

SUPREME COURT OF ONTARIO  
(DIVISIONAL COURT)

B E T W E E N:

THE CORPORATION OF THE TOWN OF MILTON

Applicant

- and -

THE JOINT BOARD (ESTABLISHED UNDER SECTION 4 OF THE CONSOLIDATED HEARINGS ACT, 1981, S.O. 1981, C.20, AS AMENDED), THE REGIONAL MUNICIPALITY OF HALTON, THE CORPORATION OF THE CITY OF BURLINGTON, NSP INVESTMENTS LIMITED, THE WEST BURLINGTON CITIZENS' GROUP, THE MILTON AREA CITIZENS' COALITION, THE HALTON FEDERATION OF AGRICULTURE, WATKIN AND DOREEN MARTIN, WALTER TOMOSKY, THOMAS AND MARY-JEAN MARTIN, MICHAEL AND CYNTHIA REED, GRAHAM AND EVELYN GILLIES, SALLY VERTULIA, RAY AND ANNETTE WINTER, KIP AND ANNE CHAPUT, WILFRED AND FRED LAWRENCE, BILL AND BEVERLEY KETELAARS, JOHN VITETTA, STEVE AND SHIRLEY DOLBY, KEN WETTLAUER, HOWARD GOWLAND, MR. AND MRS. PIETRO MOSCATO, MR. AND MRS. L. CIACCO, RICK AND COLLEEN SIMMONS, MR. AND MRS. ALBERTA SILVA AND THE HONOURABLE JAMES BRADLEY, MINISTER OF THE ENVIRONMENT

Respondents.

APPLICANTS' FACTUM

PART 1:

1. The Applicant, The Corporation of the Town of Milton, is an Area Municipality of the Regional Municipality of Halton. The Applicant was granted status as a party by the Joint Board which heard and decided the applications for approval by the Regional

not ~~an~~ applications.  
just 1 or either site

Municipality of Halton.

2. The decision which the Applicant seeks to have this Court review is the decision of the Joint Board constituted under the Consolidated Hearings Act, S.O. 1981, c.20, dated February 24, 1989, as amended by the Addendum to the Decision, which was issued by the Board on March 2, 1989. The Decision purported to refuse approvals to the Region of Halton to use its preferred Site, lands known as Site "F", in the City of Burlington for landfilling and instead granted approvals to the Region of Halton to landfill at its second choice, Site "D", in the Town of Milton. In the Decision the approvals were subject to conditions imposed by the Joint Board.

#### PART 11

3. The Regional Municipality of Halton (the "Region") has a statutory responsibility to provide facilities for the purpose of receiving, dumping and disposing of waste.

Regional Municipality of Halton Act, R.S.O. 1980, c.436, s.137, as amended.

4. The Regional Municipality of Halton was required, under the Environmental Assessment Act to conduct an environmental assessment in respect to the selection of a new landfill site for the Region of Halton. The Region engaged a team of consultants (Walker, Wright, Young and Associates) in 1983 for the purpose of

conducting an environmental assessment. Site "F" in the City of Burlington emerged as the preferred site for the landfill component of the Regional waste management system. Site "D" in the Town of Milton was identified as the second ranked site.

Record of the Hearing, Exhibit H-13

5. Regional Council subsequently directed its consultants to do additional technical studies on both Sites "F" and "D" and to do a comparative analysis of the two sites based on this more detailed information. The results of that more detailed comparative analysis confirmed that Site "F" was the preferred site.

Record of the Hearing, Exhibit H-14

6. Regional Council considered this comparative analysis and the advice of its staff and solicitors and determined to make application for "the acquisition of land for the construction, operation and maintenance of a sanitary landfill site to contain 7.96 million cubic metres of waste in the Regional Municipality of Halton by one of two alternative methods:

- (i) landfilling at the site referred to in Halton's environmental assessment as Site "F" in the City of Burlington;
- (ii) landfilling at the site commonly referred to in Halton's environmental assessment as Site "D" in the Town of Milton."

Throughout the hearing before the Joint Board the position of Regional Council was that it preferred Site "F", albeit

marginally, but would be satisfied with either Site "F" or Site "D".

Record of the Hearing

7. The case put forward by the Town of Milton at the hearing was that Site "F" in Burlington was preferable for landfilling in accordance with planning principles, ground water considerations, existing planning policies and documents and Provincial agricultural policies.

