

**SUPREME COURT OF ONTARIO
(DIVISIONAL COURT)**

BETWEEN:

NSP INVESTMENTS LIMITED

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 TOWN OF MILTON, THE CORPORATION OF THE
CITY OF BURLINGTON, 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, AND THE
HONOURABLE JAMES BRADLEY, IN HIS CAPACITY
AS THE MINISTER OF THE ENVIRONMENT**

Respondents

**Application under the Judicial Review
Procedure Act, R.S.O. 1980, c. 224,
Subsections 2(1), 2(3) and 2(4) and
Rule 68 of the Rules of Civil Procedure**

APPLICANT'S FACTUM

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APPLICANT'S FACTUM

PART I:

NATURE OF APPLICATION

1. This is an application for Judicial Review, pursuant to subsections 2(1), 2(3) and 2(4) of the *Judicial Review Procedure Act*, R.S.O. 1980, c.224 as amended and Rule 68 of the Rules of Civil Procedure, of a Decision by the Joint Board dated February 24, 1989, together with an Addendum dated March 2, 1989, in which ^{Reasons} ~~Decision~~ it was held that the proposed sanitary landfill site referred to in the Regional Municipality of Halton's (the "Region's") environmental assessment as "Site F" was hydrogeologically "unsuitable" and "unacceptable" for sanitary landfilling and was "otherwise unacceptable" for landfilling for public health and

safety reasons and in which it was held that the proposed sanitary landfill site referred to as "Site D" was hydrogeologically "acceptable" and "suitable" for sanitary landfilling by the Region.

PART II:

FACTS

A. THE APPLICANT AND SITE F

2. Site F is situate in the City of Burlington, within the Region, immediately north of Highway 403 on the northwest corner of the North Service Road and King Road. It is located between two other landfill sites, namely, the Region's existing landfill site (the Burlington Landfill) on the west and the City of Burlington's former landfill site (Bayview Park) on the east. Site "F" comprises approximately 96 hectares, approximately 70.23 hectares of which are owned by the Applicant, NSP Investments Limited ("NSP").

NSP's Application Record

- Tab 1: Decision of the Joint Board, pp. 4-5
- Tab 2: Evidence of Max Bacon, Transcript, Vol. 103, p. 24687
- Tab 3: Exhibit N-586, Tab 2, p. 12

3. NSP has owned most of the lands comprising Site F since before the turn of the century. The balance of Site F is owned by a corporation known as Azova Investments Limited ("Azova").

NSP's Application Record

- Tab 3: Exhibit N-586, Tab 1, p. 1
Tab 2, p. 14

4. Both NSP and Azova were granted status as parties by the Joint Board. NSP participated at the Hearing before the Joint Board as a full-time party. Both NSP and Azova supported the Region's proposal before the Joint Board for approval of sanitary landfilling at Site F. There is thus no opposition by the owners of Site F to its expropriation by the Region for this purpose.

5. The majority of Site F, for decades, has been maintained by its owners as vacant land. Approximately 30 hectares (74 acres) of NSP's lands on Site F, in the north central area of the Site, have been licensed since August, 1972 by the Ontario Ministry of Natural Resources for the operation of a shale quarry. No significant active quarrying has been carried out on the Site for many years.

NSP's Application Record

Tab 4: Evidence of P. Walker, Transcript, Vol. 59, pp. 13697-13711

Tab 5: Evidence of Max Bacon, Transcript, Vol. 103, p. 24672

Tab 6: Exhibit H-306

Tab 7: Exhibit H-42, p. 19

Tab 3: Exhibit N-586, Tab 2, p. 12

6. On April 14, 1982, NSP submitted an application as a private landowner to the Ontario Minister of the Environment (the "MOE") for a Certificate of Approval under the *Environmental Protection Act* (Ontario) for the private operation of a sanitary landfill site on approximately 20.6 hectares of the lands now comprising Site F. After April, 1982 the size of the area proposed by NSP in its application for landfilling was twice increased such that, by December, 1986, NSP's application contemplated the use of some 40.5 hectares of Site F for sanitary landfilling having an estimated waste capacity of 3,754,000 tonnes.

NSP's Application Record

Tab 8: Evidence of Max Bacon, Transcript, Vol. 102, pp. 24500-503; 24553-557

Tab 9: Exhibit N-587, Tabs C and H

Tab 10: Exhibit N-313

7. In late 1982, while NSP's application for approval of a private sanitary landfill site was pending, the Region began a review under the *Environmental Assessment Act* (Ontario) to select a suitable sanitary landfill site for the Region. At the request of various provincial and municipal government agencies, NSP agreed to the deferral of any further processing of its landfill application until the Region's environmental assessment review and landfill site search could be completed.

