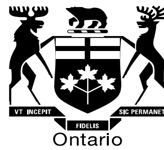
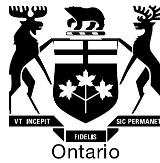


ANNUAL REPORT

Environmental Review Tribunal

April 1, 2006 to March 31, 2007



ANNUAL REPORT

Environmental Review Tribunal

April 1, 2006 to March 31, 2007

Table of Contents

Message from the Chair 1

The Tribunal's Mandate 2
Core Functions of the Tribunal 3
Rules of Practice and Practice Directions 5
In-House Learning Program 5

Tribunal Activities 6
Total Resolved Cases - 2004-2005 vs. 2005-2006 vs. 2006-2007 7
Total Cases in 2005-2006; 2006-2007 by Case Type 8
Total Number of Appeals/Applications Received by Case Type
Fiscal Years 2002-2003 to 2006-2007 9
Total Number of Requests for Hearing Received
Fiscal Years 2002-2003 to 2006-2007 10
Consolidated Hearings under the *Consolidated Hearings Act* 11
Summaries of Selected Decisions 12
Consolidated Hearings Act 12
Environmental Bill of Rights, 1993 15
Environmental Protection Act 22
Ontario Water Resources Act 32
Niagara Escarpment Planning and Development Act 37
Safe Drinking Water Act, 2002 51
Summaries of Selected Orders 52
Summaries of Appeals and Judicial Reviews
of Decisions of the Tribunal 62

Report on Performance Measures Fiscal Year 2006-2007 63

Appendix A - Overview of Relevant Legislation 68
Appendix B - Profile of Tribunal Members 78
Appendix C - Learning Program 83
Appendix D - Key Performance Goals and Objectives
Fiscal Year 2007-2008 85
Appendix E - Website Statistics - Downloads 90
Appendix F - Financial Report 91
Appendix G - Contact Information 92

Message from the Chair

This year's Annual Report describes the activities of the Environmental Tribunal for fiscal year 2006-2007.

This has been a busy year for the Tribunal. The number of appeals and applications received increased by 46% from last fiscal year. In July 2006, the Tribunal was named the Hearing Office for matters under the *Oak Ridges Moraine Conservation Act, 2001.*

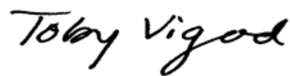
Further revisions were undertaken to our Rules of Practice and Practice Directions, which were posted on our website on September 18, 2006.

The Tribunal continues to improve its website and the information sources available to the public. All decisions of the Niagara Escarpment Hearing Office have been posted from 1989 to this fiscal year. Past decisions from all predecessor Boards as well as the Joint Board will be posted over the next few months, as the Tribunal is committed to providing an accurate archival section on its website.

We have exceeded our performance target for the scheduling of hearings and continue to improve our performance standard for the rendering of timely decisions.

During this past fiscal year, Paul Muldoon, Heather Gibbs and Dirk VanderBent were appointed as Vice-Chairs and Joyce Young was appointed as a part-time Member. Two Vice-Chairs' terms expired this past fiscal year: Don Martyn and Norman Crawford. I want to thank them for their contribution to the work of the Tribunal. As well, I would like to thank David Pearson, a part-time Member, since 1987, for his service over these many years and also thank Gary Harron for his contribution as a part-time Member from March 2003-September 2006.

Finally, I would like to thank all Tribunal Members and Staff for their continuing commitment to meeting our performance targets and enabling the Tribunal to fulfill its mandate.



Chair

June, 2007

The Tribunal's Mandate

The Environmental Review Tribunal (Tribunal) was established under the *Environmental Review Tribunal Act, 2000.*

The Tribunal is a quasi-judicial administrative tribunal, subject to procedural fairness, the rules of natural justice, requirements of its governing legislation and the *Statutory Powers Procedure Act*. The Tribunal adjudicates applications and appeals under the following statutes: *Consolidated Hearings Act, Environmental Assessment Act*, *Environmental Bill of Rights*, *1993, Environmental Protection Act*, *Niagara Escarpment Planning and Development Act, Nutrient Management Act*, *2002, Ontario Water Resources Act*, *Pesticides Act*, and *Safe Drinking Water Act, 2002.* The Tribunal also hears matters under the *Oak Ridges Moraine Conservation Act, 2001*. An overview of the legislation governing the Tribunal's work is provided in Appendix A.

Under the *Niagara Escarpment Planning and Development Act*, members of the Tribunal are appointed by the Minister of Natural Resources as Hearing Officers to conduct hearings. The Hearing Officers make recommendations concerning appeals of decisions of the Niagara Escarpment Commission (NEC) regarding development permit applications. Members are also appointed to conduct public hearings for the purpose of making recommendations regarding proposed Niagara Escarpment Plan (NEP) amendments and every 10 years, conduct hearings to review the NEP.

The Tribunal has the administrative responsibility for hearings requested under the *Consolidated Hearings Act.* Such hearings are conducted under the designation of the Office of Consolidated Hearings. Under the authority of the *Consolidated Hearings Act,* a Joint Board is established in order to eliminate a multiplicity of hearings before different tribunals under various acts on matters relating to the same undertaking. A Joint Board usually consists of members of the Tribunal and the Ontario Municipal Board. A Joint Board is empowered to hold a hearing to consider all of the matters under all of the acts to which the undertaking is subject and for which hearings are required.

The principal task of Tribunal members, who are Lieutenant Governor-in-Council appointees, is to conduct fair, efficient and impartial hearings. Tribunal members must consider all the evidence presented, and make decisions (or recommendations) with written reasons based on that evidence, in a manner that protects the environment and is consistent with the Tribunal's governing legislation. A profile of the Tribunal members is found at Appendix B.

Core Functions of the Tribunal

The Environmental Review Tribunal has four main functions which are:

1. **Pre-Hearings, Hearings and Decision Making**
2. **Staff Processing of Hearings**
3. **Mediation**
4. **Public Access to the Tribunal**

1. PRE-HEARINGS, HEARINGS AND DECISION MAKING

The Tribunal Members, all of whom are Order-in-Council appointees, are responsible for these functions which include the conduct of hearings and the issuance of written decisions.

All reports arising from appeals of development permit applications under the *Niagara Escarpment Planning and Development Act* (*NEPDA)* are required by legislation to be issued within 30 days of the conclusion of the hearing or within such longer period as the Minister of Natural Resources may allow. Niagara Escarpment Plan amendment application recommendations must be rendered no more than 60 days after the conclusion of the hearing or within such extended time as the Niagara Escarpment Commission may specify. Tribunal decisions on leave to appeal applications under the *Environmental Bill of Rights, 1993* are to be issued within 30 days of the filing date of the application, unless the Tribunal determines that, due to unusual circumstances, a longer period is required. In all other types of decisions, Tribunal members have endeavoured to render their decision within 60 days of the completion of the hearing or the filing of final written submissions (if ordered by the hearing panel).

2. STAFF PROCESSING OF HEARINGS

The processing of appeals/applications includes all administrative steps necessary to schedule and resolve an appeal/application from the date of filing to the closing of the file. The Tribunal hears appeals/applications/referrals pursuant to ten different statutes. When an appeal/application is received, it is dealt with through an administrative process that includes:

- screening the appeal/application for compliance with the Act under which the appeal/application was filed;
- assigning the appropriate hearing process which includes obtaining further information;
- scheduling the hearing;
- monitoring and managing the hearing process until a written decision is rendered and the file is closed.

3. MEDIATION

The use of mediation in the hearing process encourages the parties to discuss the issues in dispute in an attempt to narrow or settle their differences. The successful results often eliminate the need for a hearing or reduce the scheduled number of days.

The Members who conduct Tribunal mediations have received certified training. Mediation, which is offered in all appeal and application hearings (except in matters under the *NEPDA*) is conducted after a preliminary hearing and generally, 30 days before the commencement of a hearing. Should the parties choose not to participate, mediation services are available throughout the hearing process, upon request.

4. PUBLIC ACCESS TO THE TRIBUNAL

The Tribunal=s outreach function consists of a number of initiatives which include the distribution of guides that explain its role and procedures, and providing up-to-date information regarding the activities of the Tribunal on the website. The website tracks appeals/applications received, hearings scheduled, and also provides access to decisions, orders and forms, relevant statutes and the Tribunal's Rules of Practice and Practice Directions.

The Tribunal=s outreach function also includes staff responses to questions from parties, public speaking, and stakeholder consultation. The Tribunal seeks feedback regarding new Rules, policies, procedures and general operational issues from its Client Advisory Committee. The public can also provide feedback to the Tribunal by completing the form provided on the Tribunal's website.

The Tribunal's Rules of Practice and Practice Directions

The Tribunal's Rules of Practice and Practice Directions remain open to review and revision as circumstances and new legislation may dictate in order to reflect the changing needs of the Tribunal and the public. The Tribunal's Rules of Practice and Practice Directions are available on the Tribunal's website or by paper copy, upon request.

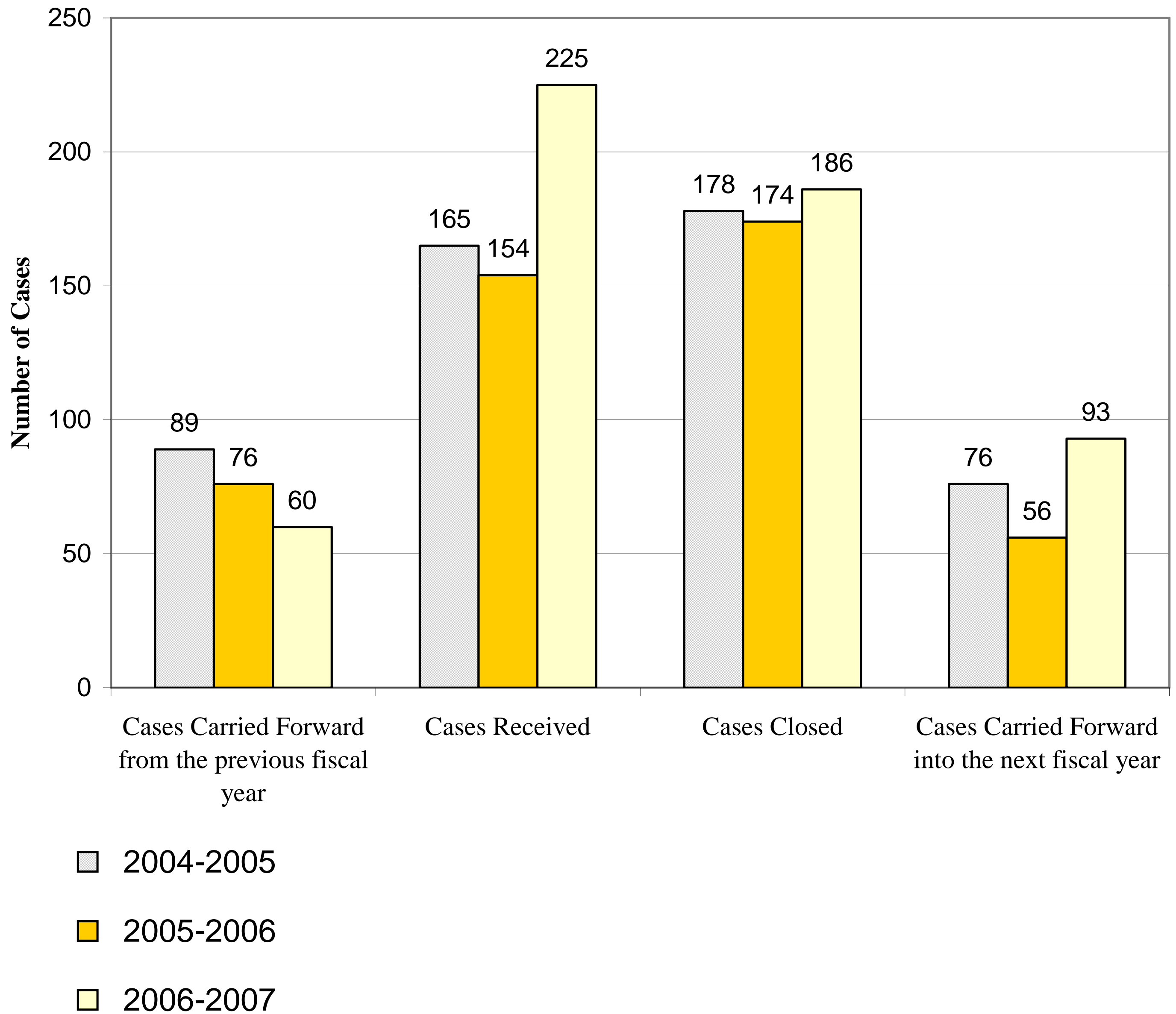
In-House Learning Program

The Tribunal continues to conduct an in-house Learning Program for its members and staff. The Learning Program provides an opportunity for the Tribunal to invite and hear guest speakers and to receive information on relevant environmental and planning issues. This fiscal year, the Tribunal hosted a number of outstanding speakers. A complete list of Learning Program events held in this fiscal year is provided at Appendix C.

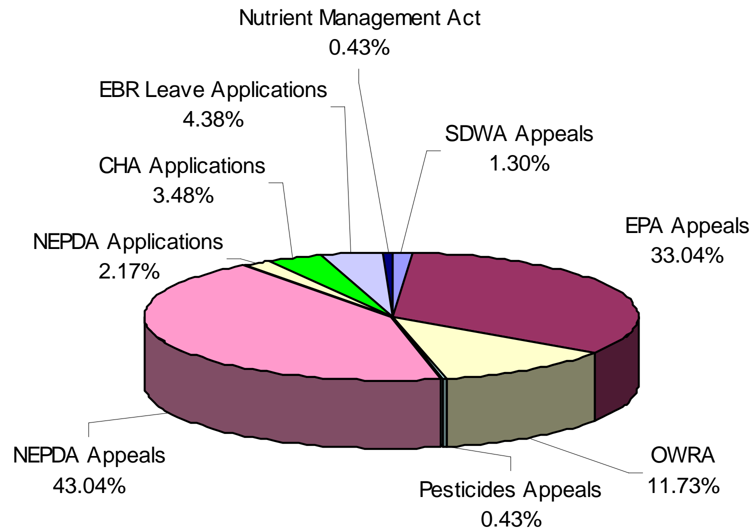
Tribunal Activities for 2006-2007

Case Type	No. of Unresolved Cases Carried Forward	No. of New Cases Received	No. of Cases Resolved by Decision of the Tribunal*	No. of Cases Resolved by Tribunal Approved Settlements	No. of Cases Closed by Other Means**	No. of Cases Carried Forward into 07-08 Fiscal Year	No. of Hearing Days held ***	No. of Motion Days held	No. of Mediation Days held	No. of Pre-Hearing Conferences held****	No. of Requests for Review of ERT Decisions
EPA											
Appeals	27	52	7	9******	16	47	40	11	11	N/A	
NMA, 2002											
Appeals	0	0	0	0	0	0	0	0	0	N/A	
OWRA											
Appeals	6	18	4	1	10	9	19	3	3	N/A	1
PA											
Appeals	0	0	0	0	0	0	0	0	0	N/A	
SDWA, 2002											
Appeals	1	1	0	1	0	1	0	0	0	N/A	
NEPDA											
Development Permit Appeals	18	105	62	0	42	13	37	4	N/A	33	
Plan Amendment Applications	1	0	1	0	0	0	0	0	N/A	N/A	
CHA											
Applications	5	1	2	0	0	4	25	5	0	N/A	
EBR, 1993**											
Leave to Appeal Applications	2	48	23	1	7	19	0	1	0	N/A	1
Total	60	225	99	12******	75	93	121	24	14	33	2

* Includes recommendations under the *NEPDA*.
** Withdrawal by applicant/appellant; case abandoned; settlement reached after mediation, etc.
*** Includes preliminary hearings.
**** Applies to Development Permit Appeals only.
***** Written hearings
****** Does not include case no. 03-080 re-opened and settled.

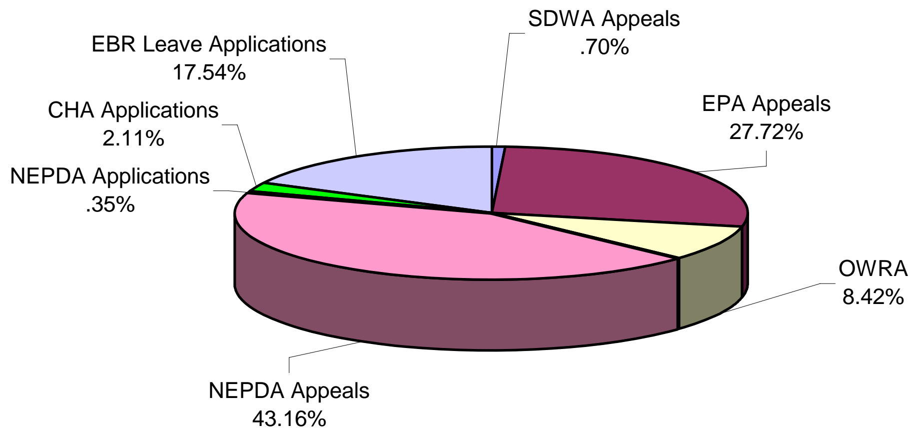

Total Number of Cases Carried Forward, Received and Closed
Number of Cases
250
200
150
100
50
0
89
76
60
165
154
225
178
174
186
76
56
93
Cases Carried Forward from the previous fiscal year
Cases Received
Cases Closed
Cases Carried Forward into the next fiscal year
2004-2005
2005-2006
2006-2007

Total Number of Cases in 2005-2006 by Case Type



Note: In 2005-2006, there were no applications referred under the *Environmental Protection Act*, the *Ontario Water Resources Act* and the *Environmental Assessment Act.*

Total Number of Cases in 2006-2007 by Case Type



Note: In 2006-2007, there were no applications referred under the *Environmental Protection Act*, the *Ontario Water Resources Act* and the *Environmental Assessment Act* and no appeals filed under the *Pesticides Act* or the *Nutrient Management Act.*

Total Number of Appeals/Applications Received by Case Type

Fiscal Years 2002 – 2003 to 2006 – 2007

	2002-2003	2003-2004	2004-2005	2005-2006	2006-2007
***Environmental Bill of Rights*, 1993**	**13**	**21**	**11**	**8**	**48**
Environmental Protection Act	**72**	**63**	**49**	**41**	**52**
***NEPDA –* Development Permits**	**69**	**84**	**74**	**82**	**105**
Nutrient Management Act, 2002*	**N/A**	**0**	**0**	**1**	**0**
Ontario Water Resources Act	**40**	**30**	**11**	**15**	**18**
Ontario Regulation 459 (Walkerton)**	**47**	**3**	**N/A**	**N/A**	**N/A**
Pesticides Act	**0**	**0**	**0**	**1**	**0**
Safe Drinking Water Act,* 2002**	**N/A**	**18**	**15**	**0**	**1**

* **Date Proclaimed July 1, 2003**
** **Date Revoked June 1, 2003**
*** **Date Proclaimed June 1, 2003**

Total Number of Requests for Hearing Received

Fiscal Years 2002 – 2003 to 2006 – 2007

	2002-2003	2003-2004	2004-2005	2005-2006	2006-2007
Consolidated Hearings Act	**2**	**4**	**5**	**2**	**1**
***NEPDA* – Plan Amendments**	**1**	**1**	**0**	**4**	**0**
Oak Ridges Moraine Conservation Act, 2001*	**N/A**	**N/A**	**N/A**	**N/A**	**0**

***On July 31, 2006 the Tribunal received authority to be the Hearing Officer**

Consolidated Hearings under the *Consolidated Hearings Act*

The Environmental Review Tribunal has administrative responsibility for the *Consolidated Hearings Act* (*CHA*). This administrative responsibility is conducted under the designation of the Office of Consolidated Hearings. This fiscal year, there was one request for a Consolidated Hearing, five were carried forward from the previous fiscal year, for a total of six on-going proceedings.

The following table sets out the legislation relevant to potential hearings that the Joint Board[1] was requested to consolidate.

Case Name and Number	***NEPDA*[2] (Plan Amendment)**	***Environmental Protection Act***	***NEPDA*[2] (Development Permit)**	***Planning Act***	***Ontario Planning & Development Act***	***Expropriations Act***
Central Milton Holdings Ltd./665497 Ontario Limited (99-036)	•			•		
Rock Garden Farms (05-027)			•	•		
Creekbank Developments Limited (05-109)				•	•	
Hamilton General Homes (04-044)	•			•		
The Corporation Of the Municipality of Clarington (04-164)				•		•
Fisher Farms (06-037)			•	•		

[1] For further information, refer to The Tribunal's Mandate on page 2 of this report.
[2] *Niagara Escarpment Planning and Development Act*

Summaries of Selected Decisions

The following are summaries of all cases heard this fiscal year, except those cases where the Appellant, Applicant or Proponent withdrew before a Hearing. All references to the Tribunal's Rules of Practice and Practice Directions reflect those provisions that were in place at the time the decision or order was issued.

Consolidated Hearings Act

The Corporation of the Municipality of Clarington

The Corporation of the Municipality of Clarington ("Proponent") filed for a hearing before a Joint Board pursuant to section 3 of the *Consolidated Hearings Act* regarding an expropriation by the Proponent under the *Expropriations Act* ("*EA*"), and regarding Appeals of its Official Plan Amendment No. 39, filed pursuant to subsection 17(36) of the *Planning Act* ("*PA*") by Mr. Glen Ransom, the Port Darlington Harbour Company ("PDHC"), and Wiggers Custom Yachts Limited ("Wiggers"). Hearings of Necessity were requested pursuant to section 6 of the *EA*, but the request was subsequently withdrawn.

A settlement of the appeal of Official Plan Amendment No. 39 was reached.

The key issues remaining before the Joint Board were as follows:

1. Whether the Town has the jurisdiction pursuant to the *Municipal Act, 2001* ("*MA*") and the *EA* to expropriate lands owned by PDHC given the creation of the PDHC pursuant to pre-Confederation legislation to establish a harbour and related facilities on the lands.
2. Whether the Town has the jurisdiction pursuant to the *MA* and the *EA* to acquire lands used or intended to be used for the purposes of a harbour, such being an area of exclusive federal jurisdiction.
3. Whether the proposed taking of the lands is fair, sound and reasonably necessary in the achievement of the objectives of the Town.
4. Whether the proposed expropriation of the lands will implement the objectives of the Town's Official Plan and the Port Darlington Neighbourhood Secondary Plan respecting the establishment of municipal parks, the protection and enhancement of the natural heritage system and natural heritage features, and the control of environmental protection areas, hazard lands and the regulatory shoreline area applicable to the lands.
5. Whether the proposed expropriation of the lands is consistent with the provisions of the Provincial Policy Statement (2005) ("PPS") made under section 3 of the *PA* respecting the portion of the lands that has been determined by the Ministry of Natural Resources to be a Provincially Significant Wetland, and the provisions of the PPS respecting natural heritage, natural hazardous lands adjacent to shoreline of Lake Ontario or adjacent to rivers or streams which are impacted by flooding hazards and/or erosion hazards, as they apply to lands.
6. Whether the roadways illustrated on Plan 34501933 are owned by PDHC or the Town; whether they are subject to the proposed expropriation, and if not, whether they should be.

With respect to the jurisdictional issues, the Joint Board found that the lands had never been used as harbour facilities and that PDHC is not a port authority under the *Canada Marine Act*, 1998. Consequently, the Joint Board held that the Proponent has the jurisdiction to act under the *EA* with respect to the lands in question.

The Joint Board also found that the proposed expropriation was fair, reasonable and sound, but made no comment on the most appropriate use of the property and specifically stated that the Decision should not be construed as a specific finding as to the highest and best use of the property for valuation purposes.

With respect to the PPS and the Official Plans, the Joint Board found that the proposed expropriation by the Proponent, and the uses intended by it, were consistent with the PPS, and that the expropriation and intended uses conform to and will implement the Town's Official Plan and any secondary plans.

In regards to the ownership of the roadways, after reviewing the evidence the Joint Board found that the roadways were not property of the PDHC, and should neither be included in the expropriation nor compensated for.

For the reasons outlined above, the Application for Expropriation before the Joint Board was granted.

Decision released: December 12, 2006 (Case No.: 04-164)

Rock Garden Farms

The Joint Board considered an application pursuant to section 3 of the *Consolidated Hearings Act*, by Rock Garden Farms ("Proponents") to allow a commercial/retail operation and related facilities associated with the sale of farm and other fresh produce, to allow the construction of a greenhouse on the agricultural portion of the lands, and to recognize the existence of a farm pond on the property and the existing construction of part of the Rock Garden Farms. In order to proceed with the undertakings, the Proponents required an amendment to the Niagara Escarpment Plan ("NEP") and Development Permits under the *Niagara Escarpment Planning and Development Act* ("*NEPDA*").

The main issues before the Joint Board were as follows:

1. Is the proposed Niagara Escarpment Plan Amendment ("*NEPA*") justified and consistent with the purpose and objectives of the *NEPDA* and the NEP?

The Joint Board found that the Proponents had discharged their duty pursuant to the NEP and the *NEPDA* to justify the NEPA. The evidence indicated that the NEPA was appropriate and the represented good planning. The Joint Board also noted that the approval of this particular NEPA

should not be interpreted as a precedent or an endorsement of other proposals relating to similar commercial operations in the NEP area.

2. If the NEPA is justified, then are the proposed Town of Caledon Official Plan Amendment ("OPA"), proposed Site Plan and proposed Site Plan Conditions appropriate?