Record of the Hearing

8. The Board heard submissions from Council at the outset as to the order of presentation of evidence. The order of presentation was as follows:

- (i) case in chief, Region of Halton;
- (ii) case in chief, Town of Milton;
- (iii) case in chief, Milton Area  
Citizens' Coalition et al;
- (iv) case in chief, NSP Investments  
Limited;
- (v) case in chief, City of Burlington;
- (vi) case in chief, West Burlington  
Citizens' Group;
- (vii) case in chief, Minister of the  
Environment.

Record of Hearing.

9. The Joint Board heard submissions as to the right of parties to call reply evidence. The proponent, Regional Municipality of Halton, was accorded a full right to call reply evidence in respect of all cases in chief which followed its case in chief. In addition, the Town of Milton was accorded a limited right of reply in respect of cases in chief which followed its case in chief. The proponent, Region of Halton, was accorded the right to call its case in reply last and the limited right of reply accorded to the Town of Milton was ordered to precede the reply case of the proponent, Region of Halton. The reply case in chief for the Town of Milton was led August 22, and August 23, 1988. The reply case consisted of geotechnical engineers, Gray and Rowe, called on the issue of the cost of a liner at Site "F", responding to subject matter raised in the case in chief of the City of Burlington. Thereafter, the reply case of the proponent, Region of Halton, commenced on August 29, 1988 and consisted of the hydrogeology and hygeochemistry evidence of Feenstra. Cross-examination of each of the reply cases was interrupted and completed as follows:

September 12, 1988 - cross-examination of Feenstra by counsel for Ministry of the Environment, Town of Milton, NSP Investments Limited and Milton Area Citizens' Coalition.

September 13, 1988 - cross-examination of Rowe and Gray by counsel for Ministry of the Environment and City of Burlington - re-examination of Rowe and Gray by counsel for Town of Milton.

September 13, 1988 - cross-examination of Feenstra by counsel for City of Burlington.

September 14, 1988 - continued cross-examination of

Feenstra by counsel for City of Burlington.  
September 16, 1988 - continued cross-examination of  
Feenstra by counsel for City of Burlington and counsel  
for West Burlington Citizens' Group.

September 16, 1988 - re-examination of Feenstra by counsel  
for proponent, Region of Halton.

Record of Hearing

10. Among the consultants retained and called by the Town of Milton were experts in matters of hydrogeology, geology and geotechnical engineering. The Milton evidence in chief with respect to hydrogeology was called prior to the hydrogeology evidence of the City of Burlington. Geotechnical engineering evidence was called as reply evidence in response to evidence called by the City of Burlington as to the cost of a liner to line the proposed landfill at Site "F".

Record of Hearing

11. The conceptual design for a landfill at Site "D" called for an hydraulic trap which was intended to collect all the leachate from the refuse and draw in a relatively small amount of surrounding ground water. The upper till in which the landfill would be constructed comprised a weathered upper till and an unweathered upper till. The unweathered 4 metres of upper till was a key design feature at Site "D" and was a principal element of safety in the event of failure of the hydraulic trap system. In essence, it provided a barrier through which contaminants would move very slowly (over many years) thus providing adequate

time to deal with the reversal of the hydraulic trap and ensure that contaminants could be intercepted before crossing the property line and infecting neighbouring ground water supplies.

Record of Hearing and Decision p.114 and following

12. The subject of possible fracturing in the unweathered upper glacial till arose for the first time in the cross-examination of the hydrogeologists called by the City of Burlington as part of its case. Under cross-examination by David Estrin, counsel for the Town of Milton, witness John Petrie gave evidence as to deep fractures in glacial till material which he had reported in earlier published work having to do with another location but stated that he found no evidence of such fractures in the investigation of the unweathered upper till at Site "D" by the proponents' hydrogeologists or any other hydrogeologic data which he had reviewed.

Record of Hearing

13. Thereafter, on the 23rd day of August, 1988, the subject of fractures in the unweathered upper till was again addressed. On that date a witness statement for the hydrogeology/hydrogeochemistry consultant of the Region of Halton (Feenstra) was distributed. The witness statement contained the opinion of Feenstra that there was a reasonable possibility that deeper fractures existed in the unweathered upper till at Site "D" in the Town of Milton. He had no direct evidence of the

existence of such fractures.