NSP's Application Record

- Tab 11: Evidence of Max Bacon, Transcript, Vol. 102,
pp. 24514-519
Tab 3: Exhibit N-586, pp. 5-6
Tab 12: Exhibit H-316

B. SITE D AND ITS OWNERS

8. Site D comprises approximately 126 hectares and is situate between Highway 25 and First Line, approximately one-half kilometre south of Britannia Road, in the Town of Milton, within the Region.

NSP's Application Record

- Tab 1: Decision of the Joint Board, p. 4

9. Title to Site D is held in multiple ownership. It is currently used, in its entirety, for residential, commercial and farming purposes. investment

10. The owners of the lands comprising Site D and lands adjacent thereto were granted party status by the Joint Board. They are opposed to the use of Site D as a sanitary landfill site as contemplated under the Decision of the Joint Board and, in consequence, if landfilling by the Region proceeds at Site D, these landowners will be expropriated against their will from their homes, farms and businesses.

NSP's Application Record

- Tab 13: Evidence of Watkin and Doreen Martin,
Thomas and Mary-Jean Martin, Michael and
Cynthia Reed, Walter Tomosky and Milton
Coalition Members
Transcript, Vol. 99, pp. 23668, 23706-07,
23767-68, 23739, 23728-30; Vol. 2, pp. 278-281

C. THE REGION'S PREFERRED SITE FOR LANDFILLING

11. From July, 1982 until January, 1987, the Region commissioned extensive investigations and studies by various consultants to examine its future solid waste management needs and, pursuant to the Environmental Assessment Act (Ontario), to locate a suitable site for Regional landfilling. For this purpose the

- (b) on behalf of the Town of Milton, from Dr. D. Charlesworth, a hydrogeologist; from Dr. K. Rowe, an expert on contaminant transport modelling and geotechnical engineering issues; and from Mr. Brian Gray, also on geotechnical engineering issues;

NSP's Application Record

Tab 28: Transcript, Vol. 79, pp. 18622 and 18650-51
Vol. 166, pp. 41316-319

Tab 1: Decision of the Joint Board, p. 55

- (c) on behalf of the City of Burlington, from two hydrogeologists, namely, Messrs. J. Petrie and A. Crutcher. The latter witness also gave opinion evidence on landfill design issues, together with Mr. Tim Mereu;

NSP's Application Record

Tab 29: Transcript, Vol. 105, p. 25202

Tab 1: Decision of the Joint Board, pp. 55, 115 and 117

- (d) on behalf of the West Burlington Citizens' Group, from Mr. Paul Bowen, a hydrogeologist; and *geotech eng.*

NSP's Application Record

Tab 1: Decision of the Joint Board, p. 55;

Tab 30: Transcript, Vol. 160, p. 38845

- (e) on behalf of the MOE, from Dr. G. Hughes, a hydrogeologist.

NSP's Application Record

Tab 1: Decision of the Joint Board, pp. 104-105

Tab 31: Transcript, Vol. 167, pp. 41662-65

25. Dr. G. Hughes gave no evidence regarding the suitability of either Site F or D for landfilling. Rather, his evidence was elicited "... to explain two Ministry policies which are applicable to the consideration of the hydrogeologic suitability of the two sites."

NSP's Application Record

Tab 32: Exhibit E-928, Witness Statement of Dr. G. Hughes, p. 2

26. It was the uncontroverted evidence of all of these experts (save only for Dr. Hughes who gave no evidence on the matter) that Site F, with the design proposed by the Region, was suitable for sanitary landfilling or, with the construction of a liner, could be made so. Indeed, all of these experts, save only for Messrs. Petrie and Crutcher, testified that Site F was suitable for landfilling by the

? wasn't whether it
is suitable or
which was suitable
Most

Dmore

Region without any need for an engineered liner. It was Messrs. Petrie and Crutchers' opinion that:

"For an alternative landfill design consisting of a suitable liner and an underdrain system, the site is hydrogeologically suitable for landfilling."