Neither of these municipal matters were in contention by the end of the Hearing. The Joint Board found that the Official Plan Amendment, a revised Site Plan and the Site Plan Conditions were appropriate and should be approved.

3. What are the appropriate conditions of approval for the Development Permit for the pond?

The Parties reached an agreement as to the appropriate conditions of the approval for the pond, and the Joint Board approved the Development Permit Application subject to the agreed upon conditions.

4. What are the appropriate conditions of approval for the Development Permit for the greenhouse?

The Parties reached an agreement as to the appropriate conditions of the approval for the greenhouse, and the Joint Board approved the Development Permit Application subject to the agreed upon conditions.

5. What are the appropriate conditions of approval for the Development Permit for the commercial establishment?

Two issues remained in dispute with respect to the appropriate conditions of approval for the commercial establishment. One issue was whether a security deposit was appropriate, and the second issue related to limits on the proportions of the types of products to be sold in the commercial establishment.

With respect to the issue regarding the security deposit, the Joint Board found that there was no added value in the use of a security deposit in this case, though they noted that there may be other situations where such a condition would be appropriate.

With respect to the issue about the types of products to be sold in the commercial establishment, it appeared to the Joint Board that the contentious issue was a factual dispute regarding the proportions of onsite grown products and other products, including imported products sold at Rock Garden Farms. The issue of appropriate conditions of approval for the Development Permit application became intertwined with some of the considerations relevant to the NEPA and OPA. The NEPA and OPA provide guidance for what should be contained in the Development Permit conditions. The conditions of the Development Permit, as a more detailed site-specific document will often go beyond the wording of the NEPA and OPA, but the Development Permit must remain consistent with the higher level documents. The Joint Board did not find any justification for deviating from the standards set out in the wording of the unopposed OPA, and disagreed with the

NEC's positions that the Development Permit should impose a standard different than that of the OPA. However, the Joint Board did note that it wished to ensure that the OPA standard was enforceable through the Development Permit, which is the document that must be complied with under section 24 of the *NEPDA*. The Joint Board found that this could be addressed by adding a stipulation to the Proponents' proposed wording to ensure that the clear direction in the OPA is incorporated in the Development Permit conditions of approval by means of a clear reference. The Joint Board approved the Development Permit application for the commercial establishment subject to amended conditions.

In summary, the Joint Board approved the Niagara Escarpment Plan Amendment, the Official Plan Amendment for the Town of Caledon, the Site Plan and Site Plan Conditions, and the Development Permit Applications, subject to any agreed upon conditions.

Decision released: September 13, 2006. (Case No.: 05-027)

Environmental Bill of Rights, 1993

<u>Safety-Kleen Canada Inc. v. Directors, Ministry of the Environment</u>

This was an application by Safety-Kleen Canada Inc. ("Applicant") for leave to appeal the decisions of two Directors to respectively issue a Certificate of Approval (Air) under section 9 of the *Environmental Protection Act* ("*EPA*") and a Certificate of Approval (Waste) ("CofAs") under section 39 of the *EPA*, to Dunn Paving Company. The CofAs are for the operation of a hot mix asphalt plant and permit the use and storage of waste-derived fuel, used as an alternative fuel source for production purposes.

The Tribunal addressed the issue of whether the Applicant had standing under section 38 of the *Environmental Bill of Rights, 1993*. While the interest of the Applicant in the Director's decision was at least partially based on economics, the Tribunal held that the Applicant's interest also had an environmental component. The Tribunal made no pronouncement on whether an exclusive economic interest would be sufficient to meet the requirements of section 38.

The Tribunal denied leave to appeal to the Applicant for three reasons. First, the facility was exempted from a mandatory Hearing under section 30(1) of the *EPA*, contrary to the assertion of the Applicant. Thus, the decision by the Director not to require a Hearing was reasonable. Second, while the CofAs contained less stringent measures than did the Certificate of Approval issued to the Applicant for its own facility, it is the consistency in the level of environmental effects to which facilities are restricted that is relevant, not consistency in the approval conditions. On this issue, the Applicant did not provide a substantial and relevant information base to establish inconsistency in the level of environmental effects. Third, the Applicant's allegations of environmental harm were not founded on a substantial and relevant information base.

Decision released: May 4, 2006 (Case Nos.: 05-147/05-148)

Cassidy v. Director, Ministry of the Environment

This was an application for Leave to Appeal the issuance of a Certificate of Approval by the Director, Ministry of the Environment under section 53 of the *Ontario Water Resources Act* to OMYA Canada Inc. regarding an industrial sewage works associated with a quarry. After discussions among the parties, the Applicant, Michael Cassidy undertook to withdraw five of the six grounds in his application. In subsequent discussions, Mr. Cassidy reached an agreement with OMYA and the Director regarding the provision of the annual performance report on the operation of the industrial sewage works to Mr. Cassidy by OMYA. In light of the resolution of the issues, Mr. Cassidy withdrew his application. The Tribunal then dismissed the proceedings.

Decision released: June 9, 2006 (Case No.: 06-004)

Bogan v. Director, Ministry of the Environment

Sandra Bogan, Gilles Chasles, Yury Churkin, Annick Guibert, Martin Guibert, Martin and Kristy Krumins, Louis and Erin Laforest, Rocco Matricardi, Carla J. Miner, Harold Moore, Scott K. Plante, and Vincent Lavoie on behalf of the Richardson Corridor Community Association, the Stittsville Village Association, NoDump.ca and Ottawa Landfill Watch, (the "Applicants") filed an application for Leave to Appeal pursuant to section 38 of the *Environmental Bill of Rights*, 1993 ("*EBR*"), with respect to a decision of the Director, Ministry of the Environment ("MOE") to issue an Amended Certificate of Approval ("CofA") to Waste Management of Canada Corporation ("Waste Management").

The CofA under dispute amended and replaced the previous CofA issued to Waste Management. It permitted the operation of two permanent enclosed flares, one existing and one new, to incinerate the landfill gases collected at the landfill.

The Tribunal first determined that the Applicants had met all the requirements of standing to seek Leave to Appeal under section 38(1) of the *EBR*. The Tribunal then applied the test for granting Leave to Appeal in section 41 of the *EBR*. The main issue before the Tribunal was whether the Applicants met the two-pronged test for Leave to Appeal as outlined in section 41.

In applying the test, the Tribunal adopted the method used in *Simpson v. Ontario (Director, Ministry of Environment)* (2005), 18 C.E.L.R. (3d) 123. In particular, the Tribunal found that the Applicant(s) do not have to establish that

> no reasonable person could have made the decision, or that significant harm will result. Instead the Applicants must show that it *appears that there is good reason to believe* no reasonable person could have made the decision in question, and it appears that the decision could result in significant harm to the environment.

The Applicants raised a number of issues in their submissions to the Tribunal. Many of the grounds submitted had common elements, and the Tribunal chose to address the following common grounds

raised by the Applicants:

1. The CofA failed to address existing odour problems created by the landfill.

On this issue, the Tribunal found that it appears no reasonable person could have decided to issue a CofA without requiring the means to control odour emanating from the facility. Therefore, Ground 1 satisfied the first branch of the section 41 test for Leave to Appeal.

2. The application for the operation of the landfill gas-to-energy facility and bioremediation of petroleum-contaminated soils should have been considered separately from the proposal for additional landfill gas flares.

While the Tribunal did not disagree with the Applicants' allegation that the operation of a landfill gas-to-energy facility and soil bioremediation operation would create environmental impacts that were "unique" and different from the impact of landfill gas flares, there was no evidence put forward as to why the difference in impacts could not be addressed in a single application. The Applicants did not provide sufficient technical or scientific evidence, nor did they reference any part of the *EPA* that would suggest that it is improper to process approval for more than one type of equipment in a single CofA. The Tribunal, therefore, found that ground 2 had not met the first branch of the section 41 test.

3. The model used to predict point-of-impingement concentrations is inadequate.

The Applicants did not cite any statutory, regulatory, or policy provisions that suggest the model employed to assess the Waste Management application was improper, nor did they present any technical or expert evidence to establish that use of the prescribed model would provide invalid results. The Tribunal did not rule on whether the model employed was adequate or not, but found that there was insufficient information to conclude that no reasonable person could have relied on the model, having regard to the relevant law and policies developed to guide decisions of that kind. As a result of the Applicants not meeting the burden of establishing a substantial and relevant information base, the Tribunal found that on this ground, the Applicants did not meet the first branch of the section 41 test.

4. The contaminant emissions analysis is incomplete and inaccurate.

As with grounds 2 and 3, the Applicants failed to put forward sufficient professional or technical evidence. The Tribunal was unable to conclude that it appeared that no reasonable person could have issued a CofA for an application based upon the emissions analysis as described. Therefore, this ground did not meet the first branch of the section 41 test.

5. The calculated point-of-impingement concentrations for benzene are not in accordance with O.Reg. 419/05 made under the *EPA*.

The Tribunal concluded that it appeared that no reasonable Director could issue a CofA based on a

review that is not in accordance with the MOE's designation in its guideline document on O.Reg 419/05.

On grounds 1 and 5, the Tribunal found that it appeared that there was good reason to believe that no reasonable person, having regard to relevant law and government policies, could have made the decision in question; and that the decision in respect of which the Appeal was sought could result in significant harm to the environment, within the meaning of section 41 of the *EPA*. The Tribunal granted leave to appeal the Director's decision to issue the Amended CofA on the ground that the CofA did not address adverse effects from odour. The Applicant Carla J. Miner was granted leave on the ground that emissions for benzene were not assessed in a manner consistent with the Ministry's designation for benzene. The application for Leave to Appeal was granted only on the grounds specified in the Decision.

Decision released: February 23, 2007 (Case Nos.: 06-140/141/142/143/144/145/146/147/148/149/150/151/156/157)

Robins v. Director, Ministry of the Environment

Ken Robins, George Burbidge, and Jenifer Burbidge ("Applicants") filed an application for Leave to Appeal pursuant to section 38 of the *Environmental Bill of Rights*, 1993 ("*EBR*"), with respect to a decision of the Director, Ministry of the Environment to issue a Permit to Take Water (PTTW) to Jancal Power Ltd. for water taking from the Rocky Saugeen River located in the County of Grey.

The Applicants' grounds for appeal related to concerns respecting variations in the volume of water discharged from the Jancal Station, and increased water temperature during the summer months, which would have a deleterious impact on the aquatic ecosystem in the area in and around the Jancal Station. Jancal Power Ltd. was issued a PTTW permit under section 34 of the *Ontario Water Resources Act* ("*OWRA*").

The Tribunal first determined that the Applicants had met all requirements of standing to seek Leave to Appeal under section 38(1) of the *EBR*. The Tribunal then applied the test for granting Leave to Appeal under section 41 of the *EBR*. The main issue before the Tribunal was whether the Applicants met the two-pronged test for Leave to Appeal in section 41 of the *EBR*. It was noted that the approach to applying the section 41 test may be found in *Simpson v. Ontario (Director, Ministry of Environment)* (2005), 18 C.E.L.R. (3d) 123, *Residents Against Company Pollution v. Ontario (Director, Ministry of Environment and Energy)* (1996), 20 C.E.L.R. (N.S.) 97, and *Grey (County) Corp. v. Ontario (Director, Ministry of Environment)* (2005), 19 C.E.L.R. (3d) 176 ("*Grey*").

The following grounds were held to be relevant to the section 41 *EBR* test applied by the Tribunal:

1. The PTTW fails to include adequate conditions to ensure that the temperature of the water discharged from the Jancal Station will not endanger the River's cold-water habitat.

2. The PTTW permits pulsing of the River flow during power outages and other interruptions in

the Jancal Station's operations, contrary to the stated requirement that the dam shall be run as a Run of the River dam. When pulsing occurs, stream flow can be reduced to a rate that will cause interference with the natural functions of the River.

Grounds 1 and 2 were considered and ruled on together. The Tribunal found that there appeared to be good reason to believe that no reasonable person could have made the decision to issue the PTTW because:

1) The decision allowed for exceptions to the Run of the River Requirement, to allow pulsing of the River, which creates potential risk of harm to the River's aquatic wildlife and habitat.
2) The decision did not provide minimum temperature specifications for water discharged downstream, thereby allowing for the potential risk to the downstream River habitat.
3) The decision failed to impose any requirement on Jancal Station's owner to resolve concerns raised by persons or government authorities (in this case the Ministry of Natural Resources) ("MNR") who have been notified and consulted on the proposed water undertaking.

3. The Director abdicated his responsibility to conduct his own evaluation of the environmental impact of high water temperatures and pulsing on the River's habitat. Instead, he relied on the Water Management Plan ("WMP"), which inadequately addresses these concerns.

The Tribunal found that there appeared to be good reason to believe that no reasonable person could have made the decision to issue the PTTW because the decision was formulated on the assumption that the MNR had sole jurisdictional control over the dam, and the Director did not fully discharge his responsibility to independently consider the matters required by the accompanying O. Reg. 387/04, the Water Taking and Transfer regulation under the *OWRA*. The Tribunal found that the Director could not delegate his responsibilities under the *OWRA* to another Ministry.

4. The Director issued the PTTW without considering the 2006 Water Temperature Study, which was reasonably available to him.

At issue, was whether the Director should have waited to issue the PTTW, as a Water Temperature Study was set to be made available to him shortly. The Water Temperature Study was released on October 12, 2006. The MOE chose to issue the PTTW on October 5, 2006. The Tribunal agreed with the Applicants that there was no pressing urgency to issue the PTTW. Further, as the Water Management Plan of the Jancal Station indicated that water temperature should be taken into consideration, the Study would have been relevant to the Director's consideration of Jancal's application. The Tribunal also found that the Director's decision did not adopt the precautionary approach, nor exercise caution in favour of the environment. The Ministry of the Environment staff decided to pursue the findings of the (then) forthcoming Water Temperature Study outside the Permit Review Process.

5. The PTTW was issued for a term of ten years, despite the fact that the Director was aware that there were legitimate concerns regarding the water temperatures and pulsing of the River flow which required further evaluation and consideration. The term of the PTTW should have been no more than one or two years.

The Tribunal found in favour of the Applicants' argument that there was a real foundation for concerns regarding the potential risk to the River habitat due to pulsing and high water temperatures, which had not been resolved. Further, the Tribunal found that there was clearly documented and important information in the Water Management Plan, which was incorporated in the PTTW. For the preceding reasons, the Tribunal found that it appears that there was reason to believe that no reasonable person could have made the decision to issue the PTTW in question for the maximum allowable term of ten years.

In applying the second part of the section 41 test for leave to appeal under the *EBR*, the Tribunal followed the reasoning as set out in *Grey*, that where a sensitive area has been studied, but not well-studied and there is a recognized uncertainty about the impacts of a Director's decision, the Tribunal must simply assess whether it appears that significant environmental harm could result from that decision. The Tribunal found that the Director's decision had not fully addressed the problem with high temperatures of the water being discharged downstream, and that the conditions in the PTTW did not appear to adequately mitigate against such potentially significant harm.

On each ground the Tribunal found the Applicants had established a real foundation for the Tribunal to conclude that it appeared that there was good reason to believe that no reasonable person could have made the decision to issue the PTTW, having regard to relevant law and government policies, and that it appeared that the Director's decision could result in significant harm to the environment. The Application for Leave to Appeal was granted in its entirety.

Decision released: March 1, 2007 (Case Nos.: 06-124/126/127)

<u>Valastro v. Director, Ministry of the Environment</u>

Anna Maria Valastro appealed the decision of the Director, Ministry of the Environment to amend a Provisional Certificate of Approval (Waste Disposal Site) ("CofA") issued to the Ministry of Natural Resources for a Waste Disposal Site (Composting) for the disposal of carcasses of cormorants at Presqu'ile Provincial Park.

Ms. Valastro originally indicated that the appeal was brought under section 139 of the *Environmental Protection Act* ("*EPA*"), but was later informed by the Tribunal that only the applicant or holder of a CofA has standing to appeal to the Tribunal under section 139 of the *EPA*. Therefore, the Tribunal had no jurisdiction to hear the Appeal under section 139 of the *EPA*. The Tribunal requested that Ms. Valastro clarify whether she intended to apply for Leave to Appeal under section 38 of the *Environmental Bill of Rights, 1993* ("*EBR*"), and if so, to provide submissions on the Tribunal's jurisdiction to consider such an application. The Director was requested to provide reply submissions.

The Tribunal received submissions from both Parties. The issue before the Tribunal was whether Ms. Valastro had the right to bring an application for Leave to Appeal the Director's amendments to the CofA under the *EBR*.

Section 38 of the *EBR* lists four requirements of an applicant seeking Leave to Appeal, one of them being that the decision must be a decision whether or not to implement a proposal for a Class I or II

instrument requiring notice under section 22 of the *EBR*. The Tribunal found that because the Minister's opinion under section 32(2) of the *EBR* was that the amendment of the CofA was a step towards implementing an undertaking that had been exempted by a regulation under the *Environmental Assessment Act*, the Director's decision to amend the CofA was exempted from the notice requirement in section 22.

The Tribunal held that as a result, the requirements in section 38 for standing to bring an application for Leave to Appeal under the *EBR* had not been met. The Tribunal dismissed the application for lack of jurisdiction.

Date Released: July 6, 2006 (Case No.: 06-036)

Davidson v. Director, Ministry of the Environment

Jessie Davidson ("Applicant") filed an application for Leave to Appeal pursuant to section 38 of the *Environmental Bill of Rights*, *1993* ("*EBR*"), with respect to a decision of the Director, Ministry of the Environment to issue a Permit to Take Water ("PTTW") under section 34 of the *Ontario Water Resources Act* ("*OWRA*") to Aquafarms 93 for the purpose of water-taking from wells for commercial water bottling.

The Applicant cited a number of issues in her application. The Tribunal addressed the following five grounds on which the Applicant submitted that Leave to Appeal should be granted:

1. Uncertainty of monitoring data upon which the granting of the PTTW is based, including whether water taking has resulted in a reduction in water flow from a regional bedrock spring.

2. The issuance of a 10-year instead of a two-year PTTW.

3. The issuance of the PTTW prior to the release of the final hydrogeological report.

4. Flaws in pump test methodology.

5. The limited nature of the monitoring network required by the PTTW.

The Tribunal first determined that the Applicant met all the requirements of standing to seek Leave to Appeal under section 38(1) of the *EBR*. The Tribunal then applied the test for granting Leave to Appeal under section 41 of the *EBR*. The Tribunal found that, on grounds 1, 2, and 3, it appeared that there was good reason to believe that no reasonable person, having regard to relevant law and government policies, could have made the decision; and that the decision under Appeal could result in significant harm to the environment. Therefore, Leave to Appeal the decision of the Director to grant the PTTW to Aquafarms, was granted pursuant to section 41 of the *EBR*. The Tribunal further decided that the scope of the appeal shall not be limited to the three grounds on which the application had been granted.

Additionally, section 42(1) of the *EBR* states:

> 42. (1) The granting of leave under section 41 to appeal a decision stays the operation of the decision until the disposition of the appeal, unless the appellant body that granted the leave orders otherwise.

Aquafarms requested that the Tribunal lift the Stay, as otherwise, it submitted that it would suffer irreparable harm to its business operations. The Tribunal found that although the decision in respect of which an Appeal was sought could have resulted in significant harm to the environment, Aquafarms had been operating under a similar PTTW for a number of years, and there was little danger of irreparable harm to person or property in the short term if Aquafarms were allowed to continue operations. The Tribunal lifted the Stay.

Decision released: September 1, 2006 (Case No.: 06-040)

McRae v. Director, Ministry of the Environment

Ken McRae ("Applicant") filed an application for Leave to Appeal pursuant to section 38 of the *Environmental Bill of Rights*, 1993 ("*EBR*") with respect to a decision of the Director, Ministry of the Environment to issue a Permit to Take Water (Ground Water) ("PTTW") under section 34 of the *Ontario Water Resources Act* ("*OWRA*") to 1374537 Ontario Ltd. and Findlay Creek Properties, allowing them to take water for the purpose of dewatering during construction of a trunk sewer and stormwater management pond. The PTTW was a renewal of a previous permit issued to the Instrument Holder. The Applicant was concerned that the PTTW did not have adequate control requirements.

Following a meeting between the Parties, the Tribunal was informed that four additional conditions would be added to the PTTW that addressed the Applicant's concerns. Therefore, the Applicant proposed to withdraw his application for Leave to Appeal. Under Rule 179 of the Rules of Practice and Practice Directions, where there has been a proposed withdrawal of an application, the Tribunal shall issue a Decision dismissing the proceeding. The Settlement Agreement was accepted, the PTTW was amended to incorporate its terms and conditions and the application for Leave to Appeal was dismissed.

Decision released: November 22, 2006 (Case No.: 06-120)

Environmental Protection Act

Johnson v. Director, Ministry of the Environment

On April 20, 2006, Sheila McNamara filed an application for costs against the Director, Ministry of the Environment ("MOE") in relation to an appeal by Margaret Johnson, owner of property adjacent to that of Ms. McNamara, under section 140 of the *Environmental Protection Act* ("*EPA*"). The subject of the appeal was a Director's Order issued under section 157.3(5) of the *EPA* regarding the operation of a wood-fired sauna located on a Ms. Johnson's cottage property in the Township of

Bonnechere Valley. Ms. McNamara had requested an investigation under Part V of the *Environmental Bill of Rights, 1993* ("*EBR*") of the impacts from the wood smoke emissions from the sauna. Ms. McNamara sought and received Party status in the appeal by Ms. Johnson. Pursuant to a mediation session held between the three Parties, prior to the Hearing, a resolution was reached between Ms. Johnson and the Director. Ms. Johnson sought to withdraw her appeal. Ms. McNamara was not content with the settlement. Prior to the Tribunal issuing its Decision dismissing the appeal on March 15, 2006, the Tribunal required submissions on the appropriateness of the two-Party settlement.

In support of her application for costs, Ms. McNamara submitted that the Director's conduct leading to a two-Party settlement agreement directly resulted in the proceedings being extended and increased legal costs on her behalf.

The Tribunal has the discretionary power to award costs under most proceedings that come before it. The costs sought by Ms. McNamara, however, fell under the narrower costs powers in section 17.1 of the *Statutory Powers Procedure Act* ("*SPPA*") and Rules 193 and 194 the Tribunal's Rules of Practice. The issue, as the Tribunal viewed it, was whether the Director's conduct was unreasonable, frivolous, vexatious or in bad faith. A finding of such conduction is a statutory pre-requisite to the awarding of costs under section 17.1(2)(a) of the *SPPA*. The Tribunal also noted, that even when conduct is found to have been improper, the Tribunal has discretion and may elect *not* to award costs.

In determining whether the Director's conduct was improper, the Tribunal considered the motivation of the Director. The Tribunal found that the Director rightfully put a priority on achieving a compromise with Ms. Johnson, and did not engage in any vexatious or bad faith conduct in any other part of the proceeding. The Tribunal also considered whether the actions of the Director were groundless or without substance or "frivolous" in nature. Bad faith and vexatious conduct involve a degree of improper motivation. In this case, the Tribunal found no evidence of improper motivation. Finding that "unreasonable" conduct has a lower a threshold than improper motivation, the Tribunal found that the proceedings could have been shortened if the Director had entered into a settlement process with all three Parties instead of two, but that the Director did not force Ms. Johnson to accept the two-Party agreement and withdraw her appeal. Therefore, the Tribunal found that the Director's actions were not unreasonable. Additionally, it was found that the Director's actions were in accordance with the Tribunal's Rules under Rule 193(d).

The application for costs was dismissed.

Decision released: June 8, 2006 (Case No.: 05-031).

<u>The Corporation of the County of Simcoe v. Director, Ministry of the Environment</u>

The Corporation of the County of Simcoe ("Appellant") filed an appeal pursuant to section 139 of the *Environmental Protection Act* ("*EPA*") with respect to an amendment to a Provisional Certificate of Approval ("CofA") issued by the Director, Ministry of the Environment ("MOE") for

the Mount St. Louis Landfill Waste Disposal Site located in the Township of Oro-Medonte, County of Simcoe.

Before the Preliminary Hearing, the parties reached a settlement. Under Rule 172, the Tribunal reviewed the settlement agreement that altered the decision under appeal to ensure that it was in accord with the Tribunal's Practice Direction for Consideration of Agreements and not adverse to the public interest.

The Tribunal found that the proposed amendments to the CofA adequately addressed the public interest in environmental protection. Pursuant to section 179, the agreement to amend the CofA was accepted and the appeal was dismissed.

Decision released: April 20, 2006 (Case No.: 05-110)

Halton Recycling Ltd. v. Director, Ministry of the Environment

This was an appeal by Halton Recycling Ltd.("Appellant") under section 140 of the *Environmental Protection Act* ("*EPA*") of a Director's Order issued under section 157.3(5) of the *EPA*, limiting the intake of organic waste for compost at the Appellant's recycling facility. The Appellant allegedly received a quantity of waste greater than permitted under the Certificate of Approval. Numerous complaints about odours were received by the Ministry of the Environment regarding the site.

The Appellant and the Director entered into mediation. The Town of Newmarket sought Party status and wished to participate in the mediation. However, the Appellant and the Director opposed the Town's participation and stated that they would withdraw from the mediation if the Town were added as a Party. The Tribunal, ruling that it would be improper to abandon any attempt to mediate the issue, did not allow the Town to participate in the mediation. However, the Town was permitted to relay its concerns to the parties to the mediation.