Record of Hearing

14. Consultants retained by the Town of Milton had opened a test pit on land comprising part of proposed Site "D" at Milton on April 6, 1988 and closed same on April 7, 1988. Fractures were observed in the test pit and at least one such fracture extended deep into the unweathered upper till.

Record of Hearing

15. The reply case of the Region of Halton consisted of the evidence of hydrogeologist/hydrogeochemist Stan Feenstra. His evidence was called commencing August 29, 1988. His testimony in reply was completed on September 16, 1988. His evidence was outlined by a witness statement, in writing, which was marked as Board Exhibit No. H-936. He stated that he was giving evidence both as a hydrogeologist and as a hydrogeochemist.

Application Record, p.11

16. Feenstra described what hydrogeologists had understood about the extent the fracturing of clay tills in Ontario prior to recent investigations (Application Record, p.12-19). The proponent's original hydrogeology theory with respect to Site "D" was based on the findings of the University of Waterloo in the area of the Sarnia clay plain. It was taken almost as a given that the weathered zone was slightly more permeable and extended



to a depth of approximately 4 - 5 metres. The basis of hydrogeology understanding at that time, in 1985 or 1986, was that the weathered zone extended to approximately 4 - 5 metres and the weathered zone was cracked and any features of weathering, colour change or fracturing did not extend any deeper than that.

Application Record, p.12-19

17. The witness Feenstra made reference to the work done by John Petrie (expert witness in hydrogeology called by the City of Burlington) in respect to a clay till in the Waterloo, Ontario area called the Maryhill Till. He took from Mr. Petrie's work as his main point that open fractures may exist, permeable fractures may exist in a clay till material, and even a clay till material that is not a surficial deposit at a depth of about 10 -15 metres and that pumping tests suggest that such fractures may be open at that considerable depth.

Application Record, p.20-21

18. Feenstra further stated that there was no direct evidence for fracturing at Site "D" and specifically, the studies undertaken by Trowe (proponent's hydrogeologist) were not directed at obtaining evidence of fracturing. There was some evidence from Site "D" however that could bear on the possibility of fracturing. Some of the evidence was confirming evidence and some of it was contradictory.

Application Record, p.23-24

19. After dealing with the existing evidence, the witness expressed his opinion that based on the findings at several other sites, being the Maryhill Till at Waterloo and the Vandalia Till in Illinois, the Halton Till in Peel and the most significant extent of the findings of the research of Mr. Ruland in the clay till in the Sarnia area, there was a reasonable possibility that fractures existed in the unweathered upper till at Site "D" in Milton.

Application Record, p.24, 25

20. The witness performed some calculations which were based upon certain fractures and certain values of hydraulic conductivity and expressed the opinion that after a period of one year, the concentrations of contaminants exiting a landfill under hydraulic trap failure conditions would be arriving at the base of the fractured unweathered upper till at significant concentrations with respect to the input concentrations and in periods of less than a year contaminants would be able to find their way through the cracks very readily.

Application Record, p.26 - 27

21. The witness Feenstra expressed the opinion that there was one other aspect of the presence of fractures which needed to be addressed and that was the possibility of heaving and some stress

relief during the excavation and construction of the landfill. He expressed the opinion that these concepts were largely in the domain of geotechnical engineering and that he, as a geologist/hydrogeologist was quite aware of the processes but not capable of doing a detailed evaluation of their significance at Site "D". It was his recommendation that the phenomenon and consideration be given careful attention by a geotechnical engineer prior to the consideration of a landfill at Site "D".

Application Record, p. 27, 28, 29

22. Mr. Feenstra then summarized his opinion for the Board that, in the event of a failure of a hydraulic trap and the unweathered upper till being fractured there could result very rapid movement of leachate contaminants throughout the unweathered upper till into the underlying granular units.

Application Record, p.30, 31

23. The witness Feenstra expressed his views as to how the hypotheses should be approached from the point of view of a hydrogeologist and what could be done to investigate the existence of fractures.

Application Record, p.32 - 36

24. In the result, Mr. Feenstra expressed the opinion that landfilling at Site "D" could be done but that it was his opinion as a hydrogeologist that Site "F" in Burlington would be

preferable to Site "D" for the proposed regional landfill in the circumstances of his opinion developed for reply evidence.

