtail the witness evidence. But it will be very important for you not to be coming up and speaking to me B not that I don't want to speak to you. I do want to speak to you but if one party is speaking to me, other parties are wondering well, I wonder what is going on there. So it is going to be very important that we have an open session that everyone knows

²³² ERT decision February 19, 2002, p. 51.

exactly what is being said and what is being transpired from one party to another in particular to the Chair.²³³

264. It is submitted that the Chair acted cautiously and appropriately, by issuing warnings to the parties and the public that they were not to directly communicate with her. It is submitted that the Chair was scrupulous in ensuring that any communications by the public were done in an open forum so that all parties would have full knowledge of any communication. It is further submitted that under these circumstances the Chair did all that could reasonably be expected of a tribunal member to ensure that the members of the public did not attempt to approach her or communicate with her.
265. OMYA complains in paragraph 348 of its submissions about a number of documents, which were received by the Chair, including a letter from a Member of Parliament (MP). It was the Chair, in fact, who disclosed the letter to all the parties and explained to them that the secretary in the ERT office had inadvertently given the letter to her. The Chair also indicated she would rather not have seen the letter but since she had, she wanted to ensure that the parties also had an opportunity to review the letter.²³⁴
266. The Chair also queried whether OMYA's counsel wanted to adjourn the hearing or take any other action to deal with the matter. OMYA's counsel responded that he simply wanted to make his objection known on the record, but was content that this incident would not reoccur.²³⁵
267. It is submitted that the Chair was forthright and candid in disclosing the letter from the MP to all the parties. It is further submitted that the Chair gave OMYA's counsel an opportunity to take any action deemed appropriate to deal with the matter, and in fact asked OMYA's counsel if an adjournment was being sought to deal with the matter. OMYA's counsel did not indicate that any further action was required and indicated that

²³³ Proceedings at Hearing, Volume 14A, pp. 10-11.

²³⁴ Evidence of Bruce Reid, Catherine Clarke, Brian Kaye, Volume 21, pp. 245-248.

²³⁵ Evidence of Bruce Reid, Catherine Clarke, Brian Kaye, Volume 21, pp. 248-249.

his client was content that the incident would not recur. There is no evidence to suggest that that the letter had any influence whatsoever on the outcome of the hearing or raised any apprehension of bias. It is submitted, therefore, that the Chair's actions in addressing the issue of the letter from the MP were forthright, fair, and reasonable.

(e) The Alleged "Gift"

268. OMYA complains in paragraphs 350 to 354 of its submission that a Water Survey of Canada Staff Gauge, ("staff gauge") which was given to the Chair by an expert witness at the end of the final day of hearings, in an open forum with all the parties present, constituted a "gift". OMYA's main contention appears to be that providing a staff gauge created actual bias or a reasonable apprehension of bias on the part of the decision-maker.

269. The Supreme Court of Canada, in *Committee for Justice and Liberty et al. v. National Energy Board* [1978] 1 S.C.R. 369 (*National Energy Board*), [p 394] outlined the test of bias as follows:

The apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information . . . [The] test is "what would an informed person, viewing the matter realistically and practically and having thought the matter through conclude."²³⁶

270. The Supreme Court of Canada recently considered the application of the test for bias set out in *National Energy Board in R. v. S.(R.D.)*(1997), 151 D.L.R. (4th) 193 (S.C.C.). (*S.(R.D.)*). Cory J. for the majority stated at paragraph 111:

Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it

²³⁶ *Committee for Justice and Liberty et al. v. National Energy Board* [1978] 1 S.C.R. 369 (*National Energy Board*) at p. 394. See Appendix "G" attached.

²³⁷ *R. v. S.(R.D.)*(1997), 151 D.L.R. (4th) 193 at p. 111. See Appendix "H" attached.

²³⁸ *Ibid.* at pp. 229-30.

²³⁹ Letter from Mr. Mario Faieta to Mr. Alan Bryant dated April 3, 2002. See Appendix "I" attached.

calls into question an element of judicial integrity. Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice. See Stark, supra, at paras. 19-20. Where reasonable grounds to make such an allegation arise, counsel must be free to fearlessly raise such allegations. Yet, this is a serious step that should not be undertaken lightly.²³⁷

The onus of demonstrating bias lies with the person who is alleging its existence: Bertram, supra, at p. 28; Lin, supra, at para. 30. Further, whether a reasonable apprehension of bias arises will depend entirely on the facts of the case.²³⁸

271. According to the case law, the appropriate test contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case.
272. The ERT's counsel has requested that all the circumstances surrounding this alleged "gift" should be disclosed on appeal. On April 3, 2002, Mr. Mario Faieta, counsel for the ERT sent a letter to OMYA's counsel, indicating that he had read OMYA's Notice of Appeal to Divisional Court. In his letter, Mr. Faieta notes that paragraph 2 of the OMYA's grounds of appeal allege that the Tribunal breached the rules of natural justice by receiving a gift from a participant who was also an expert. Mr. Faieta concludes his letter by stating: "Given the serious nature of this allegation I expect that, as an officer of the court, you will also advise the court that the Tribunal returned this "gift," should this appeal proceed to a hearing."²³⁹ This letter was sent after the ERT hearing had concluded. However, since ERT's counsel has requested all the circumstances of this alleged "gift" be disclosed should OMYA raise this issue on appeal, the Citizen Respondents believe it is appropriate that the Minister be provided a copy of the letter.
273. It is submitted that when the evidence is considered in its totality it is evident that the staff gauge was presented by the expert witness to the Chair in an effort to inject some humour into what had been a lengthy, complex and adversarial process. It is submitted
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that under the circumstances it was evident that none of the parties, the members of the public in attendance at the hearing, or the Chair considered the staff gauge as a "gift" that was intended to influence, or that could have influenced the Chair's decision.

274. The expert who presented the staff gauge had been called as a witness by a Citizen Respondent three months before the presentation. He may not have been aware that such an action could be construed as inappropriate in a hearing before an administrative tribunal. However, it is clear that the Chair acted appropriately, as she returned the staff gauge to the expert witness after showing it to her colleagues at the ERT.
275. In light of these circumstances, a reasonable person would not conclude that the decision-maker would be biased in any way. Moreover, the evidence clearly indicates that the expert witness who presented the staff gauge to the Chair did so in an attempt at humour. It is submitted that the staff gauge does not constitute a gift as it was not an object of value and was subsequently returned by the Chair to the expert witness.
276. It is submitted that an allegation of bias against a tribunal member is an extremely serious matter and ought not to be made lightly. OMYA's assertions regarding bias on the part of the Chair are made without a scintilla of credible evidence and have no merit. It is submitted that spurious allegations against administrative tribunals fundamentally undermine public confidence in the legal process and the integrity of the justice system. It is submitted that the evidence when reviewed and considered in totality, clearly demonstrates that the Chair undertook to ensure that the hearing was fair, thorough and complete with ample opportunity for public participation.

PART VIII: CONCLUSION

277. The Citizen Respondents respectfully submit that for the foregoing reasons, OMYA's appeal to the Honourable Minister of Environment be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

November 10, 2002

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