Following the mediation and further meetings and teleconference calls, a settlement was reached between the Appellant and the Director. The Tribunal held that the agreement was in accordance with the Tribunal's Practice Direction for Consideration of Agreements. The agreement did not fetter the Director's discretion to take further action against the Appellant to protect the public interest. The agreement was accepted and the appeal was dismissed.

Decision released: April 20, 2006 and amended on June 28, 2006 (Case No.: 05-106)

RPL Recycling and Transfer Limited v. Director, Ministry of the Environment

RPL Recycling and Transfer Limited ("Appellant") filed an Appeal under section 140 of the *Environmental Protection Act* ("*EPA*") of the conditions in a Director's Order issued under section 157.3 of the *EPA* related to waste stream issues regarding the operations of their transfer station. Hymopack Limited ("Hymopack"), RPL's immediate neighbour, was granted status as either a Party or a Participant, to be determined by Hymopack if a Hearing proceeded.

The Appellant and the Director reached a resolution of the issues between them regarding the Appellant's operation of the site. Three new terms were formally added to the Order through a Notice of Amendment issued by the Director, and RPL withdrew its appeal. Hymopack submitted that the settlement agreement should be reviewed under Rule 172 of the Tribunal's Rules of Practice and that evidence ought to be received by the Tribunal to determine if the agreement respected the considerations set out in the Tribunal's Practice Direction for the Consideration of Agreements.

The Tribunal received submissions on whether it should proceed with hearing evidence on the acceptability of the settlement agreement. While the Tribunal held that Rule 172 applied, as the agreement altered the terms of the decision under appeal, the agreement did not alter those aspects of the Order that were the subject of the appeal. Instead, the new terms related to the Certificate of Approval and an unrelated condition. The Tribunal ruled that the matters that concerned Hymopack were not within the scope of the appeal.

As the changes to the Order were not proximate enough to the scope of the appeal, a detailed review of the agreement under Rule 172 was not necessary. The Tribunal held that there was no longer any live issue among the Parties that was relevant to the subject matter of the appeal and that it is not the Tribunal's role to oversee all dealings between the Director and a regulated entity where those dealings are beyond the matters that would have been raised in an appeal Hearing. The settlement agreement was accepted and the appeal was dismissed.

Decision released: April 28, 2006 (Case No.: 05-065)

Lanxess Inc. v. Director, Ministry of the Environment

Lanxess Inc ("Appellant") filed an appeal pursuant to section 139 of the *Environmental Protection Act* ("*EPA*") of an Order issued by the Director, Ministry of the Environment under section 9 of the *EPA* regarding minimum performance requirements and maintenance standards of an Amended Certificate of Approval (Air) ("CofA") issued to the Appellant. The Appellant appealed a number of grounds of the CofA.

Following a Preliminary Hearing teleconference, the Tribunal was informed that the Parties had agreed to a change in the wording of a final draft Amended CofA. The Appellant subsequently withdrew its appeal. The Tribunal found that the amended CofA was not adverse to the public interest in environmental protection, and pursuant to Rule 172 of the Tribunal's Rules of Practice, dismissed the Appeal.

Decision Released: May 29, 2006 (Case No.: 05-071)

El-Kasir v. Director, Ministry of the Environment

Fathy El-Kasir ("Appellant") filed an appeal pursuant to section 140 of the *Environmental Protection Act* ("*EPA*") of an Order issued by the Director, Ministry of the Environment directing

the removal and proper disposal of waste that had been deposited on the Appellant's property. The waste consisted of shingles and some gravel mixed with asphalt.

At the Hearing, the Parties successfully negotiated terms of settlement, and the Appellant withdrew his appeal. The Tribunal was satisfied that the agreement between the Parties was in accordance with the Tribunal's Rules and not adverse to the public interest. The appeal was dismissed pursuant to Rule 172 of the Tribunal's Rules of Practice.

Decision released: July 13, 2006 (Case No.: 05-132)

Imperial Oil Limited v. Director, Ministry of the Environment

Imperial Oil Limited ("Appellant") filed an Appeal pursuant to section 140 of *the Environmental Protection Act*, with respect to an Order issued by the Director, Ministry of the Environment regarding light cat gas oil spill prevention measures for the Imperial Oil Limited Dock filling station. A stay of the original order was granted by the Tribunal in an order dated April 19, 2006.

Following mediation between the Appellant and the Director, a settlement was reached and an Order was issued by the Director revoking the original Order under Appeal. Pursuant to Rule 169 of the Rules of Practice and Practice Directions of the Tribunal, the Tribunal dismissed the appeal.

Decision released: July 28, 2006 (Case No.: 05-154)

Waterdown Garden Supplies Ltd. v. Director, Ministry of Environment

Waterdown Garden Supplies Ltd. and 1046854 Ontario Inc., carrying on business as W.G. Equipment Enterprises ("Appellants") filed appeals pursuant to section 139 of the *Environmental Protection Act* ("*EPA*"), with respect to an Order issued by the Director, Ministry of the Environment, under section 157.3 of the *EPA*, requiring the removal of compost from the Appellants' site.

During a mediation session conducted by a Tribunal Member, the Parties agreed on terms of settlement.

The Tribunal was satisfied that the Settlement Agreement were not adverse to the public interest, and ordered that the Director's Order be amended to incorporate the terms and conditions of the Agreement, and dismissed the Appeals.

Decision released: September 21, 2006 (Case Nos.: 05-139/ 05-140)

569006 Ontario Limited v. Director, Ministry of the Environment

569006 Ontario Limited ("Appellant") filed an appeal pursuant to section 140 of the *Environmental Protection Act* ("*EPA*") with respect to an Order to pay Costs issued by the Director, Ministry of the

Environment ("MOE"), under section 150(1) of the *EPA* for work done by the Ministry to clean up contamination resulting from the storage of drums.

The Appellant appealed on a number of grounds, a key one being that the Director carried out work that was in excess of what was required or reasonable. The Director subsequently filed a Notice of Motion requesting that the Tribunal dismiss the appeal on the grounds that no documents or particulars were produced upon which the Tribunal could base a decision in the Appellant's favour, and that the Tribunal had no jurisdiction to issue a decision on the grounds of appeal raised.

The Tribunal found that the Appellant had failed to submit any evidence to show that a genuine issue existed regarding whether the clean-up costs paid by the MOE were unreasonable or excessive or did not relate to items required to be done under the Director's Order. Therefore, the criteria that the Tribunal must consider under section 145.3 of the *EPA* at a hearing on an Order to Pay Costs made under section 150(1). The Tribunal granted the Motion and dismissed the appeal.

Decision released: September 25, 2006 (Case No.: 05-068)

<u>Dow AgroSciences Canada Inc. v. Director, Ministry of the Environment</u>

Dow AgroSciences Canada Inc. ("Appellant") appealed an Order issued by the Director, Ministry of the Environment ("MOE") under section 157.3 of the *Environmental Protection Act*, regarding the completion of a study to determine the extent of any contamination of the soil and groundwater on a farm property located in the County of Norfolk resulting from a leakage into the soil of Telone C-17, a pesticide manufactured by the Appellant. The Appellant was also required to submit a written plan with a detailed schedule for the removal of any contaminated soil and/or the remediation of the groundwater at the Site that may have resulted from the deposit of the contaminated soil.

At the Preliminary Hearing, the Parties advised the Tribunal that a draft settlement had been reached that satisfied the concerns of the MOE. Counsel for the Appellant and Director agreed that the original Director's Order was to be revoked and replaced with a new Director's Order, at which time the Appellant would withdraw its appeal.

The Tribunal was satisfied that the Settlement Agreement, which outlined the steps to be taken by the Appellant to remediate the Site, was consistent with the purpose and provisions of the relevant legislation and in the public interest. In accordance with Rule 181 of the Tribunal's Rules of Practice, the appeal was dismissed.

Decision released: October 17, 2006 (Case No.: 06-043)

<u>The Corporation of the Township of South Dundas v. Director, Ministry of the Environment</u>

The Corporation of the Township of South Dundas ("Appellant") filed an appeal pursuant to section 139 of the *Environmental Protection Act* ("*EPA*"), of the decision of the Director, Ministry of the Environment ("MOE") to issue an Amended Provisional Certificate of Approval ("CofA") to the

Appellant for the Matilda Waste Disposal Site ("Site"), revoking and replacing all previous CofAs. The Appellant was appealing the Site's approved maximum capacity specified by the amended CofA.

The Tribunal found that the original CofA for the Site did not contain a site capacity figure, nor did any subsequent version of the CofA. The Tribunal noted that Divisional Court jurisprudence makes it clear that certificates of approval that do not specify an approved capacity must be read in conjunction with supporting documentation such as the application, in order to determine the limits of the approval. This jurisprudence also stated that where old CofAs do not contain a stated capacity, contemporary engineering practices determine the protocol used to provide an objective standard for determination of capacity. The MOE used its protocol in determining the maximum capacity of the Site.

The Tribunal found that the approved maximum capacity was correct in the amended CofA, and as a result dismissed the appeal.

Decision released: October 31, 2006 (Case No.: 05-146)

Anne Vallentin on behalf of Haldimand Against Landfill Transfers v. Director, Ministry of the Environment

Anne Vallentin on behalf of Haldimand Against Landfill Transfers (HALT) ("Appellant") filed an appeal pursuant to section 139 of *the Environmental Protection* Act ("*EPA*") as a result of a Decision of the Environmental Review Tribunal to grant Leave to Appeal to the Appellant under section 41 of the *Environmental Bill of Rights*, *1993* ("*EBR*"). The Leave to Appeal was regarding an Amendment to a Provisional Certificate of Approval ("CofA") issued by the Director, Ministry of the Environment to allow the Edwards Landfill Site ("Site") to increase the rate of waste fill.

At the Preliminary Hearing, the Tribunal granted the Appellant's Motion requesting that the full Hearing not proceed until the Divisional Court had made a decision on her application for judicial review of the three decisions of the Director.

The Divisional Court issued its decision on July 19, 2006 (*Vallentin v. Director (Ministry of the Environment*) (2006), 23 C.E.L.R. (3d) (3d) 295. The Court found that the Director had acted in accordance with section 30(1) of the *EPA* in not requiring a public hearing. Subsequently, the Tribunal was informed that an agreement had been reached among the main Parties, which proposed an amendment to the CofA. In light of the Divisional Court's Decision and the Settlement Agreement, the Appellant proposed to withdraw her appeal. A Settlement Hearing was held, at which a Participant and Presenter in the proceedings raised concerns related to the amendments to the CofA proposed in the settlement agreement. However, the Tribunal found that the issues raised by the Participant and Presenter were related to Notices that were not before the Tribunal Panel, and that, therefore, the Tribunal had no jurisdiction to deal with them.

The Tribunal accepted the withdrawal of the appeal and dismissed it pursuant to Rule 181 of the Tribunal's Rules of Practice and Practice Directions.

Decision released: November 22, 2006 (Case No.: 05-026)

Compost Niagara Inc. v. Director, Ministry of the Environment

Compost Niagara Inc. ("Appellant") filed an appeal pursuant to section 130 of the *Environmental Protection Act* ("*EPA*") with respect to an amendment to a Provisional Certificate of Approval ("CofA") issued by the Director, Ministry of the Environment regarding new conditions and the revocation and replacement of prior conditions in the CofA for a waste disposal site. The Appellant objected to the Amended CofA on two grounds. The first was that the removal of compost product, caused no environmental impact. The second ground of appeal was that the original Provisional Certificate of Approval did not include provisions regulating the leachate pond, and, therefore, it was an invalid attempt to do so through the Amended CofA.

Prior to the Hearing, Counsel for the Director forwarded written notice to the Tribunal, advising that the Parties had reached a settlement resolving the issues raised in the appeal and that the Appellant had agreed to withdraw its appeal on the basis of the settlement. The Tribunal found that the provisions of the Amended CofA were not adverse to the public interest and were consistent with the purpose and provisions of the *EPA*. The appeal was dismissed.

Decision released: January 22, 2007 (Case No.: 06-107)

1677805 Ontario Inc. v. Director, Ministry of the Environment

1677805 Ontario Inc. ("Appellant") filed an appeal pursuant to section 139 of the *Environmental Protection Act* ("*EPA*") with respect to a Notice of Refusal issued by the Director under section 31 of the *EPA* regarding a decision by the Director, Ministry of the Environment ("MOE") to refuse to issue a Certificate of Approval for a Waste Management System for the transportation of non-hazardous waste.

The reason for refusal given by the Director was that the Appellant company and Teishu Lootawan, the owner, would not be able to operate the business in accordance with the law, and would further be liable to conduct the business in such a way as to cause environmental damage or an adverse effect. This opinion was based on previous interactions between the Ministry and the Appellant and Ms. Lootawan. The Appellant countered that the Director should not be using past transgressions as a reason for refusal and claimed that all fines and other sanctions applied against Ms. Lootawan have been paid in full.

The issue of the Ms. Lootawan's history with the Ministry was an important factor in the Director's use of discretion, which was at issue in the case before the Tribunal. The highlights of the evidence are as follows:

- Ms. Lootawon has been convicted six times relating to the operation of a waste management system or giving false information in support of an application of an approval for one. The dates of the offences commence in 1993. In addition to fines, the sentences included 30

days imprisonment to be served intermittently, plus two years of probation.

- substantial portion of these fines remained unpaid.
- Ms. Lootawon attempted on various occasions to obtain a Waste Management System Certificate of Approval through agents, friends or relatives clearly assuming that the MOE would not grant such an approval to her or a company within her control.
- There is clear evidence that Ms. Lootawon was operating a Waste Management System without any MOE approval during the latter part of 2005. Evidence was submitted that one or more of her trucks made some 113 visits to a waste disposal facility within a 30-day period.
- Evidence was presented that there remained outstanding charges against her or companies within her control with respect to the operation of a Waste Management System without an *EPA* approval.
- There was also evidence that Ms. Lootawon failed to be fully cooperative with the MOE in terms of disclosure of information. More particularly, waybills have yet to be submitted for two loads of waste that were seen by MOE officials being transported by a truck owned by Ms. Lootawon in October of 2005. The location of the deposit of these wastes still remains unknown.
- Ms. Lootawon submitted a document purported to be a bond in the amount of $100,000 in support of her application for a Waste Management System. This document was submitted to meet conditions imposed in 1998 by the MOE on Ms. Lootawon should she want to submit a further application for a Waste Management System. Evidence at the Hearing clearly demonstrated that the document was not an authentic bond issued by a bank.

The Tribunal found that there was overwhelming and uncontradicted evidence to support the exercise of the Director's discretion to refuse the issuance of a Certificate of Approval. The Notice of Refusal was confirmed and the appeal dismissed.

Decision released: January 24, 2007 (Case No.: 05-149)

<u>1446751 Ontario Inc. and Rosa Flora Limited v. Director, Ministry of the Environment</u>

1446751 Ontario Inc., carrying on business as Watson Pady Services, and Rosa Flora Limited ("Appellants") filed a joint appeal pursuant to section 140 of the *Environmental Protection Act* ("*EPA*") with respect to an Order issued by the Director, Ministry of the Environment, regarding the depositing of wood waste and grinding operations at the Rosa Flora Limited site. The Appellant (Watson Pady) is a licenced waste hauling and waste management company that processes wood waste into biomass fuel products, which they then supply to the other Appellant (Rosa Flora Limited), for use in their large-scale greenhouse operations. The Appellants appealed the Director's

Order, which directed Watson Pady to immediately cease depositing waste at both Rosa Flora and another location, and to cease grinding operations at Rosa Flora Limited.

Following a teleconference between the Parties, the Tribunal was informed that both Parties believed they were close to reaching a settlement and requested that the Tribunal postpone the Preliminary Hearing. The Tribunal agreed to the request and subsequently received a letter from Rosa Flora indicating its intention to withdraw its appeal. Under Rule 179 of the Tribunal's Rules of Practice and Practice Direction, where there has been a proposed withdrawal of an application, the Tribunal shall issue a Decision dismissing the proceeding. In this case, the appeal on behalf of Rosa Flora was dismissed. The appeal filed by 1446751 Ontario Inc. carrying on business as Watson Pady Service is continuing.

Decision released: February 8, 2007 (Case Nos.: 06-115/06-116)

Krek v. Director, Ministry of the Environment

Alex Krek ("Appellant") filed an appeal pursuant to section 140 of the *Environmental Protection Act* ("*EPA*") with respect to an Order issued by the Director, Ministry of the Environment. The Director's Order required the Appellant to: 1) retain a qualified environmental consultant or engineering firm, 2) instruct the consultant to prepare a Remedial Action Plan ("RAP") describing in detail the remediation of the hydrocarbon contamination on the Site and any other affected property and 3) to provide potable water supplies to all affected parties until directed otherwise by the Provincial Officer.

Following discussions between the Parties, the Tribunal was advised that the Parties had resolved the issues under appeal. The Appellant withdrew his appeal, with the consent of the Director. Pursuant to Rule 181 of the Tribunal's Rules of Practice and Practice Directions, the Tribunal accepted the withdrawal, and dismissed the appeal, being satisfied that it was in the public interest to do so.

Decision released: February 16, 2007 (Case No.: 06-111)

Washington Mills Electro Minerals Corporation v. Director, Ministry of the Environment

Washington Mills Electro Minerals Corporation ("Appellant") filed an appeal pursuant to section 140 of the *Environmental Protection Act* ("*EPA*") with respect to an Order of the Director regarding the Appellant's Summary and Dispersion Modeling Report (ESDM). At issue was whether the length of time given to the Appellant was sufficient to complete the work required by the Director's Order.

Following a teleconference held before the Tribunal, the Parties agreed to discuss new dates to comply with the Director's Order, and subsequently reached a Settlement Agreement with revised dates for compliance. The Order otherwise remained unchanged. The Tribunal amended the Director's Order in accordance with the Settlement Agreement.

Decision released: February 28, 2007 (Case No.: 06-125)

Delta Coatings Canada v. The Corporation of the City of Brampton

Delta Coatings Canada ("Appellant") filed an appeal pursuant to section 100.1(7) of the *Environmental Protection Act* ("*EPA*") with respect to an Order issued by the Corporation of the City of Brampton under section 100.1(5) of the *EPA* requiring the payment of costs in relation to the clean-up by the City of Brampton of a spill in the watercourse at a CN Rail Yard located in Brampton.

After mediation sessions held by the Tribunal, the Parties reached a settlement, without prejudice. The Settlement Agreement was found to be consistent with the purpose and provisions the *Environmental Protection Act*. In light of the resolution of the issues, the Appellant withdrew its application. The Tribunal dismissed the appeal.

Decision released: March 14, 2007 (Case No.: 06-109)

Ontario Water Resources Act

Jessie Davidson, Russell and Pamela Smith, Garry and Jennifer Brewster, Frank and Enid Weiner, and Fred and Naureen Zinn v. Director, Ministry of the Environment

This was an appeal of the issuance of a Permit to Take Water ("PTTW") to Aquafarms 93 by the Director, Ministry of the Environment ("MOE") under section 34 of the *Ontario Water Resources Act*. The PTTW authorizes the withdrawal of water for a commercial bottling operation. The Tribunal had granted the Appellants Leave to Appeal under section 41 of the *Environmental Bill of Rights, 1993*. The Appellants Davidson, the Smiths, the Weiners and the Zinns reached a settlement with the Director. The appeal of the Brewsters proceeded to a Hearing.

The Tribunal held that the amount of water taking allowed under the PTTW was appropriate and sustainable; the PTTW was issued with adequate consideration of the impact of the water taking and the cumulative impact considering the other nearby water bottling facilities; that a sub-watershed study was not necessary in light of the site-specific study that was conducted; the hydrogeological reports were adequate; the MOE regulations and policies with respect to the issuance of permits for water taking, including the precautionary principle, were properly applied; and that the conditions of the permit were adequate to protect the environment and users. Accordingly, the Tribunal ruled that the PTTW should stand as issued, and the appeal of the Brewsters was dismissed.

Decision released: April 4, 2006 and amended on April 26, 2006 and May 16, 2006 (Case Nos.: 03-203/03-204/03-205/03-206/03-207)

Cornwall Gravel Company Limited v. Director, Ministry of the Environment

Cornwall Gravel Company Limited ("Appellant") filed an appeal pursuant to section 100 of the *Ontario Water Resources Act* ("*OWRA*"), with respect to the denial of an application for a Permit to Take Water ("PTTW") by the Director, Ministry of the Environment under section 34 of the

OWRA. The PTTW would permit the resumption of dewatering of the Appellant's licensed Greely Quarry.

Following negotiations between the Parties, a PTTW was drafted. At the Preliminary Hearing, which was held at a community center, the Parties agreed to make changes to the draft PTTW.

During the Preliminary Hearing, Councillor Doug Thompson, City of Ottawa, telephoned and requested that the Hearing be adjourned to permit him to attend. He claimed that he had not been given notice of the Hearing. The Tribunal reviewed the documentation provided by Tribunal staff and advised Councillor Thompson that the Notice of Hearing had been mailed to the Clerk of the City of Ottawa. The Tribunal was not prepared to adjourn the Hearing since proper notice had been given to the City Councillors through the Clerk's office.

Councillor Thompson wrote to the Tribunal after the Preliminary Hearing alleging that the City Clerk's office had no record of receiving the Notice. He also requested that another Hearing be held in light of the concerns of the citizens in the area. The Tribunal responded that if Councillor Thompson wished to request Party, Participant or Presenter status, he must do so by the date indicated. He did so. All Parties were given an opportunity to make submissions on the issue.

Rule 27 of the Tribunal's Rules of Practice and Practice Directions requires an Appellant to provide the Tribunal with a list of names and addresses of all owners of property within 120 metres of the boundary of the property that is the subject of the decision, and of any persons who should be notified of the proceedings because they may have an interest in the outcome of the Hearing. The Tribunal found that the interests affected in this appeal were those of the citizens of a municipality and not the individual councillor, and that giving notice to the Clerk of the City was sufficient notice.

The Tribunal also found that Councillor Thompson did not provide any substantiation that his interests may be directly and substantially affected by the Hearing or its result pursuant to Rule 53(a) of the Tribunal's Rules of Practice and Practice Directions. The request for Party Status was denied.

The Tribunal granted the appeal in part, and ordered that the amended draft PTTW be issued to the Appellant.

Decision released: July 11, 2006 (Case No.: 05-069)

<u>Tim Horton Children's Foundation Inc. v. Director, Ministry of the Environment</u>

Tim Horton's Children Foundation Inc. ("Appellant") filed an appeal pursuant to section 100 of the *Ontario Water Resources Act* ("*OWRA*") with respect to a decision by the Director, Ministry of the Environment to issue an Amended Permit to Take Water ("PTTW") under section 34 of the *OWRA* to the Appellant (which operates a camp for children from economically disadvantaged homes) to regulate the use of its two wells. The Appellant appealed the conditions under this amended PTTW.

At the Hearing, the Parties advised the Tribunal that they had reached an agreement, and requested that the Tribunal consent to a withdrawal of the appeal by the Appellant.

The Tribunal found that the Appeal should be dismissed pursuant to the Tribunal's Rules of Practice and Practice Directions.

Decision released: October 11, 2006 (Case No.: 06-027)

Regional Municipality of Niagara v. Director, Ministry of the Environment

The Regional Municipality of Niagara ("Appellant") filed an appeal pursuant to section 100 of the *Ontario Water Resources Act* ("*OWRA*") with respect to an Amended Certificate of Approval ("CofA") issued by the Director, Ministry of the Environment under section 53 of the *OWRA*, regarding approval of modifications to the Niagara Falls Water Pollution Control Plant. The Appellant objected to certain parameters in the CofA.

Following the filing of the appeal, the Director issued an amended Certificate of Approval, which included a revocation of the previous CofA. The Appellant withdrew the appeal, with the consent of the Director. Pursuant to section 181 of the Tribunal's Rules of Practice, the Tribunal accepted the withdrawal, and dismissed the appeal being satisfied that it was in the public interest to do so.

Decision released: November 6, 2006 (Case No.: 06-091)

Claes Farms Limited v. Director, Ministry of the Environment

Dennis Claes of Claes Farms Limited ("Appellant") filed an appeal pursuant to section 100 of the *Ontario Water Resources Act* ("*OWRA*") with respect to a decision by the Director, Ministry of the Environment to issue an Amended Permit to Take Water ("PTTW") under section 34 of the *OWRA* to the Appellant regarding water taking from one on-stream pond. The PTTW was a renewal of a previously issued permit, and the Appellant appealed the terms and conditions of the new PTTW.

At the Preliminary Hearing, Counsel for the Director advised the Tribunal that a new PTTW had been drafted and would be directed to the Appellant. The Appellant subsequently withdrew its appeal.

The Tribunal found that on the consent of the Parties, and in accordance with Rule 181 of the Tribunal's Rules, the new PTTW was in the public interest. The appeal was dismissed.

Decision released: November 8, 2006 (Case No.: 05-117)

City of Hamilton v. Director, Ministry of the Environment

The City of Hamilton ("Appellant") filed an appeal pursuant to section 100 of the *Ontario Water Resources Act* ("*OWRA*") with respect to an Amended Certificate of Approval ("CofA") issued by the Director, Ministry of the Environment under section 53 of the *OWRA*, regarding modifications

to the existing effluent pumping stations and installation of a Return Activated Sludge (RAS) and effluent water chlorination system at the Appellant's Sewage Treatment Plan. The Appellant objected to monitoring requirements contained in the CofA.