Application Record, p.38 - 40

25. Mr. McQuaid, counsel for the City of Burlington, cross-examined Mr. Feenstra on the 14th of September, 1988 and in the course of his cross-examination advised the Board that the City of Burlington would be bringing a Motion seeking an Order for further investigation of Site "D" at Milton. Copies of a Notice of Motion had been delivered to parties but not filed with the Board. On September 16, 1988, prior to Burlington making a formal Motion, Dr. Kingham speaking for the Board stated as follows:

"I would just like to make an observation because this matter has been of concern to the Board for the last year and a half. This has been pointed out many times. This is quite a new departure in terms of Hearings.

Throughout this Hearing and especially over the past few weeks, this Board has been concerned about the proper place of (scientific uncertainty) in the legal process of deciding fairness and social equity with respect to these complex technological issues.

As you are all aware, we have the ultimate responsibility and obligation of assigning weight to evidence, including the scientific evidence brought before us. We have heard a great deal of evidence concerning the hydrogeology of Sites D and F. The data presented to us have assisted in our assessment of that evidence. Throughout the Hearing we have also received hypotheses about the - this is not the first and I don't think it will be the last in the broader context of Hearings - we have received hypotheses about the likely hydrogeology at these sites.

From time to time it has occurred to the Board that the measurement of additional parameters would

assist us in assigning the proper weight to the evidence presented. We asked ourselves and on occasion the witnesses whether or not additional tests would materially and clearly assist in our appreciation of the evidence. An example of this is found at pages 32,096 to 32,103 of the transcript of this Hearing. In each case we concluded upon review of all the evidence to that point that we could properly judge the value of the evidence based on the data available.

This kind of question has come to the surface again in the past few weeks. Again we have asked ourselves whether it would be necessary to have more data collected to test the hypothesis and, if so, whether the data collected would materially assist us in arriving at an unequivocal decision on the weight to be accorded to the evidence at hand.

It is sometimes desirable under the circumstances to have all the information one can get. The scientist always wants more data to better understand the phenomenon he is trying to describe. In this case, as we considered whether or not we should on our own initiative order additional data be collected, we concluded that it would be unreasonable to do so because the total evidence available was sufficient to assign appropriate weight to the various proposals before us.

In so concluding we were mindful of the fact that hydrogeology is still an evolving field. By the time we exhaust all possible tests concerning one hypothesis, another may emerge which may also demand testing. We feel that such (ad infinitum) possibilities could only be justified if meaningful data had not been collected in the first place. We do not feel this is the case in this Hearing.

This is how this Board has approached this difficult issue over the past year and a half. While our own conclusions do not preclude parties from taking whatever actions they consider necessary, we thought an understanding of our approach might be helpful at this time and I think we will adjourn for a few minutes until we hear reply."

Application Record, p. 40, 41, 42

26. Shortly after the statement by Dr. Kingham, the City of

Burlington withdrew its Motion for an Order for further testing at Site "D".

Application Record, p. 43, 44

27. Immediately following the withdrawal of the Motion by the City of Burlington, counsel for the Town of Milton requested time to obtain instructions in respect of certain evidence which it has proposed to call on the Burlington Motion to re-open the investigation of Site "D".

Application Record, p.44, 46

28. Subsequently, on the 30th day of September, 1988, the Town of Milton brought Notice of Motion seeking leave to call the evidence of Nicholas Eyles, PhD, a quaternary geologist, as to observations in a test pit at the proposed Site "D", Milton.

Application Record, p.47 - 54

29. On the Motion by the Town of Milton the Board received a witness statement together with certain photographs which became Exhibit M-962 before the Board (Application Record, p.55, 56). The Board's ruling as given by the Chairman, H. H. Lancaster was as follows:

"It has been suggested a number of times throughout this Hearing that the purpose of the Environmental Assessment Act is to ensure that the Board Hearing an Application has all the information necessary to make its decision on behalf of all parties concerned.

Mr. Garrod re-emphasized that purpose this morning

when he suggested that this forum should not be a dispute between parties. In this case, between municipalities and Halton. In gathering this information we understand that the Regional Municipality of Halton has acted in the spirit of the Act and, in particular, with respect to hydrogeology they allowed for observations and participation by the other parties to the Hearing. This helped the Board to have a clear understanding of the evidence brought before us.

The Board now understands that additional hydrogeological studies were undertaken on April 6th and 7th of this year. With the exception of the Milton parties, other parties were not informed of the test and this result and were not invited to participate in it. Within thirty hours the T-shaped hole, more than eight metres deep, had been dug, examined and filled in again. In subsequent days, particularly on April 12, 1988, counsel for the party on whose behalf the test pit had been dug was cross examining a witness on the hypothetical existence of fractures in clay tills across southern Ontario. The witness stated that he had no evidence to support such a hypothesis but that "if evidence were provided by yourself or the proponent, one would have to consider that fracturing with respect to assessing site suitability."

It was not suggested to the Board at that time or at any time since then that such evidence was available. When the expert witness for the proponent, Mr. Feenstra, proposed an hypothesis about fracturing in such tills, he also stated that he had no data to support such a hypothesis in the vicinity of Site D.

Again, it was not suggested to the Board that such data might exist. When cross examined about his hypothesis by counsel for the City of Burlington about the extent of the testing necessary to prove his hypothesis, Mr. Feenstra gave evidence that conclusive evidence could not be assured with even five test pits.

Additional tests of a different kind would be needed to clearly support or refute that hypothesis.

Now the Board has been asked to consider a Motion to admit additional evidence, evidence that was known to the parties since on or about April 7th of this year, evidence that was collected in the absence of experts for the other parties, evidence that has not been alluded to in the months since it was gathered, evidence for which the hydrogeologist in charge is not

present to testify.

The witness statement of Dr. Eyles confirms the general hydrostratigraphy in the are. It describes some fractures and concludes that a single test pit is inadequate to define the frequency spacing and ultimate depth of the penetration of such fractures. The first observation is not at issue and the second is itself qualified by the inadequacy of the data base. This confirms the evidence of the proponent of the hypothesis, Mr. Feenstra, about the significance of a single test pit result.

As previously, throughout this Hearing, the Board has considered whether the admission of evidence would materially assist in its deliberations. We are mindful of precedents brought to our attention by Ms. Cronk that suggests that such evidence could be admitted although our acceptance of this approach is tempered by the suggestion in Spoinka and Lederman and I quote "the evidence must be newly discovered evidence which reasonable diligence could not have discovered during the trial."

We are mindful as well of Ms. Vigod's reference to cases where such evidence has not been admitted.

Taking all these factors into account and especially the discretion allowed us under the legislation we conclude that the evidence proposed to be introduced by Dr. Eyles should not be admitted because it will not clearly assist us in arriving at our decision. We rule against the Motion to have such evidence introduced at this late date."

Application Record, p.56, 57, 58 and part of p.60

30. The witness statement of Dr. Eyles, Exhibit M-962, concluded:

"on the basis of this test pit that at Site D there are fractures extending below the weathered zone through the upper till and that some of these may extend into the lower till. However, on the basis of the one test pit, it is not possible to determine the frequency or spacing of such fracturing."



31. In its decision, the Joint Board specifically found that the upper 4 metres of the upper till at Site "D" was weathered and that the lower 4 metres was not weathered. The Joint Board also found that there were two granular units in the lower till from which adjacent land owners generally draw water for domestic and agricultural uses.

Board Decision, p.60

32. Further, the Board found that the Region's hydrogeologists were certain that they had not missed any significant subterranean hydrogeological features at Site "D".

Board Decision, p.63

33. The Board noted the differences between the clay till at Sarnia and the clay till at Milton. The Board also noted the skepticism with which Mr. Feenstra viewed certain confirmatory evidence of fracturing. The Board further found that Mr. Feenstra held that the tritium data did not support the existence of pre-1952 water in the upper granular unit and that, if fractures exist, they have not allowed a significant tritium effect at depth.

Board Decision, p.67, 68

34. In the result the Board found as follows:

"Having considered all the evidence, the Board does not find support for Mr. Feenstra's hypothesis about fracturing in the vicinity of Site D. To the contrary, the

bulk of the evidence supports the conclusion that groundwater moves very slowly through the unweathered upper till. By Mr. Feenstra's own admission, there is no way to conclusively prove or disprove his hypothesis. Notwithstanding his statement on this matter, counsel for the Town of Milton sought leave to introduce test pit evidence of the sort which Mr. Feenstra had averred would not help to clarify the situation."