The Director issued an Amended CofA, which was agreeable to the Appellant, who consequently withdrew the appeal. The Tribunal accepted the withdrawal, which was on consent, and dismissed the appeal pursuant to Rule 181 of the Tribunal's Rules, being satisfied that it was in the public interest to do so.

Decision released: November 10, 2006 (Case No.: 06-099)

Waterdown Garden Supplies Ltd. v. Director, Ministry of the Environment

Waterdown Garden Supplies Ltd. ("Appellant") filed an appeal pursuant to section 100 of the *Ontario Water Resources Act* ("*OWRA*"), with respect to an Order issued by the Director, Ministry of the Environment under section 16.4(5)(b) of the *OWRA*. The Order required the Appellant to change the company's groundwater monitoring program. The Director subsequently brought a Motion to Dismiss the appeal before the Tribunal.

The Appellant, in response, requested that the Tribunal dismiss the Motion to Dismiss and provide mediation services to settle all outstanding issues between the Director and the Appellant. The Tribunal found, however, that the Motion to Dismiss should be heard before mediation commences.

The main issue was whether the Director's Motion to Dismiss the appeal should be granted, pursuant to Rule 98 of the Tribunal's Rules of Practice and Practice Directions, on the grounds that the appeal was frivolous and vexatious, and that it raised no genuine issues for a Hearing.

Rule 98 of the Tribunal's Rules states:

> 98. A Party bringing a motion to dismiss a proceeding shall specify the basis for the motion, which may include that:
>   a. the proceeding is frivolous, vexatious or is commenced in bad faith;
>   b. the proceeding relates to matters that are outside the jurisdiction of the Tribunal;
>   c. some aspect of the statutory requirements for bringing the proceeding has not been met; or another Party has caused undue delay or has not complied with orders, undertakings, written requests from the Tribunal or these Rules.

Counsel for the Appellant submitted that the Certificate of Approval ("CofA") granted by the Director under the *OWRA* was an agreement, and the terms were open for re-negotiation. The Tribunal found that the Certificate of Approval and the *OWRA* are devoid of any reference to the CofA being an agreement, and that the CofA was a licence granted after due consideration of an application.

The Tribunal found that Appellant's assertion that it was currently meeting and/or exceeding the majority of the terms and conditions of the CofA, was without merit and contradicted the

documents filed as evidence by the Appellant. The Appellant further claimed that recent testing had shown no evidence of exceedance of any water quality standards. However, copies of the sampling reports were not provided at the time that the Motion was heard, nor were the samples found to be complete. Therefore, the Tribunal found that it was not sufficient on a Motion for Dismissal to say that more and better evidence will or may be available at the Hearing.

The Appellant also alleged that the Provincial Officer lacked the authority to issue an order to undertake any action that was not required under the CofA. The Director countered that sections 16, 16(1) and 104(1) of the *OWRA* grant Provincial Officers the authority to order the holder of the CofA to take actions that are not required in the CofA itself, but that she or he has reason to believe would be in the public interest. The Tribunal found that a Provincial Officer has the right to exercise discretion when she or he feels there is a reasonable chance of potential harm to the environment and public interest. The *OWRA* does not require proof before the Provincial Officer takes action under section 16. Therefore, that ground of appeal held no merit.

The Tribunal found that Appellant failed to properly address the Director's Order and did not put forward any genuine issues that could be raised at the Hearing. The Tribunal found that the appeal was frivolous in nature and lacked legal merit or basis and should therefore be dismissed pursuant to Rule 98 of the Tribunal's Rules of Practice.

Decision released: January 17, 2007 (Case No.: 06-098)

DeCorso Enterprises Limited v. Director, Ministry of the Environment

DeCorso Enterprises Limited ("Appellant") filed an appeal pursuant to section 100 of the *Ontario Water Resources Act* ("*OWRA*"), with respect to changes to a Permit To Take Water ("PTTW") by the Director, Ministry of the Environment under section 34 of the *OWRA*. The grounds of appeal put forward by the Appellant were that the monitoring requirements in the Conditions of the PTTW were too onerous and did not take into consideration a phased or trigger-level approach to monitoring.

Following a teleconference with the Parties, the Tribunal was informed that the Appellant wished to withdraw its appeal, because the Parties had resolved the issues surrounding the monitoring requirements of the PTTW.

The Tribunal reviewed the proposed amendments to the PTTW and found that they were consistent with the purpose and provisions of the *OWRA* and in the public interest. The Tribunal accepted the Appellant's withdrawal, and pursuant to section 181 of the Tribunal's Rules of Practice and Practice Direction, dismissed the appeal.

Decision released: February 16, 2007 (Case No.: 06-122)

Kagawong Power Incorporated v. Director, Ministry of the Environment

Kagawong Power Incorporated ("Appellant") filed an appeal pursuant to section 100 of the *Ontario Water Resources Act* ("*OWRA*"), with respect to an Amended Permit to Take Water ("PTTW") issued by the Director, Ministry of the Environment, regarding water taking from the Kagawong River for the specific purpose of operating a hydroelectric power generation plant in the District of Manitoulin, Ontario.

The Appellant appealed on three grounds: (1) that under sections 34(3)(b), (c) and (d) of the *OWRA*, Kagawong Power's hydroelectric generating station is exempt from the water supply permit requirement because it was built before March 29, 1961; (2) that in the alternative, Conditions 4.2, 4.3 and 4.4 with respect to the gauge to monitor water levels run counter to the conclusions of the Kagawong River Water Management Steering Committee; and (3) that Conditions 4.6, 4.7 and 4.8, which require that Kagawong Power publish data on the water levels and rates of low on a web site, are constraining and unjustified.

Following the Preliminary Hearing, mediation was conducted by the Tribunal, and a Settlement Agreement was reached which included amendments to the PTTW and withdrawal of the appeal by the Appellant.

The Tribunal found that the Settlement Agreement, which included revised conditions to the PTTW, was consistent with the purpose and provisions of the OWRA and in the public interest. The appeal was dismissed in accordance with Rule 181 of the Tribunal's Rules.

Decision released: March 6, 2007 (Case No.: 06-121).

Niagara Escarpment Planning and Development Act

Newell and Country Heritage Experience Inc. v. Niagara Escarpment Commission

Ron Newell and Country Heritage Experience Inc. ("CHE") filed appeals appealed under section 25 of the *Niagara Escarpment Planning and Development Act* of the decision of the Niagara Escarpment Commission ("NEC") to refuse the Development Permit application made by CHE to permit the seasonal use of three existing parking lots, a special events area and a pasture field as a temporary storage lot for cars destined for the Toronto Auto Auction. The site of the proposed storage lots is Country Heritage Park ("the Park") and is within the Historical Park designation of the Niagara Escarpment Plan ("NEP"). The Park features buildings and artifacts intended to stimulate public awareness of the evolution of Ontario's agriculture and food system and to preserve its heritage. The Park also houses some administrative buildings and a conference center.

The decision of the NEC to refuse the Development Permit was confirmed by the Hearing Officer, who found that the proposal involved an intensification of an existing use, which is contrary to the NEP. Furthermore, the Hearing Officer held that the proposal did not meet the Escarpment Protection Area objectives of the NEP and that a commercial venture, unrelated to the agricultural heritage nature of the Park, did not accord with the NEP Parks and Open Space System objectives.

Decision released: April 20, 2006 (Case Nos.: 05-111/05-118)

Niagara Escarpment Plan Amendment PG 156 05 (Vandeleur)

The Niagara Escarpment Commission ("NEC") proposed an amendment to the Niagara Escarpment Plan ("NEP") to change the designation of about 50 hectares of land on the western face of the Beaver Valley in the Municipality of Grey Highlands from Escarpment Recreation Area to Escarpment Natural and Escarpment Protection Areas. Prior to the approval of the NEP, the NEC had conditionally approved the development of a ski club on the subject lands. The Conditions of Approval were not satisfied and the approval lapsed. Part of the land was sold and then resold. A notation on the Conditions of Approval issued by the NEC for the development of a dwelling on the lands by the new owners, directed that an amendment to the NEP be prepared to re-designate the Escarpment Recreation Area portion of the lands to more suitable designations.

Under section 10(3) of the *Niagara Escarpment Planning and Development Act* ("*NEPDA*"), the NEC appointed a Hearing Officer to conduct a hearing of this matter.

The Municipality of Grey Highlands opposed the amendment, citing the economic benefits of maintaining the Escarpment Recreation Area designation and the attendant tourism-based uses that would be permitted and argued that the presence of a Provincially Significant Life Science Area of Natural and Scientific Interest ("ANSI") on the lands would mean that an environmental assessment would likely have to be completed for any proposed development and that a 50 metre setback from the ANSI would be required.

An area property owner also opposed the re-designation, as he felt it would devalue his land. Other nearby landowners supported the amendment, citing the presence of rare plants and a steep water course that ought to be protected and a desire not to have a ski resort constructed near their homes.

The Hearing Officer concluded that the proposed re-designation meets the objectives of both the NEP and the *NEPDA*. In recommending that the plan amendment should be accepted, the Hearing Officer cited the presence of natural streams, rare plants and unique habitat that should be protected; the fact that the Recreation designation had been in place for about 30 years without the development of a ski facility; that the lands were now owned by multiple persons and that the development of a ski facility in the future is unlikely; and that the Permitted Uses of the Escarpment Natural and Protection Areas would allow for passive recreational uses.

Decision released: April 21, 2006 (Case No.: 05-066)

Trask v. Niagara Escarpment Commission

Eric Trask appealed under section 25 of the *Niagara Escarpment Planning and Development Act* ("*NEPDA*") the decision of the Niagara Escarpment Commission ("NEC") to conditionally approve a Development Permit application to construct a one-storey addition to an existing dwelling and a two-storey garage on the lot neighbouring his. Mr. Trask and his wife, Loretta Bailey, opposed the

development and submitted that it would cause a loss of the existing green space between the homes, disturb an existing swale, involve the construction of a driveway very close to his main entrance, increase snow removal problems, impinge their privacy and alter drainage patterns. Mr. Trask and Ms. Bailey were also in disagreement with their neighbour regarding the correct boundary between their properties and were disputing the legitimacy of a fence erected by the neighbour.

The Hearing Officer informed the Parties that the dispute regarding the fence was a civil matter and that he did not have jurisdiction to resolve this dispute. The Parties did reach an agreement as to an amended condition addressing the drainage concerns of Mr. Trask and Ms. Bailey. The Hearing Officer ruled that the decision of the NEC to approve the application would have been correct if the amended condition had been included and, pursuant to sections 25(12.1) and (12.2) of the *NEPDA*, confirmed the decision of the NEC with the amended condition.

Decision released: May 17, 2006 (Case No.: 05-120)

Sanders v. Niagara Escarpment Commission

Carol and R.K. Sanders, Dr. Chip Coombs, Jayne Gosling, Jeff Hepple, Shelley and Terry Hogan, and Ginny and Brad Davidson ("Appellants") appealed under section 25 of the *Niagara Escarpment Planning and Development Act* ("*NEPDA*") the decision of the Niagara Escarpment Commission ("NEC") to approve a Development Permit application allowing Ian McSweeny ("Applicant") to install a wind assisted power generating device (40 kW) and 120 ft support tower in two phases. Phase one involved erecting a temporary tower for test purposes and phase two was the actual construction of the tower and wind turbine.

The issue before the Hearing Officer was whether the proposed tower and wind turbine would offend the Niagara Escarpment Plan ("NEP") and conform with the *NEPDA*'s purpose and objectives to maintain and enhance the open landscape character by preserving the natural scenery and ensuring that all new development is compatible with the purpose of the Plan.

The Hearing Officer agreed with the Appellants that the effect of multiple wind power generating towers would distract from the visual attractiveness of the Escarpment landscape. However, there was no evidence put forth that any neighbouring property owners were considering installing wind-generated power generators. The Hearing Officer held that a balance must be struck between the Appellants' concerns and the fact that wind energy is an alternate energy source being encouraged by the province.

The Hearing Officer found that the reduced height of 80 ft. and reduced 20kW generator size being proposed by the Applicant had somewhat lessened the visual impact of the project. However, the Hearing Officer was reluctant to recommend at that time the approval of a permanent tower and generator. He, therefore, approved the plans for the Phase one test tower at a height not to exceed 80 ft. After the one-year experimental phase, if the Applicant wished to proceed with a permanent structure, he would have to reapply for a development permit.

The Minister of Natural Resources did not concur with the Hearing Officer and directed the NEC to issue a Development Permit with two additional conditions.

Decision released: Hearing Officer's Report dated June 16, 2005 released with Minister's Decision on June 22, 2006 (Case No.: 04-135).

Stark v. Niagara Escarpment Commission

Richard Stark ("Appellant") appealed under section 25 of the *Niagara Escarpment Planning and Development Act* ("*NEPDA*") the decision of the Niagara Escarpment Commission ("NEC") to conditionally approve the Development Permit application made by the Municipality of Grey Highlands ("Applicant") for the installation of two in-stream culverts to provide a crossing of a watercourse for the purposes of a snowmobile trail route on an open but unmaintained municipal road allowance.

The issue under consideration was the reconstruction of a crossing of a tributary that would likely lead to increased traffic of snowmobile vehicles on the Bruce trail. The trail and proposed culverts were within an Escarpment Natural Area designation under the Niagara Escarpment Plan ("NEP"). The Hearing Officer had to determine whether the proposal furthered an Existing Use.

The Appellant argued that the application for the Development Permit should not be approved, as Existing Uses do not allow for an extension of use. The trail had been used previously, but had ceased being groomed as a trail for some time. Also, witnesses appearing in support of the appeal, presented evidence and expressed concerns that the intensified use by motorized snowmobiles and ATVs had led to an increase in noise and pollution on the trail.

The Hearing Officer concluded that the NEC decision should not be confirmed. The main reason provided was that because this area is in an Escarpment Natural Area under the NEP, only Permitted Uses as set out in Part 1.3 of the NEP are allowed. The only Permitted Uses relevant to the installation of the culverts were Existing Uses, which according to the evidence, ceased approximately four to five years ago when the grooming of the trail ended. Once a Use has been abandoned, it cannot be rekindled. Additionally, the grooming and maintenance work that had previously taken place, where trees were removed as part of the process, occurred without the issuance of a Development Permit. This made the groomed trail an illegal Use, and as such, it could not be considered as an Existing Use because the term is defined in the NEP as being only those Uses existing legally.

In the alternative, the Hearing Officer also stated that even if the trail had been found to be a legal Existing Use, the Development Criteria would have pertained to an expansion of the existing use. Paragraph 1of Part 2.3 of the NEP states that an expansion in use is allowed where it can be sufficiently demonstrated that the objectives of the Escarpment Natural Area designation have been met. The Hearing Officer found that the expanded use by motorized vehicles was not recreation "compatible" with the natural area designation.

The decision of the NEC to conditionally approve the Development Permit application was not confirmed. The Hearing Officer recommended that the Minister of Natural Resources not approve the Development Permit application.

The Minister of Natural Resources concurred with the Hearing Officer's recommendation and directed the NEC not to issue a Development Permit.

Decision released: Hearing Officer's Report dated February 1, 2006 released with Minister's Decision on June 22, 2006. (Case No.: 05-042)

Woods v. Niagara Escarpment Commission

Owen and Andrea Woods ("Appellants") appealed under section 25 of the *Niagara Escarpment Planning and Development Act* ("*NEPDA*") the decision of the Niagara Escarpment Commission ("NEC") to conditionally approve a Development Permit application to construct two second-storey additions by Philip and Sharlene Trotoux ("Applicants").

The issue before the Hearing Officer was whether the proposed additions, with the reduced side yard as set out in the Development Permit application, conformed to the Niagara Escarpment Plan ("NEP"). Additionally, the Appellants were concerned that the dug well being used by the Applicants could become contaminated by the construction of the proposed addition and, in turn, the runoff could contaminate their drilled well.

The Applicants had several experts inspect their well and proposed septic system and then carried out the experts' recommendations relating to the well improvements. The Hearing Officer accepted this as proof of the fitness of the well, and additionally added an agreed-to condition requiring the Applicants to resubmit their final plans to the City for comment.

The Hearing Officer found that the proposed additions complied with the General Development Criteria and Minor Urban Center policies of the NEP, and confirmed the decision of the NEC to issue the Development Permit with the added conditions as agreed to by the Parties, in accordance with section 25(12.1) of the *NEPDA*.

Decision Released: June 29, 2006 (Case No.: 05-152)

Paletta International Corporation v. Niagara Escarpment Commission

Paletta International Corporation ("Appellant") appealed under section 25 of the *Niagara Escarpment Planning and Development Act* ("*NEPDA*") the decision of the Niagara Escarpment Commission ("NEC") conditionally approving a Development Permit application for Edwark Svetek and Lesley Seager to construct an addition to an existing dwelling. The concern of the Appellants was the adequacy of the septic system. At the Hearing, the parties reached a mutually agreed-upon solution to the septic system issue. The Hearing Officer confirmed the NEC's Decision pursuant to section 25(12.1) of the *NEPDA*, with revised conditions.

Decision released: July 7, 2006 (Case No.: 06-016)

Tomarin v. Niagara Escarpment Commission

Seymour and Debra Tomarin ("Appellants") appealed under section 25 of the *Niagara Escarpment Planning and Development Act* ("*NEPDA*") the decision of the Niagara Escarpment Commission ("NEC") to refuse to issue a Development Permit allowing the Appellants to construct a two-storey single dwelling.

Prior to the Hearing, the Appellants filed an application with the Minister of Natural Resources for a Plan amendment of the Niagara Escarpment Plan under section 6.1(3) of the *NEPDA*. The application was refused. The NEC then requested that the appeal be dismissed under section 25(8.1)(a) of the *NEPDA*, given the Minister's refusal on the plan amendment. The Appellants were given a chance to make representations on the request. No representations were made. The Hearing Officer found that the appeal disclosed no planning justification, given the refusal of the Plan amendment, and refused to conduct a Hearing pursuant to section 25(8.1)(a) of the *NEPDA*.

Decision released: August 3, 2006 (Case No.: 03-180)

Goruk v. Niagara Escarpment Commission

William S. Goruk ("Appellant") appealed under section 25 of the *Niagara Escarpment Planning and Development Act* ("*NEPDA*") the Niagara Escarpment Commission's ("NEC") decision to conditionally approve an application for a Development Permit by The Georgian Peaks Club to establish a new ski trail area that would require the removal of .094 ha of tree cover. The Appellant was concerned that the removal of the tree cover would destroy the visually attractive continuous view of trees, cause soil erosion, and increase road noise emanating from traffic on Highway 26.

The Hearing Officer held that while ski runs are permitted uses under section 1.8 of the Niagara Escarpment Plan ("NEP"), they must be developed with minimum effect on the Escarpment environment and must be compatible with cultural and heritage values. However, while the aim of the NEP is to provide for the maintenance of the Niagara Escarpment, the Hearing Officer found that the NEC, when drafting the Plan, was aware that the natural environment could not be continuous along the full length of the Escarpment and that a recreation area is an example of how the Plan contemplates some interruption to that continuity.

The Hearing Officer found the NEC's Decision to conditionally approve the Development permit was correct, and pursuant to section 25(12) of the *NEPDA*, confirmed the decision.

Decision released: August 3, 2006 (Case No.: 06-030)

Brown v. Niagara Escarpment Commission

Robert Brown ("Appellant") appealed under section 25 of the *Niagara Escarpment Planning and Development Act* ("*NEPDA*") the decision of the Niagara Escarpment Commission ("NEC") to conditionally approve a Development Permit application to de-commission an existing residence for use as a personal hobby/woodworking accessory building. The Appellant had appealed three of the Conditions, which subsequently were revised on the agreement of the Parties. The Hearing Officer concluded that had the decision of the NEC been to issue the Development Permit with the revised three Conditions, the decision would have been correct and, therefore, it should not be changed.

In consideration of the revised Conditions, and pursuant to section 25(12.1) of the *NEPDA*, the Hearing Officer confirmed the NEC's decision to issue the Development Permit.

Decision released: September 5, 2006 (Case No.: 06-044)

Graydon et al v. Niagara Escarpment Commission

Ron Graydon, Annette Graydon, Terry Brazil, Sarah Byram, Peter Coe, Pat Coe, Doug DeForest, Christine DeForest, Peter Sanchioni, Tracey Bastedo, Jack Keeling, Donald Lee Raymond, Michael Jehu, Garry Lee Raymond, Horst Bernhardt, and Gladys R. Baker ("Appellants") appealed under section 25 of the *Niagara Escarpment Planning and Development Act* the decision of the Niagara Escarpment Commission ("NEC") to conditionally approve a Development Permit application by 122703 Canada Inc. to construct a two-storey single detached residence, septic system and driveway. The Appellants were concerned about the potential effects of the development on the water resources in the area and the compatibility of the development with the Greenbelt Plan. The Hearing Officer did not confirm the NEC decision, recommending to the Minister of Natural Resources that modifications to the conditions of approval be made to ensure compliance with the Greenbelt Plan.

The Minister of Natural Resources issued a decision on September 6, 2006 concurring with the Hearing Officer's recommendations, and directing the NEC to issue a Development Permit subject to the additional and revised conditions.

Decision released: Hearing Officer's Report dated January 13, 2006 released with Minister's Decision on September 6, 2006 (Case Nos.: 05-050-053/05-055-062)

Rogers v. Niagara Escarpment Commission

Jennifer Rogers, Jeremy McIntosh, Rebekah McIntosh, Donald Lobb and Lillie Anne Morris filed appeals under section 25 of the *Niagara Escarpment Planning and Development Act* ("*NEPDA*") of the decision of the Niagara Escarpment Commission to conditionally approve a Development Permit application made by Thomas Wilson and Nicole Judge. The proposed development is a seasonal retail farm market and apple processing/storage facility. The appeals of Mr. and Mrs. McIntosh, Mr. Lobb and Ms. Morris were not accepted as they did not own property within 120m of the boundary of the subject site as was required by section 25(5) of the *Niagara Escarpment*

Planning and Development Act. The Niagara Escarpment Hearing Office lacked the jurisdiction to hear those appeals. The Appellant Ms. Rogers (Case No.: 06-008) met the requirements of section 25(5) and her appeal proceeded. The Hearing Officer granted Presenter status to Mr. And Mrs. McIntosh, Mr. Lobb and Ms. Morris.

During the Hearing, the Parties involved mutually agreed to revised conditions of approval. Pursuant to section 25(12.1) of the *NEPDA*, the Hearing Officer confirmed the decision of the NEC to approve the application subject to the revised conditions.

Decision released: September 12, 2006 (Case Nos.: 06-008/06-009/06-010/06-011/06-012)

Orchard Glen Garden Fresh Traditions Inc. v. Niagara Escarpment Commission

Orchard Glen Garden Fresh Traditions Inc. and Bryce Ivanchuk ("Appellants") appealed under section 25 of the *Niagara Escarpment Planning and Development Act* ("*NEPDA*") the decision of the Niagara Escarpment Commission ("NEC") to conditionally approve a Development Permit application by James Johnson ("Applicant") to construct an accessory building. During the Hearing, the Parties mutually agreed to revised conditions of approval.

In consideration of the revised conditions, and pursuant to section 25(12.1) of the *NEPDA*, the Hearing Officer confirmed the NEC's Decision to issue the Development Permit.

Decision released: September 15, 2006 (Case No.: 06-034)

Bohrer v. Niagara Escarpment Commission

Marilyn Bennett-Bohrer and Gerhardt Bohrer ("Appellants") appealed under section 25 of the *Niagara Escarpment Planning and Development Act* ("*NEPDA*"), the decision of the Niagara Escarpment Commission ("NEC") to conditionally approve a Development Permit application by Russell and Shelley Gordon ("Applicants") to construct a single dwelling. The Appellants were concerned with the impacts the development would have on the visual characteristics of the area.

At issue with respect to the visual characteristic of the area was the length of setback of the Applicants' proposed development. The dominant characteristic of the existing development in the area is one of large front yard setbacks. The Hearing Officer found that that characteristic ought to be preserved as much as possible, but noted that preserving visual characteristics does not mean making every development apply the exact same setback.

The Hearing Officer found that the existing conditions of approval could be improved by requiring the Applicants to return to the NEC for final approval once their final building plans were developed and made that recommendation to the Minister of Natural Resources The Hearing Officer stated that there would be a significant disadvantage in approving the dwelling at the conceptual stage without the benefit of a more detailed plan. The NEC decision was not confirmed.

The Minister issued a decision on September 29, 2006 concurring with the recommendation of the Hearing Officer and directing the NEC to issue a Development Permit subject to the additional and revised conditions.

Decision released: Hearing Officer's Report dated May 26, 2006 released with Minister's Decision on September 29, 2006 (Case No.: 05-114)

Adams v. Niagara Escarpment Commission

Laurie Adams ("Appellant") appealed under section 25 of the *Niagara Escarpment Planning and Development Act* ("*NEPDA*") the decision of the Niagara Escarpment Commission to approve a Development Permit application by Frederick Johnson ("Applicant") to construct an addition to an existing dwelling. The Appellant was seeking an explanation of a condition of approval attached to the Development Permit; as well the Appellant was concerned about the use by the Applicant of her private road. The Appellant requested that the Applicant be forbidden to access her private road and requested that he construct a new access road.