Board Decision, p.69

34. Mr. Feenstra, in fact, stated that to investigate the existence of fractures the first thing one would do would be to design a program of test pits to investigate to see if one could visually determine the presence of fractures at depths between four and eight metres below the ground surface representing that depth interval which would be the unweathered upper till underlying Site "D". In addition to looking at some test pits, visual evidence from test pits, one could provide or develop a program of some angled bore holes in an attempt to firstly identify whether the vertical fractures are present at those depths and secondly allow the installation of piezometers in these angled bore holes which might allow an estimation of the vertical hydraulic conductivity of this unit. In addition, one could attempt to undertake a program of pumping tests similar to those undertaken by Mr. Petrie on the Maryhill Till to identify whether, upon pumping of the underlying upper granular unit that piezometers in the unweathered upper till respond in a way that reflects fracturing in the unweathered upper till. Upon investigating the presence of fracturing in the unweathered upper

till in this fashion one could either come to the conclusion to a varying degree of confidence that the till was either fractured or unfractured.

Application Record, p.33, 34, 35

35. The Board further observed:

"This Board is of the view that according great weight to an unprovable hypothesis introduced at the very end of evidence in a two-year long Hearing might be interpreted by others who may have to participate in the environmental assessment process as a strategy for success. This legacy is not one we seek."

Reasons for Decision, p.69.

36. The Board stated:

"The best way to decide the magnitude of the controlling vertical hydraulic conductivity at Site D would have been to take direct measurements across the unweathered upper till layer in the field. Although such measurements were not performed either by the proponent or by consultants for the Town of Milton, they could be ordered as part of a site preparation process."

Reasons for Decision, p.69, 70

37. In respect of Mr. Feenstra's hypothesis that the construction of the landfill could itself induce fractures in the unweathered upper till, the Board found that the timing for the introduction of this hypothesis was not the best possible and that it could have been and should have been introduced during the proponents original case.

Reasons for Decision, p.70

38. Notwithstanding the rejection of the fracturing hypotheses put forward by the proponent's hydrogeologist Feenstra, the Board structured tests and contingencies for them in its decision. The Board granted approval to proceed with landfilling at Site "D", subject to the conditions set out in the Decision pursuant to Section 38 of the Environmental Protection Act and Sections 12 and 14 of the Environmental Assessment Act. The conditions relating to the fracture hypotheses are condition 2 (design and operations), condition 5 (site preparation), condition 12 (groundwater monitoring), condition 16 (off-site contaminant attenuation contingency zone).

Reasons for Decision, p.177 - 194

39. By condition 2, the Board left matters of final design to the Director of Approvals, Ministry of the Environment and required that such final design must take place within the range allowed in the Board's conditions.

Reasons for Decision (conditions of approval) p.177

40. In condition 5, the Board designed twelve monitoring wells to be used for short-term pumping tests and long-term groundwater quality monitoring and left the interpretation of results of pump and response tests to the Director of Approvals. The Board dictated a measure for hydraulic conductivity of the unweathered upper till as a bench mark for the construction of a liner at Site "D". Hydraulic conductivity greater than the Board value

would require the construction of a liner and hydraulic conductivity below the Board value meant that the landfill could be constructed without a liner. The value selected by the Board fell within a range of values which had been given in evidence by various hydrogeologists. The value was  $1.4 \times 10^{-7}$  centimeters per second. The results are to be generated by the proponent and interpreted by the Approvals Director. If the interpretation shows a permeability for the unweathered upper till above the bench mark value then a liner of compacted native glacial till is to be constructed at the base of the excavation by remoulding the upper 1 metre or more of the unweathered upper till material on site to achieve the lowest practical permeability.

Reasons for Decision, p.182 - 184

41. There was evidence before the Board that a liner at Site "D" should be between 1 metre and 1.5 metres in thickness. There is no evidence as to what thickness of liner could be achieved by remoulding the upper 1 metre or more of the unweathered upper till material.

Record of Hearing and Reasons for Decision, p.183

42. In condition 12, the design of a ground water monitoring program was, in part, dictated by the Board and in part, left to the judgment and approval of the Director of Approvals, Ministry of the Environment.

Reasons for Decision, p.189 - 191

43. In condition 16, the Board created a property purchase scheme which it described as a off-site contaminant attenuation contingency zone. In essence, the owners of adjacent property most likely to be affected by groundwater contamination were given the option to require the proponent, Region of Halton, to purchase their properties at fair market value as of the date of Decision within three years from the date of release of the Decision (February 24, 1989).

#### PART 111

#### ISSUES RAISED

44. Did the Board deny the Applicant natural justice or make an error of law on the fact of the Record and hence, lose jurisdiction by rejecting the fracturing hypotheses given in evidence by the proponent's hydrogeologist/hydrogeochemist Feenstra and denying the request of the Applicant to lead evidence of direct field testing which supported the existence of such fractures? ] no way →

45. Did the Board decline jurisdiction by delegating its adjudicative function to the Director of Approvals of the Ministry of the Environment in respect of the interpretation of pumping test results and other investigation of fracturing during excavation of the landfill at Site "D"?

46. Is it a denial of natural justice for the Joint Board to delegate statutory decision making to the Director of Approvals in respect of evidence generated by a proponent and thereby remove the Applicant's right of Hearing, including cross-examination and the right to call rebuttal expert opinion evidence?

47. Did the Board deny the Applicant's natural justice or make an error of law on the face of the Record by rejecting the fracturing hypotheses of the proponent's reply witness, Feenstra, while at the same time designing conditions which accept the "reasonable possibility of fracturing"?

48. In the exercise of its statutory power of decision in the circumstances before it, ought the Board to have found that the environmental assessment with respect to Site "D" was inconclusive or otherwise unsatisfactory to enable a decision to be made as to whether approval to proceed should be given and by order require the proponent to carry out such research, investigations, studies monitoring programs related to the undertaking as would make the assessment conclusive and satisfactory to enable a decision to be made?

49. Did the Board make an error of law on the face of the Record and hence lose jurisdiction by partitioning the environmental process and delegating jurisdiction with respect to part thereof

to the proponent and the Director of Approvals of the Ministry of the Environment?

#### LAW AND AUTHORITIES

50. The Joint Board, in deciding the Applications before it, was exercising a statutory power of decision.

Judicial Review Procedure Act, Section 1(g)  
Consolidated Hearings Act, Section 4(11)

51. The jurisdiction under an Act specified in a notice under the Consolidated Hearings Act under Section 3 applies with necessary modification in respect of a decision that may be made by a Joint Board under the Consolidated Hearings Act.

Consolidated Hearings Act, 1981, S.O. c.20, s.5(7)

52. The Environmental Assessment Act, in Section 11 thereof authorizes the Minister of the Environment to order a proponent to carry out further research, investigation, studies and monitoring. The power in Section 11 resides in the Joint Board in accordance with Section 5(7) of the Consolidated Hearings Act.

Environmental Assessment Act, R.S.O. 1989, s.11, c.140  
Consolidated Hearings Act, S.O. 1981, c.20 s.5, ss.7

53. Under the Environmental Statute Law Amendment Act, 1988, c.54, decisions of Boards are implemented by the Director. The decision making resides in the Board and there is no legislated



authority to delegate determinations to the Director. Under the Consolidated Hearings Act there is a right of appeal by way of a petition to the Lieutenant Governor in Council. There is no appeal procedure in respect of a decision made by a Director in the implementation of a Board decision; nor does a Board retain control over the proponent or Director after rendering a Decision.

Environmental Protection Act, 1980, c.141, s.33(4)  
Consolidated Hearings Act, S.O. 1981, c.20

54. Where a Board makes a mistake which is patently unreasonable or fundamentally erroneous, a reviewing Court will intervene.

Tandy Electronics Ltd. and UAW (1980) 30 O.R. (2d) 29 p.42

55. An error of law in an administrative decision will justify intervention if it is of such magnitude as to require intervention in light of the general principle that courts should intervene in the administrative process as little as possible.

Hughes Boat Works Inc. and UAW, Local 1620, 1979, 26 O.R. (2d) (Div. Court)

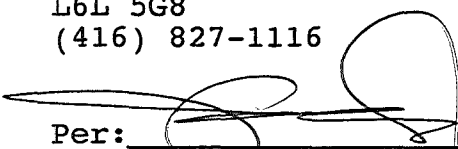
#### PART IV

56. The Applicant herein respectfully requests the Court to quash the Decision of the Joint Board dated February 24, 1989 as amended by Addendum dated march 2, 1989 and order the Joint Board to require the proponent to carry out the investigations

necessary to determine the degree of fracturing of the unweathered upper till at Site "D" (including pump tests and response tests to determine the permeability of the unweathered upper till) and further, to hold Hearings in respect thereof, and incorporate same as part of the environmental assessment in the rendering of its Decision herein. The Applicant herein further respectfully requests its costs of this Application.

All of which is respectfully submitted this 30 day of October, 1989.

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