The Hearing Officer found that the matter of the use and access of the private road was a matter beyond the jurisdiction of the Niagara Escarpment Hearing Office. The Hearing Officer found that the *NEPDA* and Niagara Escarpment Plan do not require that there be road access to a property as a condition of issuing a Development Permit. Pursuant to section 25(12) of the *NEPDA*, the Hearing Officer confirmed the NEC's decision to approve the Development Permit application.

Decision released: October 27, 2006 (Case No.: 06-088)

Moss-Thachuk v. Niagara Escarpment Commission

Josephine Moss-Thachuk ("Appellant") appealed under section 25 of the *Niagara Escarpment Planning and Development Act* ("*NEPDA*") the decision of the Niagara Escarpment Commission ("NEC") to approve a Development Permit application by Alison Davies ("Applicant") to construct a single dwelling.

The Appellant was concerned about the location of the proposed driveway to the Applicant's dwelling. In the Notice of Appeal, the Appellant claimed ownership of the land comprising part of the area where the driveway would be constructed. The Appellant only provided photocopies of pictures as evidence to this claim of legal ownership. The NEC requested that the appeal be dismissed pursuant to section 25(8.1) of the *NEPDA* on the basis that land claim assertions should be supported by a legal plan of survey and sworn affidavits, and be dealt with by a court of law in an action separate from a Development Permit application.

The Hearing Officer found that the subject property was located in the Escarpment Natural Area, where the Niagara Escarpment Plan ("NEP") development criteria allow for the construction of single-family dwellings. The Hearing Officer held that there was no nexus between the Appellant's opposition to the issuance of a Development Permit based on disputed land ownership and any

planning considerations under the *NEPDA* or the NEP. Further, the Hearing Officer found no merit in the Appellant's assertion that the access to her property would be impeded.

The Hearing Officer refused to conduct a Hearing of the Appeal under section 25(8.1) of the *NEPDA*, and confirmed the NEC's decision to approve the Development Permit application.

Decision released: November 30, 2006 (Case No.: 06-106)

Bosnjak v. Niagara Escarpment Commission

Ivan Bosnjak ("Appellant") appealed under section 25 of the *Niagara Escarpment Planning and Development Act* ("*NEPDA*") the decision of the Niagara Escarpment Commission ("NEC") to conditionally approve a Development Permit application by 371865 Ontario Ltd. ("Applicant") to construct a storage coverall. The Appellant resided adjacent to the Applicant and was concerned about the use of the coverall, the distance from a water easement, and the effect of the storage coverall on the property value and development potential of the neighbouring property.

The Appellant failed to appear at the Hearing, and the Hearing Officer held that the NEC decision was confirmed pursuant to section 25(10.2) of the *NEPDA*.

Decision released: December 21, 2006 (Case No.: 06-117)

823484 Ontario Limited v. Niagara Escarpment Commission

823484 Ontario Limited ("Appellant") appealed under section 25 of the *Niagara Planning and Development Act* ("*NEPDA*") the decision of the Niagara Escarpment Commission ("NEC") to refuse to issue a Development Permit allowing the Appellant to construct a single residence, septic system, and driveway in the Town of Halton.

At the initial Pre-hearing Conference, a representative of the NEC indicated that the NEC might reconsider the Appellant's application if an environmental impact survey was completed and indicated the development was feasible. The Appellant subsequently advised that it would conduct the environmental impact survey, at which time, the NEC indicated that, should the Appellant withdraw its appeal, it could re-apply for a Development Permit in the future. The Appellant withdrew its appeal, and pursuant to section 25(10.2) of the *NEPDA*, the Hearing Officer confirmed the decision of the NEC to refuse the Development Permit application.

Decision released: January 16, 2007 (Case No.: 06-102)

Farewell v. Niagara Escarpment Commission

William Farewell ("Appellant") filed an appeal under section 25 of the *Niagara Escarpment Planning and Development Act* ("*NEPDA*") of the decision of the Niagara Escarpment Commission ("NEC") to conditionally approve a Development permit application made by Greg Callaghan of

Hicks-Pettes Architects Inc. on behalf of the Applicants to demolish an existing two-storey single dwelling, and construct a one-storey single dwelling. The Appellant's concerns centered around the appropriate use of the property, landscaping, tree preservation and planting on the property. During a teleconference, the Parties mutually agreed to revised conditions of approval that alleviated the concerns of the Appellant.

In consideration of the revised conditions, and pursuant to section 25(12.1) of the *NEPDA*, the Hearing Officer confirmed the NEC's Decision to issue the Development Permit.

Decision released: January 19, 2007 (Case No.: 06-133)

Mackie v. Niagara Escarpment Commission

Robert and Starr Mackie ("Appellants") appealed under section 25 of the *Niagara Escarpment Planning and Development Act* ("*NEPDA*") the decision of the Niagara Escarpment Commission ("NEC") to refuse the Development Permit application made by the Appellants to recognize the construction and use of an addition to a dwelling as an archery retail store, and to recognize the placement of a one storey portable building for archery activities. The addition would be added to Appellants' established retail store, Mackie's Mountain Archery ("MMA").

The main issue before the Hearing Officer was whether the proposed development was a permitted use pursuant to Part 1.4 of the Niagara Escarpment Plan ("NEP"). Part 1.4 provides a list of permitted uses subject to the development criteria set out in Part 2 of the NEP. It was undisputed that the MMA's operations constituted a recreational use with a secondary commercial component. Under Part 1.4 of the NEP, permitted use #5 allows recreation uses oriented to land only in non-agricultural areas. Therefore, it was necessary to determine whether the Appellant's property was in an agricultural area. Another permitted use #14, Home Occupation was considered. The Appellants argued that MMA should be deemed to be a permitted use, because it was a valued community service and its operations are consistent with the intent of the NEP, and Official Plans.

The relevant issues the Hearing Officer decided the matter on are as follows:

1. Whether the Mackie property is located in an agricultural area.

   The Hearing Officer found that the Mackie property is located in an agricultural area as defined in the NEP.

2. Whether the MMA operation, as a recreational use, is oriented towards the land within the meaning of permitted use #5 in Part 1.4 of the NEP.

   Since recreational uses are not permitted in an agricultural area within the meaning of permitted use #5 in Part 1.4 of the NEP, the Hearing Officer determined that it was unnecessary to evaluate whether this recreational use is oriented towards the land.

3. Whether MMA could qualify as a permitted use as a home occupation within the meaning of permitted use #14 in Part 1.4 of the NEP.

Although MMA's operations include a teaching component, the Hearing Officer found that MMA's operations are predominantly a recreational use with a secondary commercial component.

4. Whether there is any residual discretion to approve an application that does not otherwise satisfy the requirements of the NEP.

There is no such residual discretion to approve an application. As such, the Hearing Officer found that it was unnecessary to determine whether MMA's operations are sufficiently meritorious to warrant the exercise of such discretion.

The Hearing Officer also addressed the Appellants' primary argument that the MMA provides a valued community service, and that the NEP should be interpreted to accommodate such meritorious applications. It was acknowledged that the NEP should be treated as a "living" document that can be adapted and changed to meet the needs of the communities within its jurisdiction. However, the Hearing Officer found, while it is a valid consideration, this objective is not best achieved through piecemeal approval of development permit applications. The Hearing Officer found that this issue would be better addressed by individuals applying for amendments to the NEP, and for reviews of the NEP itself.

The Hearing Officer found the NEC's Decision to refuse the Development Permit application was correct, and pursuant to section 25(12) of the *NEPDA*, confirmed the decision.

Decision released: January 22, 2007 (Case Nos.: 06-113/114)

<u>Lang v. Niagara Escarpment Commission</u>

Dan Lang ("Appellant") filed an appeal under section 25 of the *Niagara Escarpment Planning and Development Act* ("*NEPDA*") of the decision of the Niagara Escarpment Commission ("NEC") to conditionally approve a Development Permit application to construct a one-storey sleeping cabin. The NEC staff had issued the Development Permit for an alternate site from the one the Appellant had originally cited on the application. The Appellant's reason for appeal was that the process had not provided him with any specific credible evidence or rationale as to why the placing of the cabin in the location requested represented a material risk to the quality of the water in the nearby pond.

The NEC, in approving the alternate site, relied on the findings of Nottawasaga Valley Conservation Authority ("NVCA"), who advised the NEC that they were not supportive of the placement of the sleeping cabin in the original application. The NEC took the position that comments received from the NVCA spoke to the Development Criteria in Part 2 of the Niagara Escarpment Plan ("NEP"). A Development Permit application is subject to the applicable policies that are in place at the time the application is made.

The Hearing Officer found that the NEC was correct in following the General Development Criteria under section 2.2 of the NEP in reaching its decision, and in particular, Section 2.2.1(d) which states that the development must meet applicable federal, provincial and municipal requirements. The Hearing Officer found that the NEC properly applied the criterion under this section, as the original site did not meet provincial requirements inasmuch as the NVCA, as a provincial authority, took the position that the original site was unsuitable. The alternate site proposed by the NEC and conditionally approved in the Development Permit application, was approved by the NVCA.

The Hearing Officer found the NEC's decision to conditionally approve the Development Permit was correct, and pursuant to section 25(12) of the *NEPDA*, confirmed the decision.

Decision released: March 6, 2007 (Case No.: 06-128)

Zelea v. Niagara Escarpment Commission.

Gabriel Zelea ("Appellant") appealed under section 25 of the *Niagara Escarpment Planning and Development Act* ("*NEPDA*") the decision of the Niagara Escarpment Commission ("NEC") to conditionally approve a Development Permit application made by Glendale Golf and Country Club to construct a reservoir and associated water taking/distribution infrastructure and golf course site modifications for irrigation purposes on the Glendale Golf and Country Club property. At the Hearing, the Hearing Officer was informed by the Parties that the appeal in this matter had been withdrawn. The Hearing Officer confirmed the NEC's Decision pursuant to section 25(10.2) of the *NEPDA*.

Decision released: March 9, 2007 (Case No.: 06-138)

Black v. Niagara Escarpment Commission

Jeffrey Black ("Appellant") filed an appeal under section 25 of the *Niagara Planning and Development Act* ("*NEPDA*") of the decision of the Niagara Escarpment Commission ("NEC") to conditionally approve a Development Permit application made by Patricia Hope Sullivan to construct a one storey accessory building to be situated in front of her ski chalet adjacent to Beaver Valley Ski Club. The Appellant was concerned with the visual attractiveness of the building, consistency with the visual characteristics of the area, and was also concerned that the construction would have a deleterious impact on trees on the subject property.

Following settlement discussions held at a Pre-Hearing teleconference, the Parties reached an agreement that alleviated the concerns of the Appellant, who withdrew his appeal. The Hearing Officer confirmed the NEC's decision granting conditional approval of the Development Permit.

Decision released: March 14, 2007 (Case No.: 06-184)

Sideris v. Niagara Escarpment Commission

George Vorovenci and Nick and Jan Sideris filed appeals under section 25 of the *Niagara Escarpment Planning and Development Act* ("*NEPDA*") of the decision of the Niagara Escarpment Commission ("NEC") to conditionally approve a Development Permit Application made by George Vorovenci to construct a 1 storey accessory building (Building 1). Mr. Vorovenci already had received approval from the NEC to build the building and had the accompanying infrastructure. However, he was denied approval for a second building (Building 2). Nick and Jan Sideris were appealing the NEC's decision to approve Building 1. The Sideris' main concern was that the developments could interfere with the flow of water on their land, either causing damage to their property, or potentially polluting ground and/or surface water on both the Sideris and Vorovenci property.

The relevant issues the Hearing Officer decided the matter on are as follows:

1. Whether the proposal to construct Building 1 satisfies the development criteria under Part 2 of the NEP, more specifically, Part 2.6 (New Development Affecting Water Resources), Criteria #6.

The Hearing Officer found that Building 1 constituted a permitted use as an Accessory Building, which satisfied the General Development Criteria under Part 2.2 of the Niagara Escarpment Plan ("NEP"). The NEC's decision to conditionally approve the proposed development to construct Building 1 was correct and confirmed.

2. Whether Building 2 qualifies as an accessory building as defined in the NEP ("Accessory Building").

The Hearing Officer noted that the definition of Accessory Building is based on its use, not its size or an evaluation of its necessity to the Applicant. The definition requires only that the use be either incidental, subordinate, or exclusively devoted to the principal use of the same lot. What is decisive is that the nature and character of a proposed accessory use must not eclipse the permitted use as the principal use of the property. A property owner may propose multiple accessory buildings, each of them in accordance with the NEP. However, there may be so many that they collectively cease to be subordinate or normally incidental to the principal use of the property. The Hearing Officer found that this was not the case with Mr. Vorovenci's building.

3. If Building 2 qualifies as an Accessory Building, whether the proposal to construct Building 2 satisfies the development criteria under Part 2 of the NEP, more specifically Part 2.2 (General Development Criteria), Criteria #1(a) and #4, and Part 2. 6 (New Development Affecting Water Resources), Criteria #1.

The Hearing Officer found that when evaluating the visual impact of the proposed Accessory Buildings, it was necessary to consider the impact of the residential dwelling, given the requirement of the NEP to consider the cumulative impact of development on the landscape. The Hearing Officer took into consideration both the visual impact of the house and the proposed location for

Building 2, and found that the NEC was correct in concluding that due to its proposed size and location, Building 2 would create a visually overpowering continuous line of buildings along the Escarpment slope, which would not preserve the visual characteristics as required by the NEP.

Mr. Vorovenci did not submit any evidence to contradict the submission of the NEC that Building 2 had the potential to interfere with the water flow or drainage of the area, which Part 2.6 of the NEP states should be avoided.

The Hearing Officer found that the NEC's decision to refuse the application to construct Building 2 and conditionally approve the Development Permit for Building 1 was correct, and confirmed the decision.

Decision released: March 30, 2007 (Case Nos.: 06-130/131/132)

Safe Drinking Water Act, 2002

Team Aquatic Management (Operations) Ltd. v. Director, Ministry of the Environment

Team Aquatic Management (Operations) Ltd. ("Appellant") filed an appeal pursuant to section 129 of the *Safe Drinking Water Act*, 2002 ("*SDWA*") with respect to an Order issued by the Director, Ministry of the Environment regarding a water system serving a mobile home park and trailer park under the operating authority of the Appellant.

The Director's Order revoked a Provincial Officer's Order and required the Appellant to take steps to remedy failures of compliance regarding sampling, testing and recording data.

During a mediation session, the Parties negotiated a settlement. The Tribunal was satisfied that the agreement was in accordance with the Tribunal's Practice Direction for Consideration of Agreements, and dismissed the appeal.

Decision released: May 5, 2006 (Case No.: 04-132).

Summaries of Selected Orders

Consolidated Hearings Act

Central Milton Holdings Limited and 665497 Ontario Limited

Central Milton Holdings Limited and 665497 Ontario Ltd ("Proponents") filed for a Hearing before a Joint Board pursuant to Section 3 of the *Consolidated Hearings Act* ("*CHA*"), regarding a proposal to amend the Region of Halton Official Plan and the Niagara Escarpment Plan ("NEP") to allow the inclusion of approximately 63 hectares of land in the Urban Area of the Town of Milton.

The Niagara Escarpment Commission ("NEC"), the Region of Halton ("Halton"), and the Town of Milton ("Town") brought a Motion requesting that the Joint Board dismiss the proceedings. The Motion was brought under Rule 98(d) of the Rules of Practice and Practice Directions of the Environmental Review Tribunal, on the grounds that the Proponents failed to comply with undertakings and Orders of the Joint Board to the extent that the responding Parties (NEC, Halton, and Town) had suffered prejudice to such a degree that procedural fairness was compromised.

The Proponents maintained that they had complied with the Joint Board's Orders, and further argued that the Joint Board was without jurisdiction to dismiss the proceedings, notwithstanding Rule 98(d) of the Tribunal's Rules, since there is no statutory authority under the *Niagara Escarpment Planning and Development Act* ("*NEPDA*") to dismiss proceedings respecting a NEP amendment as there is under the *Planning Act* respecting the Halton Official Plan amendment. The Proponents also argued that the Joint Board had a duty to hold a hearing under the *CHA*.

With respect to the authority to dismiss, the Joint Board found that the provisions of sections 5(2) and 5(6) of the *CHA*, when read in conjunction with section 6.1(3) of the *NEPDA,* provide the authority to refuse an amendment to the NEP in the circumstances set out in the *NEPDA* where such a proposed amendment does not disclose a planning justification, is not in the public interest, is without merit, is frivolous or vexatious, or is made only for the purpose of delay. The Joint Board also concluded that it possessed the authority to dismiss a proceeding as a necessary part of its jurisdiction under the *Statutory Powers Procedure Act* ("*SPPA*") to control its process and any alleged abuse of process. The Joint Board found that this jurisdiction is also reflected in Rule 111 of the Tribunal's Rules, which states that the proceeding in regard to the NEP amendment can only be dismissed by the Tribunal, if the proceeding is under the *CHA*, to which the *SPPA* applies. Also, Rule 17 of the Tribunal's Rules makes it clear that Rule 16 applies to NEP amendment proceedings where such proceedings are brought under the *CHA*. Rule 16 allows the Tribunal to issue procedural order to ensure compliance with the Rules, orders, undertakings or written requests from the Tribunal, or to prevent undue delay and, if the non-compliance continues, to dismiss the proceeding or limit or revoke participation rights, after giving the affected Party or Participant the opportunity to make submissions. Therefore, the Joint Board found that it did have the appropriate jurisdiction to deal with the Motion for Dismissal.

Rule 98 sets out the requirements for a Motion to Dismiss. In applying the Rules applicable to dismissal, the Joint Board found that the Proponents had not so much failed to comply to with

undertaking and Orders, as they had filed the hydrogeological and environmental noise assessment information late. The Joint Board found that this conduct would more properly be dealt with in an application for costs, and did not warrant a dismissal of the proceedings. The Joint Board was not convinced that sufficient prejudice had resulted from the actions of the Proponents that a fair Hearing could not remedy. For those reasons, the Joint Board dismissed the Motion to Dismiss.

Order released: October 26, 2006 (Case No.: 99-036)

Environmental Bill of Rights, 1993

Cassidy v. Director, Ministry of the Environment

Michael Cassidy ("Applicant") filed an application under section 38 of the *Environmental Bill of Rights, 1993* ("*EBR*"), for leave to appeal a decision of the Director, Ministry of the Environment, made under section 53 of the *Ontario Water Resources Act* to issue a Certificate of Approval to OMYA (Canada) Inc. ("OMYA") for the discharge of water from Tatlock Quarry to a receiving watercourse in Lanark Highlands, Ontario.

OMYA filed a Motion seeking an order dismissing the Applicant's application on the basis of non-compliance with section 40 of the *EBR*, which requires that an application for leave to appeal be filed within 15 days after notice of a Director's decision. OMYA also alleged that the Applicant failed to comply with Rules 40, 41, 77, 78, 79 and 81 of the Tribunal's Rules.

The Tribunal dismissed the Motion. In its findings, the Tribunal considered whether any of the instances of non-compliance with its Rules were tantamount to a violation of the *EBR* itself. The Tribunal also considered whether there was any relief from compliance where a statute imposed a mandatory obligation that constituted a statutory prerequisite to proceeding with an application.

With respect to non-compliance with section 40 of the *EBR*, the Tribunal found that the *EBR* does not stipulate that the limitation period ends at the close of business on the 15th day. The applicant has until the end of the 15th day to make an application.

With respect to the non-compliance with its Rules, the Tribunal found that the *EBR* does not state that an application is only considered to be made if it is in accordance with the appellate body's Rules. Similarly, the *EBR* does not state that an application is only properly made once the Instrument-holder has been given notice. Further, section 46 of the *EBR* provides an appellate body with flexibility in dealing with an application but does not impose a statutory obligation on applicants to comply with the Tribunal's procedures. Therefore, Mr. Cassidy's violations of the Rules of the Tribunal were not statutory violations that would invalidate the application.

Additionally, the Tribunal referred to Rule 16, which provides that the remedy of dismissing a proceeding for non-compliance with the Rules be undertaken only when attempts to encourage compliance through procedural orders have failed. The Tribunal found that to terminate a proceeding on the basis of procedural irregularities, as opposed to jurisdictional problems, runs contrary to the purpose of the *EBR*, the Tribunal's Rules and the *Statutory Powers Procedure Act*

("SPPA"). The appropriate remedies for Mr. Cassidy's non-compliance with the Rules were to: (1) direct the Parties to comply with the Rules in all future steps of the proceeding, and (2) provide the Director and OMYA with at least as much time to respond to the Application as they would have enjoyed had Mr. Cassidy complied with the Rules.

Order released: May 5, 2006. (Case No.: 06-004)

Environmental Protection Act

Stericycle Inc. v. Director, Ministry of the Environment.

Stericycle Inc. ("Stericycle") filed an appeal for a Hearing by the Environmental Review Tribunal ("Tribunal") under section 139 of the *Environmental Protection Act* ("*EPA*"), of the Director's decision under section 38(2)(a) of the *EPA* to refuse to amend the Certificates of Approval for a Waste Disposal Site and a Waste Management System to allow the use of reusable sharp containers. Stericycle appealed the "entirety of the decisions refusing to grant the requested amendments that would permit the appellant to use a reusable waste needle or 'sharps' container as part of its biomedical waste management business."

Medical Waste Management Inc. ("Medical Waste") filed a request for Party status at the Hearing before the Tribunal. Stericycle objected to the granting of Party status to Medical Waste.

Besides Stericycle, Medical Waste was the only other company providing a reusable sharps containment system in the province at the time of the order, making Medical Waste the market competitor of Stericycle.

The Tribunal found that competitor status is not an inherent bar to the granting of Party status, nor is the presence of an economic interest. Rather, each request for Party status must be assessed individually, in the context of the facts, the proceeding and the criteria in Rule 53 of the Tribunal's Rules of Practice.

The Tribunal held that Party status should be granted conditionally under Rule 53(c), because Medical Waste's experience as a regulated entity operating under the Ministry of Environment Guideline made it likely that it would make a relevant contribution to the Tribunal's understanding of the issues. The Tribunal stated that it was, therefore, unnecessary to consider the other two criteria listed in Rule 53.

In making its findings, the Tribunal noted that, while the court cases deciding party or intervener status are instructive, the broader role of many administrative tribunals requires a more expansive and inclusive approach than that applied by the courts. In other words, even if many of the criteria considered by the courts and tribunals in assessing requests for status are similar, the threshold for granting status is often lower for tribunals. This is especially true for the Environmental Review Tribunal, which has a mandate that may be broader than the *lis* between the two main parties.

In granting Party status conditionally, the Tribunal addressed the concerns of Stericycle by placing limits on Medical Waste's participation. The Tribunal noted that Medical Waste had already

committed to not seeking access to any confidential information held by Stericycle through this proceeding. The Tribunal found that Medical Waste should not be allowed "to enter into the fray of whether Stericycle's container complies with the Guideline. It may, however, provide a regulated entity's perspective on the history, rationale, intent and requirements of the Guideline."

Order released: June 9, 2006 (Case No.: 05-150)

Krek v. Director, Ministry of the Environment

Alex Krek ("Appellant") filed an appeal under section 140 of the *Environmental Protection Act* ("*EPA*"), with respect to a Director's Order issued under the *EPA* regarding remediation measures for petroleum hydrocarbon contamination. The Provincial Officer's report attached to the Order from the Director indicated that in June 1990, up to 3500 litres of heating oil had leaked from an above ground storage tank located on the site of Mr. Krek's property.

Subsequent to filing the Appeal, the Appellant, through his Counsel, declined to comply with Rule 27 of the Tribunal's Rules of Practice and Practice Directions ("Rules"). Rule 27 states that the Appellant must provide the Case Manager at the Tribunal with (1) a list of names and addresses of the owners of property within 120 metres of the boundary of Mr. Krek's property, and (2) the names and addresses of any other person who should be notified of the proceeding because they may have an interest in the outcome, as required by Rule 27. A Preliminary Hearing could not be scheduled without first giving Notice to persons identified under Rule 27.

Mr. Krek's Counsel, Mr. O'Leary, explained that several of the neighbours are the litigants in either a settled lawsuit or a pending lawsuit. Where the lawsuit was settled, the litigant Parties were under an Order by the Court to not take any actions which might lead to claims being brought by other parties. Mr. O'Leary was of the view that providing the names and addresses of the parties required under Rule 27 would violate the Order of the Court on Mr. Krek's part. Counsel for the Director, Sylvia Davis, submitted in response that the Order of the Court had a qualifying sentence at the end that stated that the Order was "subject to any obligations they (parties to the Order) may have at law." Ms. Davis suggested that the Tribunal could issue an Order requiring Mr. Krek to provide the information required pursuant to Rule 27 and that such an Order would create an obligation at law. The issue before the Tribunal was whether such an Order should be issued.

The Tribunal accepted the submissions of Mr. O'Leary, that it is the Court, not the Tribunal that has the jurisdiction to decide whether any actions taken by Mr. Krek in the current proceedings constituted an infringement on the Court Order. However, the Tribunal also found that the Court Order did not negate the jurisdiction of the Tribunal to implement its own rules and practices. The Tribunal's powers are conferred by statute, pursuant to section 25.0.1 of the *Statutory Powers Procedure Act*. In this particular case, jurisdiction is also reinforced under section 145(1) of the *EPA*, which provides the authority for the Tribunal to specify Parties in addition of the Appellant and the Director. The Court Order binds only persons who are parties to that proceeding, and does not extend to the Tribunal, nor members of the public who are entitled to notice of this appeal

pursuant to the Rules. The Tribunal's jurisdiction was not limited because the Appellant chose to commence an appeal while he remained subject to the restrictive provisions of the Court Order. The Court Order fettered only the discretion of the Appellant's conduct before the Tribunal.

Mr. O'Leary also submitted, on behalf of the Appellant, that Rule 27 was only procedural in nature, and the Tribunal had the discretion to waive or depart from its application. The Tribunal rejected the argument that Rule 27 is only procedural in its effect, citing that the practice of the Tribunal is to allow interested persons to participate in a proceeding as a Party, Participant, or Presenter, and that the rules of natural justice require that such persons be afforded the opportunity to participate in the proceedings. Therefore, Rule 27's entitlement to notice directly affects the substantive rights of persons interested in the subject matter of the appeal. Interested parties cannot participate in the process unless they are aware the appeal is taking place.

The Tribunal noted that it would take very compelling reasons to waive or depart from the provisions of Rule 27. The Appellant's submissions fell short of this standard. There was nothing in the submissions to suggest that the public's right to notice of the appeal was unnecessary, nor that the public interest would be served in limiting participation in the proceeding.

Rule 27 imposes a mandatory obligation on the Appellant to provide the required lists of names. Therefore, an Order to provide this information is not required. However, in the interest of fairness, the Tribunal issued the Order so as to assist the Appellant, Mr. Krek, should his compliance with the Court Order become the subject of judicial scrutiny.

The Tribunal denied the Appellant's request to waive the requirement with Rule 27 of the Rules of Practice and Practice Directions, and ordered that the Appellant must comply with Rule 27.

Order released: January 23, 2007 (Case No.: 06-111)

Limoges v. Director, Ministry of the Environment

Mitech Plastics Corporation, Pop & Lock Corporation, Brian D. Mitchell and Richard G. Limoges ("Appellants") filed a Notice of Motion for a Stay of a Director's Order being appealed pursuant to section 140 of the *Environmental Protection Act* ("*EPA*"), with respect to a Director's Order regarding remediation measures for existing volatile organic and halogenated compound contamination of soil and groundwater on the site.

The issue before the Environmental Review Tribunal ("Tribunal") was whether the Tribunal was precluded from granting a stay of the Director's Order under section 143(3) of the *EPA*, and if the Tribunal was not precluded from so doing, whether the tests for a stay, as set out in Rule 97 of the Tribunal's Rules of Practice and Practice Directions ("Rules"), were met. The Director opposed the Stay, and a teleconference was held to rule on the motion.

In this matter, the Tribunal first examined the issue of the application of section 143(3) of the *EPA*, which pertains to the nature of the evidence before the Tribunal. Counsel for the Director argued that unless some remedial action was taken as set out in the Director's Order, there was a serious

risk of, or actual, danger to the health or safety of the public or impairment or damage to the environment or property. Counsel for the Appellants submitted that the Director only filed written submissions that relied on the Director's Order and that without any evidence, the Director had failed to discharge his onus of establishing harm, and therefore, failed to meet the statutory test as outlined in section 143(3) of the *EPA*. The Tribunal found that the Director's Order was admissible as evidence. Section 15 of the *Statutory Powers Procedure Act* ("*SPPA*") allows a tribunal to admit any relevant oral or documentary evidence at a hearing, whether or not it was given or proven under oath or affirmation or admissible as evidence in court. The Tribunal found that the Director's Order contained significant relevant information that could be admitted as evidence at the Tribunal's discretion. Therefore, the Appellants' argument that the Director did not present any evidence could hold no ground.

The Tribunal agreed with the Appellants' submission that the Director had the onus of establishing that there was a danger to health or serious risk of it, to property or plant or animal life, as stated in section 143(3) of the *EPA*, which would in effect, oust the jurisdiction of the Tribunal to grant a stay. The Director must establish a prima facie case, and if that is made out, the Appellants can bring evidence to rebut it. The Tribunal found that the threshold in the *EPA* is whether there is a serious *risk* of impairment without the need to demonstrate or establish actual impairment. If the Tribunal determines on the basis of evidence before it that there is a *risk* of impairment, this finding of risk removes the authority to grant a stay.

The Tribunal also felt it was necessary to err on the side of caution, especially when the risk of contamination has possible off-site impacts. The Tribunal accepted the evidence of the Director and found that there was a danger to health and a serious risk of impairment to the environment from potential off-site impacts of certain contaminants that would result from the granting of a stay. Therefore in accordance with section 143(3) of the *EPA*, the Tribunal denied the motion for the Stay.

In the alternative, the Tribunal found that the Appellants did not meet the tests for the granting of a stay in Rule 97 of the Tribunal's Rules. Under Rule 97, the Appellants must establish that there is a serious issue to be tried, and that irreparable harm will ensue if the relief is not granted and that the balance of convenience favours the granting of the stay. The Tribunal noted that the first prong of this three-pronged test has a very low threshold, intended only to rule out frivolous or vexatious claims. The Appellants were able to meet this threshold. The second part of the test, whether irreparable harm would ensue if the relief is not granted, was considered by the Tribunal with guidance from the jurisprudence of *Manitoba (Attorney General) v. Metropolitan Stores Ltd.,* [1987] 1 S.C.R. 110, and *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] S.C.R. 311, which elaborate on the criterion of what constitutes "irreparable harm". The Tribunal noted that the litigant arguing irreparable harm must demonstrate that such harm <u>would</u> occur. The Tribunal found that there was a lack of specific evidence that irreparable harm would occur. Additionally, the case law states that the harm must be such that it cannot be quantified in monetary terms or it cannot be cured. The Appellants failed to produce evidence that they could not seek reimbursement for their costs to comply with the Order should the Tribunal find in their favour at the Hearing. The Tribunal also rejected the argument that the threat of prosecution constituted irreparable harm,

noting that such arguments would undermine enforcement actions since orderees could wait until the time for compliance with orders has expired and then apply for a stay on the ground of irreparable harm. For these reasons, the Tribunal found that the Appellants did not meet the second criterion for the granting of the stay.

The stay requested on the Motion was denied pursuant to section 143(3) of the *EPA*. In the alternative, the Tribunal found that the tests outlined in Rule 97 of the Tribunal's Rules of Practice and Practice Directions were not met to grant the stay.

Order released: February 28, 2007 (Case Nos.: 06-152/153/154/155)

Ontario Water Resources Act

Trent Talbot River Property Owners Association v. Ontario (Ministry of Environment)

The Trent Talbot River Property Owners Association ("Trent Talbot") filed a Notice of Motion to review the Tribunal's decision issued on December 7, 2005 and amended on January 26, 2006. The Tribunal had granted in part, Trent Talbot's appeals of a Permit to Take Water and a Certificate of Approval granted by the Director under sections 34 and 53, respectively, of the *Ontario Water Resources Act* in relation to the dewatering of a proposed quarry in the Township of Ramara, by adding terms and conditions.

Trent Talbot's original Motion to review the Tribunal's decision was found deficient by the Tribunal, as it did not link the grounds for review with the factors that the Tribunal must consider under its Rules, nor did it make any specific references to the decision itself. However, the Tribunal issued an Order allowing Trent Talbot the opportunity to correct the deficiencies. Trent Talbot subsequently filed an amended Notice of Motion. The grounds for the Motion were: there were material errors of law and fact, absent which the Tribunal would likely have reached a different decision (Rule 206(b)); there was credible and material new evidence that could have affected the result of the Hearing (admissible under Rule 202)(Rule 206(c)); the Tribunal acted outside its jurisdiction (Rule 206(a)); the Decision offended the statutory purpose and underlying principles that govern the Tribunal (Rule 206); and, in respect to factors weighing against reconsideration, the Decision was prejudicial to Trent Talbot and outweighed the public interest in the finality of orders (Rule 206(d), (e) and (f)).

The Director submitted that two of Trent Talbot's grounds, new evidence and acting outside its jurisdiction did not appear in the original Notice of Motion and, therefore, the amended Notice of Motion should be dismissed. The Tribunal, referring to Rule 1 of its Rules of Practice and Practice Directions, acknowledged that while Trent Talbot should have asked leave to argue additional grounds, the general intent of the Tribunal's Order, which was to link the grounds to the criteria in Rule 206 and make specific references to the Decision, were followed. The Tribunal did not strike out the additional grounds.

The Tribunal examined Rules 203 to 210. The Tribunal noted that Rule 206 provides for a broad discretionary authority for the Tribunal to decide "whether it is advisable" to review a decision.

The list of criteria under 206 is not exhaustive. The Tribunal examined the jurisprudence of other tribunals of similar authority to decide what factors were important in deciding whether review was 'advisable'. The Tribunal noted that "correctness" of the decision was not to be assessed by the panel hearing a motion to review. The language of Rule 206 suggests a high threshold, and that the errors of fact or law must be "material" such that the Tribunal would likely have reached a different decision but for the error. The ground of new evidence is similarly stringent. Any new evidence must be material and credible and also of such a character that it could have affected the result of the Hearing.

With respect to alleged errors of fact, the Tribunal found that aside from some minor factual errors, most of the alleged errors involved the Hearing Panel's consideration and weighing of differing expert opinion evidence with which Trent Talbot did not agree. The Hearing Panel was free to make factual findings based on the evidence and they do not constitute errors of fact.

With respect to the grounds of failure to give reasons, the Tribunal looked to common law jurisprudence such as *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 for guidance as to the standard by which written reasons ought to be judged. The Tribunal found that the Hearing Panel made clear findings in respect to the main issues raised at the Hearing, and that the Hearing Panel met the basic requirements for written reasons.

With respect to the failure to fulfill the statutory mandate, the Tribunal found that the Hearing Panel made its Decision in a manner that was consistent with applicable legislation, regulations and the Statement of Environmental Values. The Tribunal noted that there is no decision template that ought to be followed by the Tribunal when it discusses the applicable law and policy context for any given proceeding in its reasons. The focus may shift between the scientific evidence and the law, depending on the case before the Hearing Panel.

With respect to credible new evidence that could have affected the result of the Hearing, the Tribunal looked to the case in *R. v. Palmer* [1980] 1 S.C.R. 759 for the principles on admission of new evidence on appeal from a verdict. The Tribunal found that the new evidence put forward by Trent Talbot did not meet the "new evidence" requirements under Rule 202 that it not have been in existence or obtainable at the time of the Hearing.

In relation to the submission that the Hearing Panel erred in how it framed the issues, the Tribunal found that the key factor in defining the issues at a Hearing is that the Hearing Panel analyze the evidence on the main issues before it and provide reasons for that decision. The Tribunal could not find any problem with the approach the Hearing Panel took in framing the issues.

Pursuant to Rule 206, the Tribunal found that it was not advisable to review all or part of the Decision. However, the Tribunal did find that some minor errors warranted correction under Rule 200.

The Motion to review was dismissed.

Order released: May 26, 2006 (Case Nos.: 02-214/02-217 and 03-188/03-189)

Niagara Escarpment Planning and Development Act

Paxton v. Niagara Escarpment Commission

John Paxton ("Appellant") filed an appeal under section 25 of the *Niagara Escarpment Planning and Development Act* ("*NEPDA*") of a decision of the Niagara Escarpment Commission to conditionally approve a Development Permit application made by Jack Lowrey ("Applicant") to develop a proposed plan of subdivision (the "subdivision"). The Appellant's lands are adjacent to the subdivision.

The Applicant brought a Motion for summary dismissal of the appeal. Along with this matter, the Hearing Officers also made rulings on the following issues at the Pre-Hearing Conference: 1) Whether Harry Murdoch and Bruce Woodruff should be granted Participant and Presenter status, respectively; 2) Whether the adjournment of the Motion and/or the upcoming Hearing sought by the Appellant should be granted.

The Hearing Officers granted the requests for Participant and Presenter status, as they found that both individuals had genuine interests that may be substantially affected by the Hearing, and were likely to make relevant contributions.

The Hearing Officers found that the Appellant's request for an adjournment of the Motion to dismiss should be denied as the Appellant's reasons for requesting an adjournment had little relevance to the Motion to dismiss the appeal. Instead, after finding that the Motion to dismiss should be dismissed, they held that the Hearing should be adjourned as it is generally appropriate to give a Party sufficient time to retain an expert, which was the main argument for the Appellant's request for adjournment.

With regard to the Motion to dismiss, the Applicant alleged that the Appellant had not specified reasons for the appeal and the appeal was without merit and had no planning justification.

The Hearing Officers found that, as noted in *Dodds v. Ontario (Niagara Escarpment Commission)* (2005), 19 C.E.L.R. (3d) 47 (NEHO), the *NEPDA* imposes limited mandatory requirements for a Notice of Appeal. A Notice of Appeal need only specify reasons, without any analysis of their merit. The Hearing Officers found that the Appellant's Notice of Appeal, while vague, did make explicit mention of the reasons for his appeal, and they, therefore, did not dismiss his appeal on that basis.

In regards to the alleged lack of planning justification and merit, the Hearing Officers noted that the onus rests on the Party requesting the dismissal to show how the appeal fails to disclose a planning justification or is without merit. They also noted that the bar for summary dismissals should not be set too low such that meritorious appeals are erroneously dismissed. The Hearing Officers concluded that they could not, at that preliminary stage, make a judgment that the Appellant's appeal was without merit. The focus of the appeal was on the adequacy of the Conditions of Approval, and the Hearing Officers found that the Appellant raised legitimate issues regarding how

the Conditions of Approval could be improved to achieve the objectives of the NEP. As such, the Motion to dismiss the appeal was dismissed.

Order released: November 20, 2006 (Case No.: 06-096)

Summaries of Appeals and Judicial Reviews of Decisions of the Tribunal

Dufferin Aggregates, a Division of St. Lawrence Cement Inc.

In a decision dated December 1, 2006, the Lieutenant Governor in Council reviewed the Decision of the Joint Board released on June 8, 2005 (Case No.: 03-86) on the matter of a proposal by Dufferin Aggregates, a Division of St. Lawrence Cement Inc., to proceed with an undertaking to expand its existing operation and quarry additional aggregate resources. The Joint Board had approved the undertaking subject to a number of conditions set out in Appendix F of their Decision.

The Coalition on the Niagara Escarpment (CONE) and Protect our Water and Environmental Resources (POWER) applied to the Lieutenant Governor in Council to review the Order of the Joint Board. CONE and POWER, and other parties, had disagreed with the Joint Board's conclusions and argued that the Joint Board failed to make proper findings of fact and law, such that the decision was contrary to Provincial policies, and to the public interest.

The Cabinet, in its decision, noted that it had previously considered a blanket prohibition for pits and quarries on the Niagara Escarpment, but has decided that each proposal for aggregate extraction on the Escarpment must be judged on its own merits, and will continue to be permitted within the Escarpment Rural designation.

Cabinet found that there were no instances where relevant provincial policies were not considered, the Joint Board's decision addressed all of the issues raised in the Petitions, and there were no instances where the decision contained findings that contravened applicable laws, policies or regulations.

Cabinet was satisfied that adequate safeguards for the environment were in place, and confirmed the bulk of the Joint Board decision with the following variations:

- Boundaries of setbacks of the Wetlands (W7, W8, and V2) were changed, and V2 was excluded from the area of extraction
- Whereas condition 34 set out by the Joint Board in Appendix F allowed for the modification of the Development Permit by the Niagara Escarpment Commission in accordance with Part 7 of the Niagara Escarpment Plan Amendment PH 135 as was revised by the NEC in November 2003; this condition was deleted in Cabinet's amendments because the Development Permit cannot be modified further by the NEC
- Conditions 3, 4, 17, 19, 38 and 45 were varied in wording slightly to advance rehabilitation and promote public participation and transparency, as well as to ensure clarity.

Cabinet Decision released: December 1, 2006 (O.C.: 2384/2006)

Report on Performance Measures
Fiscal Year 2006-2007

For fiscal year 2006-2007, the Tribunal adopted nine goals that are critical to the effective and efficient performance and service quality of the Tribunal's main functions.

In this fiscal year, the Tribunal met or exceeded the performance measures in eight out of nine targeted areas. The Key Performance Goals and Objectives for the next fiscal year 2007-2008 are set out in Appendix D.

Commitment #1: Courtesy

"Tribunal members are committed to ensuring that all parties are treated with courtesy and respect when appearing before the Tribunal at a hearing."

In order to monitor the performance of a Tribunal member, the Tribunal sends out questionnaires after every mediation and hearing. Questionnaires were sent after every mediation and hearing to every party, representative of a party and every participant during this fiscal year. These questionnaires provide feedback and assist the Tribunal to improve the hearing processes. The questionnaires include questions relating explicitly to the conduct and performance of the Tribunal members during the hearing process. This fiscal year, the number of questionnaires received by the Tribunal has increased and of those received, 100% reported satisfaction with member courtesy. Although the increase of questionnaires received is minimal, the low number may be due to parties choosing not to respond as they regularly appear before the Tribunal or Hearing Office and may find it repetitive to complete the questionnaires after every hearing when there is no new information to report.

The Tribunal has a formal policy and process for complaints received from the parties or the public concerning its members. The Tribunal received one complaint during this fiscal year, which is still under investigation.

Commitment #2: Decisions

"Tribunal members will render timely decisions."

Legislation requires that all recommendations/decisions made under the *Niagara Escarpment Planning and Development Act* on development permit applications be made within 30 days of the conclusion of the hearing or within such longer period as the Minister of Natural Resources may allow. Of the total cases carried forward and received this fiscal year under the *Niagara Escarpment Planning and Development Act* that resulted in a hearing and a decision, 25% of the decisions were rendered within 30 days of the completion of the hearing. In addition, 52% of all decisions rendered were released between 31 – 35 days following the hearing.

Niagara Escarpment Plan amendment application decisions must be rendered not more than 60 days after the conclusion of the hearing or within such extended time as the Niagara Escarpment Commission may specify. The Hearing Office received one plan amendment application which was carried forward to this fiscal year. The decision was rendered 70 days following the hearing.

Tribunal decisions on the *Environmental Bill of Rights, 1993* leave to appeal applications are to be made within 30 days after the day on which the application is filed, unless the Tribunal has determined that, because of unusual circumstances, a longer period is needed.

In all other types of decisions, Tribunal members endeavour to render 80% of their decisions within 60 days of the completion of the hearing or the filing of final written submissions (if ordered by the hearing panel).

For the purposes of this performance measure, the commitment was defined this fiscal year as *"80% of all Decisions will be rendered within 60 days of final argument, excepting hearings with legislative timelines."* For the fiscal year 2006-2007, the timeliness of decisions rendered was captured for those decisions issued on appeals under the *Environmental Protection Act,* the *Ontario Water Resources Act,* the *Pesticides Act* and the *Safe Drinking Water Act, 2002*. There were no applications under the *Environmental Assessment Act,* the *Environmental Protection Act* and the *Ontario Water Resources Act*. In 73% of these cases, members released their decisions within 60 days of the final argument. Although this figure is below the 80% target, it has improved over the last fiscal year. The Tribunal has a monitoring process in place to regularly remind members of the timelines for releasing their decisions. The Tribunal remains committed to timely decisions.

Commitment #3: Training of Members

"The Tribunal will provide training for its Members."

New Members are trained in the hearing process, conduct of hearings, knowledge of legislation, Tribunal Rules, decision writing and mediation. They receive one-on-one training regarding the hearing process, legislation, conduct of hearings, the Tribunal Rules and Practice Directions and decision writing from in-house staff. Members attend training courses on adjudication and decision writing conducted by the Society of Ontario Adjudicators and Regulators. Full-time members attend the five-day course on alternative dispute resolution offered by Stitt, Feld, Handy. Members are scheduled to receive additional training by attending hearings, as an observer, and then as a member of a hearing panel before conducting hearings independently.

In the last fiscal year, three new Vice-Chairs and a part-time Member were appointed to the Tribunal. They were conducting hearings independently within the first two months of their appointments. The Tribunal strengthened its training for members and included three sessions on legislation and process and one session on decision writing in its Learning Program. The Tribunal will continue to provide in-house training as part of its Learning Program in the next fiscal year. The Learning Program is outlined in Appendix C.

Commitment #4: Offer pre-hearing conferences and preliminary hearings

"The Tribunal will offer pre-hearing conferences in appeals under the Niagara Escarpment Planning and Development Act and schedule preliminary hearings in all other appeals and applications, prior to the commencement of the hearing."

During this fiscal year, the Tribunal was committed to providing pre-hearing conferences for matters under the *Niagara Escarpment Planning and Development Act* and preliminary hearings for all other appeals and applications. The pre-hearing conferences were held via teleconference and preliminary hearings were held at least 30 days prior to the commencement of the hearing.

Thirty-three pre-hearing conferences and 42 preliminary hearings were held during this last fiscal year. The number of pre-hearing conferences held this fiscal year has more than doubled since last fiscal. The Tribunal will continue to provide pre-hearing conferences and preliminary hearings for all matters. However, with respect to pre-hearing conferences, teleconferences can only be held if the parties agree to participate.

Commitment #5: Appeals and Judicial Reviews of Tribunal Decisions

"Report on Appeals and Judicial Reviews of Tribunal Decisions."

The Tribunal has committed to reporting on the outcome of any appeals or judicial review applications of its decisions. This fiscal year, the Tribunal received a decision of the Lieutenant Governor in Council and has reported on that decision in this Annual Report under Summaries of Appeals and Judicial Reviews of Decisions of the Tribunal.

Commitment #6: Timeliness in Scheduling Hearings

"Improve the timeliness in scheduling hearings."

The Tribunal has adopted a standard to issue a Notice of Hearing within 30 calendar days of the date of receipt of the appeal. During this fiscal year, the Tribunal exceeded that timeframe, as the average time to issue a Notice of Hearing from the date of the receipt of the appeal was 17 days.

During this fiscal year, the staff also exceeded the scheduling expectation. Hearings were scheduled on an average of four calendar days after receipt of all required information, which is well below our performance target of seven calendar days.

Commitment #7: Mediation Services

"*Offer mediation services in all appeal cases, where appropriate, and on request in application cases, prior to the commencement of the hearing."*

Mediation services are available to all parties in matters before the Tribunal. The Tribunal formally offers these services in every appeal (except in matters filed under the *Niagara Escarpment Planning and Development Act*) and, upon request, in all applications in order to encourage parties to resolve their issues. In this fiscal year, parties participated in mediations during the hearing process in 9 cases compared to 11 cases last fiscal year. Of the 9 cases where mediation took place, none of the cases proceeded to a full hearing.

These statistics indicate that the Tribunal mediation services are successful in resolving issues, narrowing the scope of those issues proceeding to a hearing and in reducing hearing time and costs for both the public and the government.

Tribunal members who conducted mediation sessions were certified through an accredited course. Questionnaires are regularly sent to parties after each mediation session to obtain feedback on the Tribunal's performance. Of the responses received, 100% expressed overall satisfaction with the mediation process.

Commitment #8: Website Access

"The Tribunal will use its website to communicate with its clients."

The website is the primary way to access copies of orders and decisions and information about the Tribunal and its processes. From April 1, 2006 to March 31, 2007, the Tribunal had a total of 30,104 visitors to its site and a total of 737,430 "hits" on specific pages in the site. One decision of the Tribunal was downloaded over 3,900 times. The Tribunal's Annual Reports were downloaded over 7,000 times. Copies of the Tribunal's Rules of Practice and Practice Directions, and Guides were also downloaded over 12,000 times. During the year there was a total of 266,539 downloads of documents from its website, including over 246,159 downloads of Tribunal decisions and orders. "Webtrends" is used to monitor the Tribunal's statistics. For a list of the most popular downloads, refer to Appendix E.

The staff have made a commitment to update the website within 24 hours of receiving a change. With the exception of a few hours each month for website maintenance and unforeseen disruptions, the website is available at all times. If the gateway for the Ontario Government is not in service, the Tribunal's website would not be operational.

Through access to the website, the Tribunal continues to ensure that the public has access to the most current documents available. Decisions and orders, Rules of Practice and Practice Directions, as well as the current published Annual Report, Business Plan and Guides are posted. The Tribunal has been working to post decisions that have not been previously posted. In this fiscal year, all decisions of the Niagara Escarpment Hearing Office from 1989-1996 were posted on the website.

During the last fiscal year, the visitors to the Tribunal's website doubled in numbers. The Tribunal continues to review and make changes to its website to provide the public with more comprehensive access to information, Decisions and Orders of the Tribunal.

Commitment #9: Guides

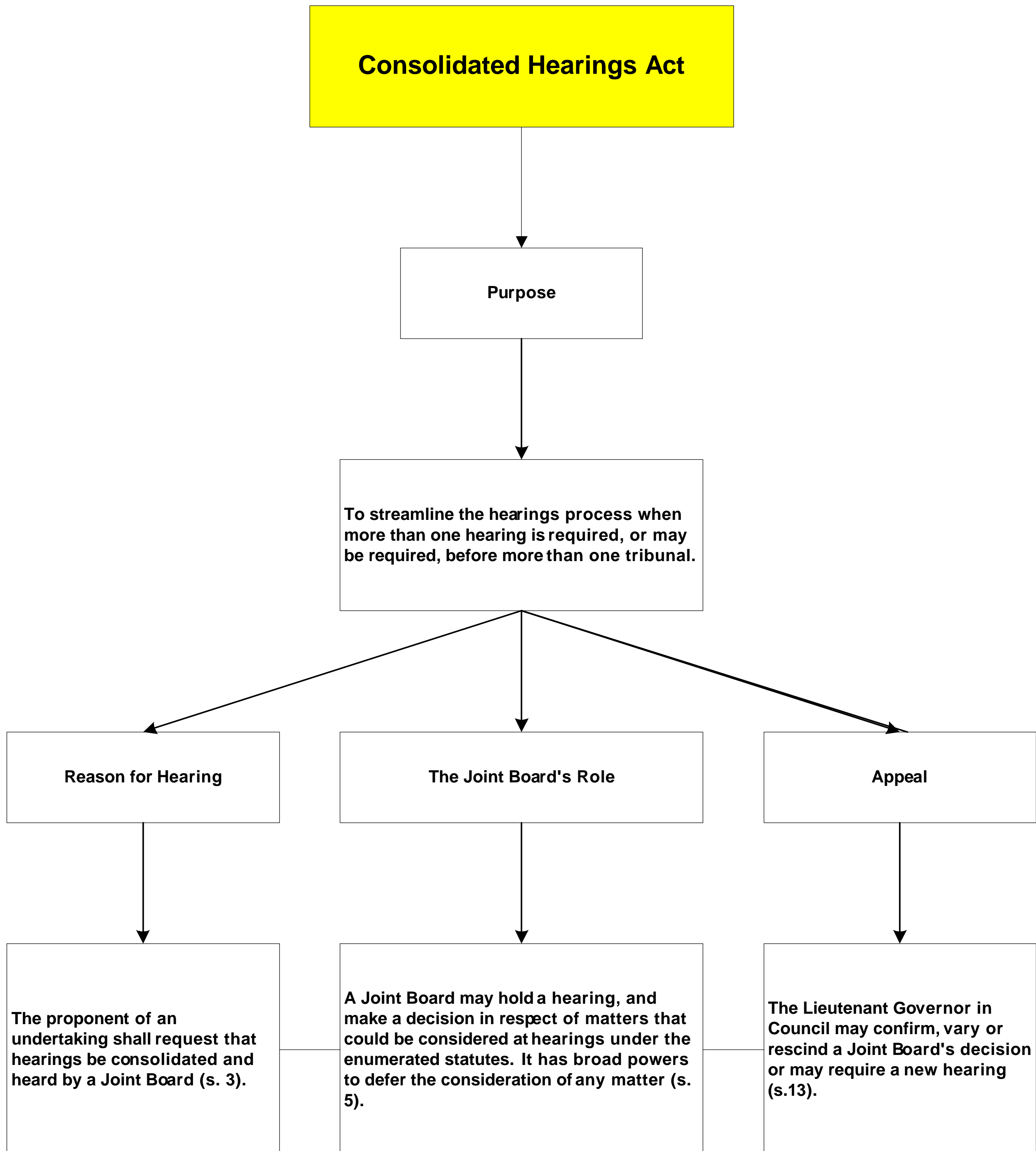
"Guides will be updated."

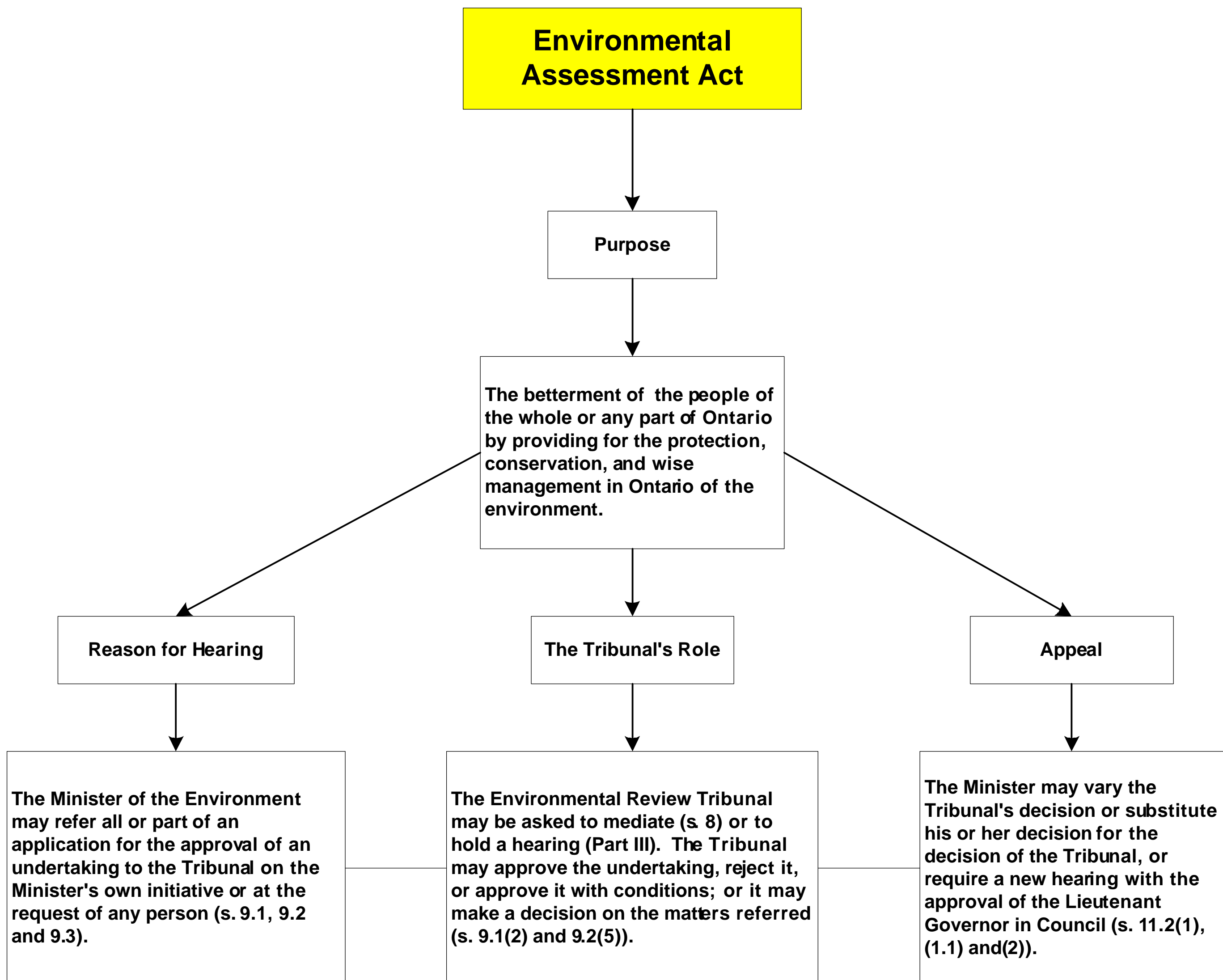
During the 2006-2007 fiscal year, the Tribunal produced "A Guide to Hearings under sections 10, 12, or 18 of the *Oak Ridges Moraine Conservation Act, 2001*."

This Guide was created as a result of the appointment of the Tribunal as the Hearing Officer to hear matters under this *Act*. All of the Guides clarify the legislated requirements, the Tribunal's Rules and assist the public to better understand the hearing process.

Appendix A

Overview of Relevant Legislation




Environmental Assessment Act
Purpose
The betterment of the people of the whole or any part of Ontario by providing for the protection, conservation, and wise management in Ontario of the environment.
Reason for Hearing
The Tribunal's Role
Appeal
The Minister of the Environment may refer all or part of an application for the approval of an undertaking to the Tribunal on the Minister's own initiative or at the request of any person (s. 9.1, 9.2 and 9.3).
The Environmental Review Tribunal may be asked to mediate (s. 8) or to hold a hearing (Part III). The Tribunal may approve the undertaking, reject it, or approve it with conditions; or it may make a decision on the matters referred (s. 9.1(2) and 9.2(5)).
The Minister may vary the Tribunal's decision or substitute his or her decision for the decision of the Tribunal, or require a new hearing with the approval of the Lieutenant Governor in Council (s. 11.2(1), (1.1) and(2)).

Environmental Bill of Rights, 1993

Purpose

The purposes of the Act are:
(a) to protect, conserve, and where reasonable, restore the integrity of the environment by the means provided in the Act;
(b) to provide sustainability of the environment by the means provided in the Act; and
(c) to protect the right to a healthful environment by the means provided in the Act.

Reason for Hearing

Any person resident in Ontario may seek leave to appeal a decision whether or not to implement a proposal for a Class I or II instrument if the person seeking leave to appeal has an interest in the decision, and another person has a right under another Act to appeal from a decision whether or not to implement the proposal. (s. 38(1))

The Tribunal's Role

Leave to appeal shall not be granted unless it appears to the Tribunal that:
(1) there is good reason to believe that no reasonable person, having regard to the relevant law and to any government policies developed to guide decisions of that kind, could have made the decision;
(2) the decision in respect of which an appeal is sought could result in significant harm to the environment. (s. 41)

Appeal

No right of appeal. (s. 43)

Environmental Protection Act

Purpose

To provide for the protection and conservation of the natural environment.

Reason for Hearing

The Director of Approvals shall require a hearing for large waste disposal sites (s. 30), and may require a hearing for waste management systems (s. 32). As well, the Tribunal may be required to determine whether a municipal by-law should apply to a proposed waste disposal site (s. 36).

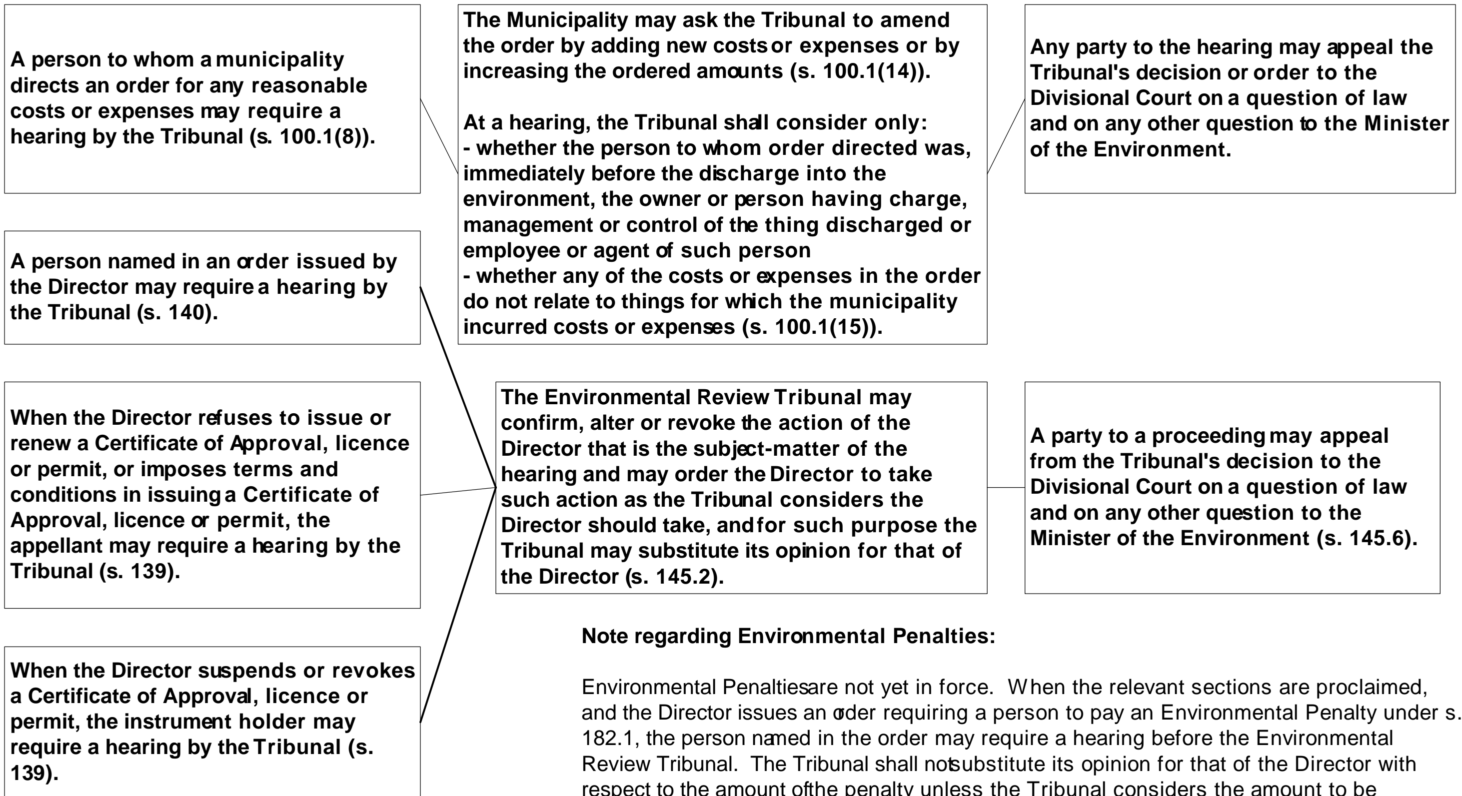
The Tribunal's Role

The Environmental Review Tribunal decides whether a Certificate of Approval should be issued (s. 33(1)) or whether a by-law should apply (s. 36(5)), and if so, what its terms and conditions should be. The Tribunal's decision must be implemented by the Director (s. 33(4)).

Appeal

A party to a proceeding may appeal the Tribunal 's decision to the Divisional Court on a question of law and on any other question to the Lieutenant Governor in Council (s. 34(1)).

OR



Note regarding Environmental Penalties:

Environmental Penalties are not yet in force. When the relevant sections are proclaimed, and the Director issues an order requiring a person to pay an Environmental Penalty under s. 182.1, the person named in the order may require a hearing before the Environmental Review Tribunal. The Tribunal shall not substitute its opinion for that of the Director with respect to the amount of the penalty unless the Tribunal considers the amount to be unreasonable (s. 145.4(2)).

Niagara Escarpment Planning and Development Act

Purpose

To provide for the maintenance of the Niagara Escarpment and land in its vicinity substantially as a continuous natural environment, and ensure only such development occurs as is compatible with that natural environment.

Reason for Hearing

A person who receives notice of the Niagara Escarpment Commission's decision regarding a development permit may appeal that decision to the Minister of Natural Resources, who in turn, is required to appoint a Hearing Officer to conduct a hearing at which representations may be made respecting the decision. (s. 25(5))

Hearing Officer's Role *

After the hearing, the Hearing Officer shall report to the Minister a summary of the representations made, together with his or her opinion on the merits of the decision. (s. 25(11))

The decision of the NEC is deemed to be confirmed if the opinion of the officer expressed in his or her report is that the decision is correct and should not be changed, and the decision is not appealed by a local municipality, a county or a regional municipality. (s. 25(12))

The decision of the NEC is also deemed to be confirmed if (a) the decision was to issue a development permit; (b) the parties who appeared at the hearing have agreed on all of the terms and conditions that should be included in the development permit, and these are set out in the Hearing Officer's report; and (c) it is the Hearing Officer's opinion in the report that the decision to issue the development permit with the agreed terms and conditions would be correct and should not be changed. (s. 25(12.1))

Next Step

If the NEC's decision is not deemed to be confirmed, the Minister, after considering the Hearing Officer's report, decides whether to confirm, vary or substitute the NEC's decision. (s. 25(14))

OR

Where the NEC prepares or receives an application to amend the Niagara Escarpment Plan, it may appoint one or more Hearing Officers for the purpose of receiving representations from the public. (s. 10(3))**

A Hearing Officer shall report to the NEC, with a copy to the Minister, a summary of the representations made, together with his or her opinion and reasons regarding whether the proposed amendment should be accepted, rejected or modified. (s. 10(8))

After considering the Hearing Officer's report, the NEC submits its recommendations to the Minister. In some cases, the Minister may make the final decision. In other cases, the Minister may make a recommendation to Cabinet. (s. 10(9), (11), and (12))

*Members of the Environmental Review Tribunal may be appointed as Hearing Officers under the *Niagara Escarpment Planning and Development Act* ("*NEPDA*") to hear appeals of Niagara Escarpment Commission decisions on development permits and to conduct hearings on applications to amend the Niagara Escarpment Plan.

**Hearing Officers are normally appointed by the NEC to conduct hearings on proposed Plan amendments only if objections are made to the proposed amendments.

Nutrient Management Act, 2002

Purpose

To provide for the management of materials containing nutrients in ways that will enhance protection to the natural environment and provide a sustainable future for agricultural operations and rural development.

Reason for Hearing

Where a Director issues or amends a certificate, licence or approval, imposes or amends conditions on a certificate, licence or approval or suspends or revokes a certificate, licence or approval, the holder of the certificate, licence or approval, as the case may be, may require a hearing (s. 9(1)). Where a Director refuses to issue or renew a certificate, licence or approval, the person to whom the Director refused to issue or renew the certificate, licence or approval, as the case may be, may require a hearing (s. 9(1)). If a Director makes, amends, revokes or is deemed to have made an order under this Act, the person to whom the order is directed may require a hearing (s. 9(2)).

The Tribunal's Role

The Tribunal may confirm, alter or revoke the action of the Director that is the subject-matter of the hearing and may order the Director to take the action that the Tribunal considers the Director should take in accordance with this Act and the regulations and for such purpose the Tribunal may substitute its opinion for that of the Director (s. 11(1)).

Appeal

A party to the hearing before the Tribunal may appeal the Tribunal's decision or order to the Divisional Court on a question of law (s. 11(2)).

A party to a hearing before the Tribunal may appeal to the Minister on any matter other than a question of law (s. 11(3))

Re: Administrative Penalties

When a Director is of the opinion that a person has contravened a provision of the Act or regulations, failed to comply with an Order under the Act (other than an Order to pay costs), or has failed to comply with a condition of a certificate, license or approval, the Director may issue a notice in writing requiring the person to pay an administrative penalty. The person to whom the order is directed, may require a hearing before the Environmental Review Tribunal (s. 40(1) and (5)).

The Tribunal may confirm, rescind or amend the notice according to what the Tribunal considers reasonable in the circumstances, but the Tribunal shall not vary the amount of the penalty unless it considers the amount to be unreasonable (s. 40(6)).

No appeal of decisions on administrative penalties.

Ontario Water Resources Act

Purpose

To prevent the impairment of the quality and quantity of any water body (such as a lake, river or well).

Reason for Hearing

The Director of Approvals shall require a hearing when a proposed sewage works enters another municipality (s. 54(1)) or prior to defining an area of public water or sewage service (s. 74(4)). The Director may require a hearing with respect to a proposed sewage works within a single municipality (s. 55(1)).

The Tribunal's Role

The Environmental Review Tribunal decides whether a certificate of approval should be issued, and if so, what its terms and conditions should be (s. 54, 55) or it designates an area as an area of public water or sewage service (s. 74). The Tribunal is not required to hold a hearing if no person objects to the proposed works or if the objections are insufficient (s. 8(2)). The Tribunal's decision must be implemented by the Director (s. 7(4)).

Appeal

A party to a proceeding may appeal the Tribunal's decision to the Divisional Court on a question of law and on any other question to the Lieutenant Governor in Council (s. 9(1)).

OR

A person named in an order issued by the Director may require a hearing by the Tribunal (s. 100(3)).

When the Director refuses to issue or renew, or cancels or suspends a licence, permit or imposes terms and conditions in issuing an approval, licence or permit, or alters or imposes new terms and conditions of an approval, licence or permit after ir is issued, the applicant may require a hearing by the Tribunal (s. 100(3)).

The Environmental Review Tribunal may confirm, alter or revoke the action of the Director that is the subject-matter of the hearing and may order the Director to take such action as the Tribunal considers the Director should take and for such purpose the Tribunal may substitute its opinion for that of the Director (s. 100(10)).

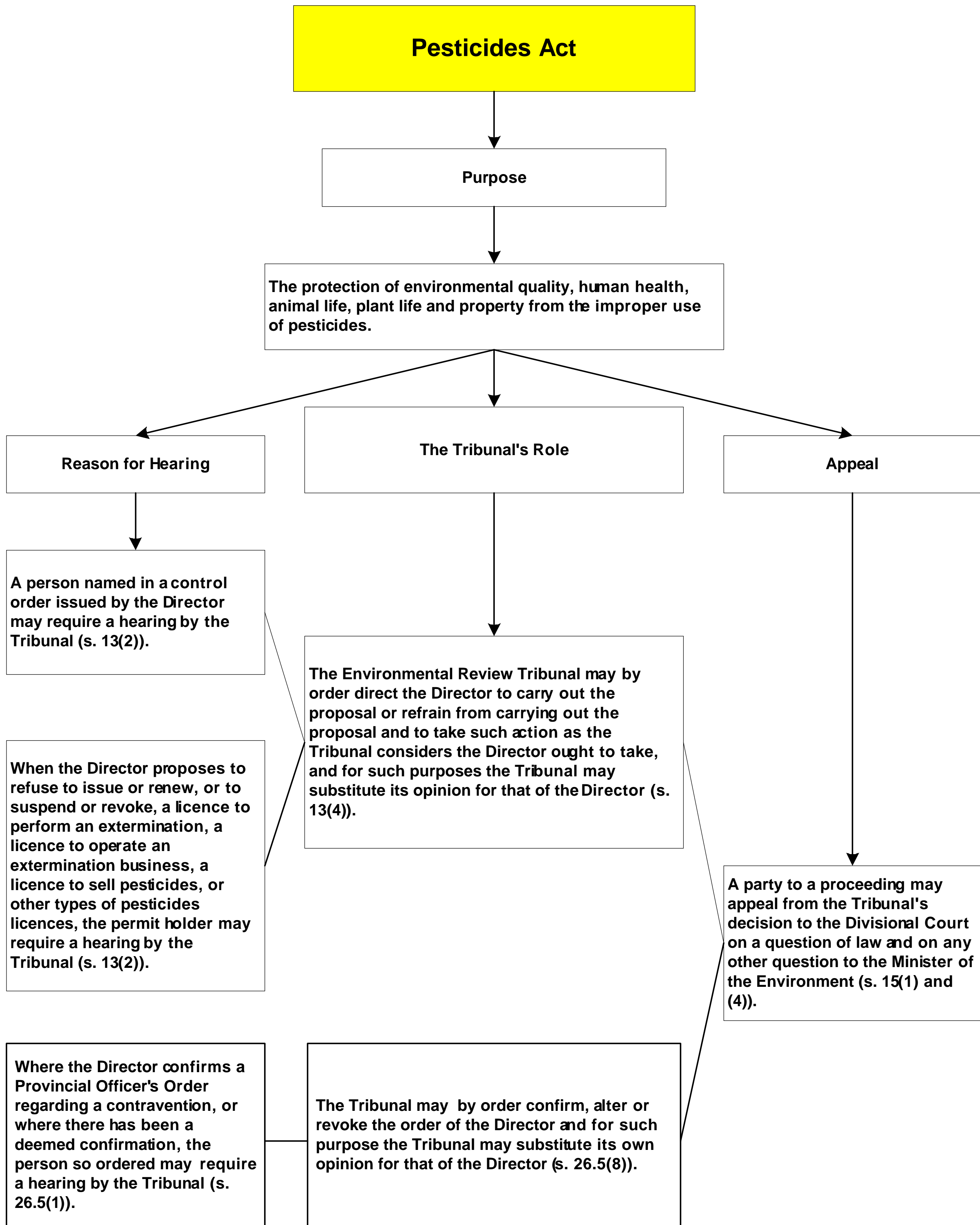
When the Director proposes to refuse to issue or renew, or revoke a well construction permit, a well contractor licence or a well technician licence or suspend a well contractor licence or a well technician licence, or impose terms and conditions in a well construction permit, or to alter the terms and conditions in a well construction permit, the permit/license holder/applicant may require a hearing by the Tribunal (s. 47).

The Environmental Review Tribunal may order the Director to carry out the proposal and to take such action as the Tribunal considers the Director ought to take, and for such purposes may substitute its opinion for that of the Director (s. 47(2)).

A party to a proceeding may appeal from the Tribunal's decision to the Divisional Court on a question of law and on any other question to the Minister of the Environment (s. 102.3).

Note regarding Environmental Penalties:

Environmental Penalties are not yet in force. When the relevant sections are proclaimed, and the Director issues an order requiring a person to pay an Environmental Penalty under s. 106.1, the person named in the order may require a hearing before the Environmental Review Tribunal. The Tribunal shall not substitute its opinion for that of the Director with respect to the amount of the penalty unless the Tribunal considers the amount to be unreasonable (s. 102.1(2)).


Pesticides Act
Purpose
The protection of environmental quality, human health, animal life, plant life and property from the improper use of pesticides.
Reason for Hearing
The Tribunal's Role
Appeal
A person named in a control order issued by the Director may require a hearing by the Tribunal (s. 13(2)).
The Environmental Review Tribunal may by order direct the Director to carry out the proposal or refrain from carrying out the proposal and to take such action as the Tribunal considers the Director ought to take, and for such purposes the Tribunal may substitute its opinion for that of the Director (s. 13(4)).
When the Director proposes to refuse to issue or renew, or to suspend or revoke, a licence to perform an extermination, a licence to operate an extermination business, a licence to sell pesticides, or other types of pesticides licences, the permit holder may require a hearing by the Tribunal (s. 13(2)).
A party to a proceeding may appeal from the Tribunal's decision to the Divisional Court on a question of law and on any other question to the Minister of the Environment (s. 15(1) and (4)).
Where the Director confirms a Provincial Officer's Order regarding a contravention, or where there has been a deemed confirmation, the person so ordered may require a hearing by the Tribunal (s. 26.5(1)).
The Tribunal may by order confirm, alter or revoke the order of the Director and for such purpose the Tribunal may substitute its own opinion for that of the Director (s. 26.5(8)).

Safe Drinking Water Act, 2002

Purpose

To recognize that the people of Ontario are entitled to expect their drinking water to be safe. To provide for the protection of human health and the prevention of drinking water health hazards through the control and regulation of drinking water systems and drinking water testing.

Reason for Hearing

Each of the following decisions of a Director under this Act may be appealed to the Tribunal (provided that the instrument holder or applicant did not consent to or request the Director's decision):

1. A refusal to issue or amend a permit, licence or approval.
2. A refusal to grant a consent for the fragmentation of a non-municipal drinking-water system.
3. A decision to impose, vary or remove conditions in a permit, licence or approval.
4. A refusal to impose a condition in a permit, licence or approval.
5. A decision to suspend a licence or approval, other than a suspension of a drinking-water testing licence ordered by the Minister under section 108.
6. A decision to revoke a permit, licence or approval.
7. A refusal to extend the expiry date of a drinking water licence under subsection 73(5) (or, when proclaimed, section 44(6)).
8. A refusal to renew a licence or approval.
9. A refusal to consent to the transfer of a licence.
10. A decision to issue an order, including an order to pay costs under section 122.
11. A decision to confirm, amend or revoke an order made by a Director or a Provincial Officer.
12. A decision to issue a notice of administrative penalty under section 121.

A refusal by a Director or provincial officer to issue, amend or revoke an order is not a reviewable decision (s. 127)

The Tribunal's Role

The Tribunal may confirm, vary, or revoke the decision of the Director. The Tribunal may direct the Director to take such action as the Tribunal considers necessary for the purposes of this Act. The Tribunal may substitute its opinion for that of the Director (s. 132). These powers do not apply to a decision in relation to a notice of administrative penalty or an order to pay costs.

Appeal

With the exception of a hearing regarding a notice of administrative penalty or a hearing regarding an order to pay costs under section 122, a party to a hearing before the Tribunal may appeal to the Divisional Court on a question of law from the decision or order of the Tribunal in accordance with the rules of the Court (s. 134).

With the exception of a hearing in relation to a notice of administrative penalty or a hearing in relation to an order to pay costs under section 122, a party to a hearing before the Tribunal may make a written appeal to the Minister from the Tribunal's decision on any matter other than a question of law within 30 days from the receipt of the notice of the Tribunal's decision or within 30 days after the disposition of an appeal at Divisional Court. The Minister may, if he or she deems it necessary for the purposes of this Act, confirm, vary or revoke the Tribunal's decision (s. 135).

Note regarding administrative penalties and orders to pay costs:

When the Director decides to issue a notice of administrative penalty under s. 121, the recipient may require a hearing before the Environmental Review Tribunal. The Tribunal may only confirm, vary or revoke the decision, but not so as to vary the amount of the penalty unless it considers the amount to be unreasonable (s. 127 and 132(4)).

When the Director decides to issue an order to pay costs under section 122, the person to whom the order is issued may require a hearing before the Environmental Review Tribunal. The Tribunal may confirm, vary or revoke the decision. The Tribunal can also grant the Director's request to add new items of costs or to increase the amounts set out in the order (s. 127 and 133).

Oak Ridges Moraine Conservation Act, 2001

Purpose

The objectives of the Oak Ridges Moraine Conservation Plan are:

(a) to protect the ecological and hydrological integrity of the OakRidges Moraine Area ("ORMA");
(b) to ensure that only land and resource uses that maintain, improveor restore the ecological and hydrological functions of the ORMA are permitted;
(c) to maintain, improve or restore all the elements that contribute to these functions,including quality and quantity of the ORMA waters and other resources;
(d) to ensure that the ORMA is maintained as a continuous natural landform and environment for the benefit of present and future generations;
(e) to provide for land and resource uses and development compatible with the other objectives of the Oak Ridges Moraine Conservation Plan;
(f) to provide for continued development within existing urban settlement areas and recognize existing rural settlements;
(g) to provide for a continuous recreational trail through the ORMA that is accessible to all including persons with disabilities;
(h) to provide for other public recreational access to the ORMA; and
(i) any other prescribed objectives.

Reason for Hearing	Hearing Officer's Role*	Next Step
The Minister may appoint a Hearing Officer to conduct a Hearing and make written recommendations with respect to official plan and zoning by-law amendments required to conform to the Oak Ridges Moraine Conservation Plan (s. 10(8)) or with respect to a proposed amendment to the Oak Ridges Moraine Conservation Plan (s. 12(9)).	After the Hearing, the HearingOfficer shall prepare written recommendations, with reasons, recommending what action the Minister should take (s. 13(4)).	Minister may approve, modify or refuse to approve amendments (ss. 10(8)(a)) and make regulation (ss. 12(9)(a)). Minister's decision final, not subject to appeal.
The Minister may appoint a Hearing Officer to conduct a Hearing regarding matters stayed before the Ontario Municipal Board under this Act (s. 18(5)).	The Hearing Officer shall conduct a Hearing and make written recommendations, with reasons, recommending what action the Minister, with the approval of the Lieutenant Governor in Council, should take, including making any decision that the Ontario Municipal Board could have made (s. 18(8)).	Minister may, with approval of the Lieutenant Governor in Council, approve, modify or refuse all or part of recommendations. Decision final, not subject to appeal.

*The Environmental Review Tribunal has been appointed the Hearing Officer under the *Oak Ridges Moraine Conservation Act, 2001.*

Appendix B

Profile of Tribunal Members

Chair

Toby Vigod *(appointment expires May 31, 2008)*

- Appointed as Chair in June 2005
- Appointed as a Vice-Chair in December 2004
- Manager, Federal/Provincial/Territorial Relations and Co-Manager, National Secretariat, Climate Change Secretariat, Ottawa (2000-2004)
- Chair, Environmental Appeal Board and Forest Appeals Commission, British Columbia (1996-2000)
- Assistant Deputy Minister, Department of Policy, Planning and Legislation, Ministry of Environment, Lands and Parks, British Columbia (1994-1996)
- Commissioner, Commission on Planning and Development Reform in Ontario (1991-1993)
- Sessional Lecturer, Queen's University, Faculty of Law (1985-1991, 1993); University of Toronto, Faculty of Law (1991 and 1992); Osgoode Hall Law School (1993); Queen's School of Public Administration (1990 and 1991); Department of Geography, Ryerson University (2005)
- Counsel (1980-1993) and Executive Director (1986-1993), Canadian Environmental Law Association
- Called to the Ontario Bar (1980)
- B.A. (History Specialist) University of Toronto (1973) and LL.B Queen's University (1977)
- Member of a number of federal and Ontario environmental law reform committees; written extensively in the areas of environmental law and policy

Vice-Chairs

Norman A. Crawford *(appointment expired July 29, 2006)*

- Appointed as a Vice-Chair in July 2003
- Appointed as a member of the Ontario Municipal Board from August 2002 to July 2003
- A lawyer since 1972, he is a graduate of Osgoode Hall Law School and practised in both the public and the corporate and private sectors
- Prior to his appointment to the OMB, he carried on a general law practice in Kitchener

Jerry V. DeMarco *(appointment expires June 26, 2008)*

- Appointed as a Vice-Chair in June 2005
- Staff Lawyer (1996-2000) and Managing Lawyer (2000-2004), Sierra Legal Defence Fund, Ontario Office
- Master of Management (M.M.), McGill (2003); Master in Environmental Studies (M.E.S.), York (1994); Bachelor of Laws (LL.B.), Toronto (1994); Bachelor of Arts (B.A.), Winsdor (1990)
- Registered Professional Planner (R.P.P./MCIP) (1996)

- Called to the Ontario Bar (1996)
- Articled at Ministry of Environment and Energy (1994-1995)
- Publications have appeared in a wide variety of periodicals, journals and books
- Recipient of City of Toronto's first Green Toronto Award for environmental leadership

Heather Gibbs *(appointment expires June 29, 2009)*

- Appointed as a Vice-Chair September 20, 2006
- Appointed as a Member of the Immigration and Refugee Board from November 1998 to September 2006, where she was member of the Professional Development Committee and nominated to conduct training for decision-makers in Mexico
- Legal Officer with the United Nations High Commissioner for Refugees (1994 to 1998), as a local Officer in Canada as well as a Regional Legal Officer in Rwanda and Central African Republic
- Called to the Ontario Bar 1992 and subsequently practiced administrative law (human rights, labour and immigration law)
- Graduate of University of Ottawa (L.L.B. 1990) and University of Western Ontario (B.A. 1986)

Knox M. Henry *(appointment expires March 14, 2009)*

- Acting Chair (December 2004-May 2005)
- Appointed as a Vice-Chair in 1991
- Member, Environmental Appeal Board (1978-1991)
- Member, Pesticides Appeal Board (1975-1978)
- Cross-appointed as member of the Ontario Rental Housing Tribunal (1999-2003)
- Cross-appointed as a Deputy Mining and Lands Commissioner (1995-1997)
- Strong background as one of Canada's leading horticulturalists
- Guest lecturer on propagation, management and environmental issues at various universities and colleges

Donald R. Martyn *(appointment expired April 23, 2006)*

- Appointed as a Vice-Chair since April 2003
- Taught at the Toronto Board of Education, York University and University of Toronto
- Government of Ontario – Executive Officer to Premier Robarts and Executive Director for the Ministry of Community and Social Services
- Consultant to business, associations, and to all four levels of government – strategic planning and program value for expenditure
- Former Chair of the Georgina Committee of Adjustment and member of Planning Board
- Member of Lake Simcoe Conservation Authority
- Past Chair of the Royal Commonwealth Society
- Governor of Machachlan College, Oakville
- Master of Arts (University of Toronto)

Paul Muldoon *(appointment expires April 3, 2009)*

- Appointed as a Vice-Chair in April 2006
- Staff Lawyer (1994-1998) and Executive Director (1998-2006), Canadian Environmental Law Association
- Masters of Laws (LL.M), McGill (1984); Masters of Arts (M.A.), McMaster (1983), Bachelor of Laws (LL.B.) Ottawa, 1981, Bachelor of Arts (B.A.) Wilfrid Laurier, 1978
- Called to the Ontario Bar (1984)
- Member, Science Advisory Board, International Joint Commission (1990-1995)
- Member, Environmental Bill of Rights Task Force (1992-1994)
- Author or Co-author of a number of books and dozens of published articles
- Lecturer on environmental law at the Centre for the Environment, University of Toronto and the Faculty of Environmental Studies, York University

Dirk VanderBent *(appointment expires September 17, 2008)*

- Appointed as a Vice-Chair in September 2006
- Senior Manager, Judicial Support, Office of the Chief Justice, Ontario Court of Justice (2000 to 2006)
- Representative for the Attorney General, during the Walkerton water contamination crisis (2000)
- Mediator/Arbitrator, Financial Services Commission of Ontario (1994 to 2000)
- Senior Counsel, Children's Aid Society of Hamilton-Wentworth (1991 to 1994)
- Barrister & Solicitor in private practice, (1982 to 1991)
- Called to the Ontario Bar 1982
- Certificate in Advanced Mediation Skills, Ryerson Polytechnical Institute (1990)
- B. Math University of Waterloo (1975), LL.B. Osgoode Hall Law School (1980)

Part-time Members

Gary A. Harron *(appointment expired September 10, 2006)*

- Appointed as a member in 2003 and a resident of Allenford, Ontario
- Graduated from the University of Guelph
- Owns and operates a 400 acre beef farm
- Member of the Ontario Municipal Board (1982 to 2004)
- Member of the Niagara Escarpment Commission (1973 to 1982)
- Several years municipal government experience as a member, Reeve and Warden
- Former executive in the insurance business
- Recipient of the Canadian Commemorative Medal on the 125th Anniversary of Confederation and the recipient of the Ontario Bicentennial Medal

Franco R. Mariotti *(appointment expires August 26, 2007)*

- Appointed as a member in 1987 and a resident of Whitefish, Ontario
- He has traveled widely in North and South America, Iceland, and the Galapagos
- A founder of the Sudbury Naturalists' Club; active in social and environmentally-concerned groups

- A Biologist/Staff Scientist at Science North and manager of its Biosphere Exhibit since 1981

George W. Ozburn *(appointment expires August 26, 2007)*

- Appointed as a member in 1975 and a resident of Thunder Bay, Ontario
- Bachelor of Science degree in Agriculture (McGill); spent a year studying at Imperial College of Science and Technology in London (UK) prior to receiving his Ph.D. (Entomology and Toxicology) from McGill University, and prior to joining the Faculty of Science at Lakehead University in Thunder Bay
- Worked in pesticide research for three years in West Africa followed by a university appointment in Michigan
- For many years was responsible for a major study of chronic and acute toxicity of many families of chlorinated organic compounds
- As Professor Emeritus, is now associated with a laboratory at Lakehead University which carries out regulatory and chronic toxicity testing for industry

Bruce Pardy *(appointment expires June 21, 2008)*

- Appointed as a member in June 2005
- Associate Professor, Faculty of Law, Queen's University (2000 -)
- Associate Dean, Faculty of Law, Queen's University (2002-04)
- Visiting Professor, South Texas School of Law International Program, Malta (2000); California Western School of Law, San Diego (1998-2000); Seattle University School of Law (1996)
- Visiting Scholar, University of British Columbia Faculty of Law (1997)
- Senior Lecturer (Associate Professor) (1996-99) and Lecturer (Assistant Professor) (1993-96), Faculty of Law, Victoria University of Wellington, New Zealand
- Sessional Lecturer, Faculty of Law, University of Western Ontario (1992)
- Lawyer, Litigation Associate (1990-93) and Articling Student (1988-89), Borden Ladner Gervais LLP, Barristers & Solicitors
- Called to the Ontario Bar (1990)
- LL.B. University of Western Ontario (1988); LL.M. Dalhousie University (1991)
- Written extensively on environmental law and policy in Canada, U.S. and New Zealand

Joyce M. Young *(appointment expires April 10, 2009)*

- Appointed as a member in April 2006
- Mediator for over 20 years
- Trained Circle facilitator
- Teaches in the Advanced Dispute Resolution Certificate Program at York University
- Director of the Alternative Dispute Resolution Institute of Ontario
- Mediated a number of Environmental Assessments for both private and public proponents
- Negotiated one of the first Community Compensation Agreements between a private waste management company and a Public Liaison Committee of local residents and stakeholders

David A. B. Pearson *(appointment expired November 22, 2006)*

- Appointed as a member in 1987 and a resident of Sudbury, Ontario
- Professor of Earth Sciences at Laurentian University
- Involved in research concerning lake water quality; leader of the Urban Lakes section of the Co-operative Fresh Water Ecology Unit at the university
- Took leave to be Project Director during the development of Science North 1980-1986, where he continues as Associate Director
- Past host of "Down to Earth" and "Understanding the Earth" TV series, and "Radio Lab" on CBC Northern Ontario Radio

Mary C. Schwass *(appointment expires August 26, 2007)*

- Appointed as a member in 1987 and a resident of Tara, Ontario
- President of Canadian International Consulting Economists Ltd., a firm specializing in developing long-term strategic planning, policies and priorities for private sector companies and governments throughout North America, Africa and Asia

Appendix C

Learning Program		
Date	**Topic**	**Presenters/Visitors**
April 7, 2006	*Proposed Clean Water Act (Bill 43)*	Ian Smith, Director, Drinking Water Program Management Branch, Ministry of the Environment Theresa McClenaghan, Counsel, Canadian Environmental Law Association
June 23, 2006	Protection of the Natural Environment Northern Section of the Niagara Escarpment Development, Preservation and Protection of the Head Waters A Look at the Natural Wonders of Fathom Five Park Environmental Issues and Regulations, NEC Planning, Planning - Regulations and Objectives in the Grey-Bruce Area with References to the Oak Ridges Moraine, Greenbelt and Wetlands	 Peter Tollefsen, Director of Planning, Town of the Blue Mountains Ethan Meleg, Outreach Co-ordinator Ron Glenn, Planner, Ministry of Housing (formerly with Grey County)
September 22, 2006	Places to Grow: Growth Plan for the Greater Golden Horseshoe	Hannah Evans, Director, Partnerships and Consultation, Ontario Growth Secretariat, Public Infrastructure Renewal Bruce Krushelnicki, Director of Planning, City of Burlington Mark Winfield, Director, Environmental Governance, Pembina Institute
December 1, 2006	*Oak Ridges Moraine Conservation Act, 2001* Update on the Cluster Project	Carolyn Tudge, Team Lead, Provincial Planning and Environmental Services Branch, MMAH Kevin Whitaker, Facilitator

February 9, 2007	An Overview to Waste Management Policy in Ontario – Status and Commentary	Jo-Anne St. Godard, Executive Director, Recycling Council of Ontario
	Environmental Economics of Discards	Jeffrey Morris, Sound Resource Management
	The Public's Perception and Views on Current Management Issues	John Jackson, Coordinator, Citizens' Network on Waste Management
	Update on Environmental Assessment and Waste Management Issues	Paul Muldoon, Vice-Chair, Environmental Review Tribunal and John Jackson, Coordinator, Citizens' Network on Waste Management
	Decision – Writing: The Importance of Giving Reasons	Madame Justice Andromache Karakatsanis, Ontario Superior Court of Justice
	Update on Environmental Penalties	Wally Rozenberg, Project Manager, Environmental Penalties, Assistant Director's Office, MOE Cynthia Carr, Acting Manager, Water Policy Section, Land and Water Policy Branch, MOE Chris Bahaviolos, Senior Policy Advisor, Land and Water Policy Branch, MOE

Appendix D

Key Performance Goals and Objectives For Next Fiscal Year 2007-2008

For more information on the Tribunal's performance goals and objectives refer to the Business Plan for 2007-2010.

1. Pre-Hearings, Hearings and Decision Making Core Function:

Goals/Outcomes	Measures	Targets/Standards	2007-2008 Commitments
Commitment #1: Tribunal Members will treat all participants in a hearing with courtesy and respect.	The Tribunal will survey hearing participants through Questionnaires at the completion of the hearing to monitor respect and courtesy. The Tribunal will investigate complaints in accordance with the Tribunal's Complaints Policy.	To provide Questionnaires to hearing participants; To monitor the conduct of Tribunal Members;. To investigate complaints in accordance with the Tribunal's Complaints Policy.	Results of hearing Questionnaires will be reported in the Tribunal's Annual Report. All complaints will be treated seriously and the Tribunal will comply with its Complaints Policy.
Commitment #2: Tribunal Members will render timely decisions.	The Tribunal will track the time it takes to render its written decisions.	Render decisions within 60 days of final arguments, except decisions that have legislated timelines and decisions under the *Consolidated Hearings Act*.	Tribunal Members will adhere to the target to render decisions within 60 days in 80% of all decisions rendered.

Commitment #3: Training of Tribunal Members.	All Tribunal Members will receive adequate training to conduct hearings, write decisions and, in some cases, conduct mediation sessions.	Train Tribunal Members in the processes and conduct of hearings, knowledge of legislation, Tribunal's Rules, decision writing and alternative dispute resolution.	New Tribunal Members without prior Tribunal experience are trained to conduct hearings independently within three months of their appointment. All Tribunal Members will receive ongoing training regarding the Tribunal's legislation, Rules of Practice and administrative policies. The Tribunal will continue to conduct its Learning Program designed to enlighten its Members on environmental issues and administrative law.
Commitment #4: Offer pre-hearing conferences in appeals under the *NEPDA** and schedule preliminary hearings in all other appeals and applications, prior to the commencement of the hearing. **Niagara Escarpment Planning and Development Act*	When all parties agree to participate, pre-hearing conferences for matters under the *NEPDA** will be held and for all other appeals and applications, preliminary hearings will be held, at least 30 days prior to the commencement of the hearing.	Encourage parties to participate in pre-hearing conferences under the *NEPDA* * and continue to hold preliminary hearings for all other appeals and applications.	Continue to offer pre-hearing conferences in every matter under the *NEPDA** and preliminary hearings in all other appeals and applications. At the completion of all hearings, Questionnaires will be sent to all parties to ascertain their level of satisfaction with the process and assist the Tribunal in improving its services. The Tribunal will monitor the success

			of pre-hearing conferences and preliminary hearings by tracking the cases that are resolved prior to the hearing.
Commitment #5: Report on appeals and judicial review of Tribunal Decisions.	The Tribunal will report the outcome of any appeal of its decisions or judicial review applications.	Review and analyze the outcome of any appeal of its decisions or judicial review applications.	The Tribunal will summarize any decision on appeal or judicial review in its Annual Report. The Tribunal will review practices in light of any appeal decisions.

2. Staff Processing of Hearings Core Function:

Goals/Outcomes	Measures	Targets/Standards	2007-2008 Commitments
Commitment #6: Improve Timeliness in Scheduling Hearings.	Hearings will be scheduled within the timeliness standard.	On average, schedule hearing dates within 30 calendar days from the filing date of the application/appeal and 7 calendar days from the date the Tribunal receives all required information/ documentation from the parties.	Staff will adhere to the target.

3. Mediation
Core Function:

Goals/Outcomes	Measures	Targets/Standards	2007-2008 Commitments
Commitment #7: Offer Mediation services in all appeal cases, where appropriate, and on request in application cases, prior to the commencement of the hearing.	When all parties agree to participate, mediation sessions will generally be held at least 30 days prior to the commencement of the hearing.	Increase the number of cases receiving mediation.	Continue to offer mediation services in every appeal and at the request of the parties in applications. Questionnaires will be sent to all parties at the completion of the mediation session to ascertain their level of satisfaction with the process and assist the Tribunal in improving its services. The Tribunal will monitor the success of mediation sessions by tracking the cases that are resolved prior to the hearing.

4. Public Access to the Tribunal
Core Function:

Goals/Outcomes	Measures	Targets/Standards	2007-2008 Commitments
Commitment #8: The Tribunal will use its website to post decisions and orders, provide information and communicate with the public.	The Tribunal will continue its review of its website to improve ease of access search capabilities. The Tribunal will continue to track the number of visitors to the site and	Increase in the use and improvement of the efficiency of the site.	The information contained on the website will be reviewed and improvements made to ensure ease of use for the public.

	monitor its use.		The website will be updated each business day. Any amendments to the Rules of Practice and Practice Directions or publication of the Annual Report will be posted as approved.
Commitment #9: Guides will be updated.	The Tribunal will review its Guides in order to update the information to ensure accuracy and consistency.	Provide accurate information regarding the hearing processes to the public.	To review and revise the Guides as changes to Tribunal Rules, legislation and policies arise.

Appendix E
Website Statistics – Downloads
During the period April 1, 2006 to March 31, 2007

Most Popular Downloads – Entire ERT Website:

Download	Count
Trent Talbot Property Owners Association v. MOE (Amended Decision released May 25, 2006)	**3,990**
Annual Report 2005-2006	**3,693**
Rules of Practice and Practice Directions of the Environmental Review Tribunal (September 18, 2006)	**3,195**
Rules of Practice and Practice Directions of the Environmental Review Tribunal (October, 2005 changed November 10, 2005)	**1,745**
Dufferin Aggregates, a Division of St. Lawrence Cement Inc. (Decision released June 8, 2005)	**1,547**
Halton Recycling Ltd. v. MOE (Decision released April 20, 2006)	**1,510**
Uniroyal Chemical Ltd. v. MOE (Decision released February 4, 1992)	**1,256**
Rules of Practice and Practice Directions of the Environmental Review Tribunal (July 21, 2006)	**1,065**
Niagara Escarpment Plan (June, 2005)	**988**
Annual Report 1999-2000	**853**
Lanxess Inc. v. MOE (Decision released May 29, 2006)	**819**
Jessie Davidson, Russell and Pamela Smith, Garry and Jennifer Brewster, Frank and Enid Weiner, and Fred and Naureen Zinn v. MOE (Decision released April 4, 2006)	**703**

Appendix F

Financial Report
2006-2007

General Account for the Operation of the Tribunal:

Standard Account	Printed Estimates	Approved Budget	Actual Expenditures
Salaries & Wages[1]	$1,024,100	$ 952,700	$ 952,707
Transportation and Communications	97,500	67,500	61,334
Services	174,100	376,500	363,114
Supplies and Equipment	97,500	104,000	105,441
Total	**$1,393,200**	**$1,500,700**	**$1,482,596**

Additional Funds Allocated:

Clean Water

Standard Account	Printed Estimates	Approved Budget	Actual Expenditures
Transportation and Communications	$ 0	$ 8,200	$ 0
Services	$ 396,400	$ 9,500	$ 20,171
Supplies and Equipment	$ 0	$ 12,300	$ 4,388
Total	**$ 396,400**	**$ 30,000**	**$ 24,559**

Nutrient Management Act

Standard Account	Printed Estimates	Approved Budget	Actual Expenditures
Salaries & Wages[1]	$ 42,800	$ 0	$ 0
Transportation and Communications	$ 4,300	$ 4,500	$ 0
Services	$ 60,400	$ 3,300	$ 0
Supplies and Equipment	$ 4,300	$ 1,700	$ 0
Total	**$ 111,800**	**$ 9,500**	**$ 0**

[1] Employee benefits are being managed centrally.

Appendix G

Contact Information

For further information about this report or the Environmental Review Tribunal contact:

The Tribunal Secretary
Environmental Review Tribunal
2300 Yonge Street
Suite 1700, 17th Floor
Toronto, ON   M4P 1E4
Telephone: 416-314-4600
Fax: 416-314-4506
Email: **ERTTribunalsecretary@ert.gov.on.ca**

Website: www.ert.gov.on.ca