NSP's Application Record

- Tab 33: Evidence of S. Feenstra, Transcript, Vol. 170, pp. 42328-29
- Tab 34: Evidence of A. Sobanski and J. Beechinor, Transcript, Vol. 37, pp. 8206-07
Vol. 32, p. 7005
- Tab 35: Evidence of Drs. Charlesworth and Rowe, Exhibit M-437, pp. 1-2
Transcript, Vol. 85, p. 20338-39
Vol. 79, p. 18675
Vol. 80, p. 18865
Vol. 83, p. 19748
Vol. 86, pp. 20416-17
- Tab 36: Evidence of Messrs. Petrie and Crutcher, Transcript, Vol. 121, pp. 29227-57;
Exhibit B-617, p. 162
- Tab 37: Evidence of P. Bowen, Transcript, Vol. 160, p. 38904 and pp. 38961-63
- Tab 7: Evidence of J. Hiraishi, Exhibit H-42, p. 31

27. In his concluding submissions to the Joint Board, Counsel for the Region put the matter as follows:

"First, on Site F. In my respectful submission, at Site F, all of this evidence comes down to a single question. Does Site F need a liner. At Site F, all investigators agree that the Site can be safely used for landfill. The only outstanding issue between the investigators, in my respectful submission, is the question of whether or not Site F needs a liner. The argument all comes down to the degree of engineering required and I propose to focus my attention on Site F on this single question..."

NSP's Application Record

- Tab 38: Transcript, Vol. 177, pp. 44007-44008 and 44276

28. The position of the MOE regarding the hydrogeological and engineering suitability of Site F for landfilling was confirmed in written submissions at the end of the Hearing, as follows:

"13. The position of the Ministry set out below is that both Sites D and F are acceptable under the EPA [the *Environmental Protection Act* (Ontario)] and that either Site could be given a certificate of approval. It is submitted that approval to proceed with the undertaking under the EAA [*Environmental Assessment Act* (Ontario)] should be granted by the Joint Board. The Ministry takes no position overall in support of one site over the other. There are factors that go to approval under the EAA, such as social and economic impact, that are not within the mandate of the Ministry of the Environment. It is submitted that impacts on surface and ground waters have been given appropriate weight in the environmental assessment and that either site is acceptable with respect to those issues.

[NO position]

...

46. ...It is submitted that it has not been demonstrated that a liner is necessary to prevent surface water impacts from Site F.

47. It is therefore submitted that, with the imposition of the conditions set out at Tab 4, Site F can be approved under the *Environmental Protection Act* and a certificate of approval can be issued."

MOE said acceptable

NSP's Application Record

Tab 39: Final Written Submissions of the MOE, pp. 6, 7 and 12 to 14.

29. Counsel for the MOE, in his final submissions to the Joint Board, indicated that the MOE did not regard the inclusion of a liner in the engineering design at Site F as necessary and, accordingly, Site F was suitable and acceptable to the Ministry for sanitary landfilling without a liner.

NSP's Application Record

Tab 40: Transcript, Vol. 180, pp. 44616-44620

30. Notwithstanding the uncontroverted expert evidence before it and the position of the MOE, it was the Decision of the Joint Board that Site F was not hydrogeologically "suitable" or "acceptable" for landfilling, with or without a liner.

MOE said unacceptable

NSP's Application Record

Tab 1: Decision of the Joint Board, p. 112

31. Moreover, the Joint Board found, inter alia:

"In the Public Health and Safety category overall, this Board finds Site F clearly unacceptable, and Site D acceptable with the conceptual design proposed and appropriate conditions applied."

NSP's Application Record

Tab 1: Decision of the Joint Board, p. 113

32. There was no evidence whatsoever before the Joint Board from experts qualified to give opinion evidence to support these findings by the Joint Board on Site F. No expert witness for any party testified and no Counsel for any party took the position before the Joint Board that there was any evidence upon which to conclude that, with an engineered liner, Site F was hydrogeologically "unsuitable", "unacceptable", or "unsafe", whether from a hydrogeological, a hydrogeochemical or an engineering perspective.

(iii) The Issue Of The Integrity Of A Liner At Site F

liner

33. With respect particularly to the issue of the need for a liner at Site F, the Joint Board concluded:

"Finally, with respect to the matter of the security offered by a liner beneath Site F, the Board noted that the strongest supporter of such an expensive measure, Mr. Crutcher, could not guarantee that a liner would not become fractured as a consequence of being laid down over different areas of intact bedrock and filled river valleys. Even with a liner in place, Mr. Crutcher predicted losses ranging from 1,509 gallons per day to 2,446 gallons per day, for the relatively benign situation where the water table would exist between the upper and lower boundaries of the liner. For the less favourable situation of the water table falling below the liner, leachate losses would increase. Regardless of its integrity, the cost/benefit implications of this palliative cannot be ignored."

integrity leakage

NSP's Application Record

Tab 1: Decision of the Joint Board, p. 109

and further:

"... Finally, it is likely that if Site F were approved for landfilling it would require a liner. The conservative estimate for the cost of the liner is about \$4,000,000."

NSP's Application Record

Tab 1: Decision of the Joint Board, p. 147

34. Messrs. Petrie and Crutcher alone testified that Site F required a liner in order to render it suitable for landfilling. It was the evidence of these witnesses

Bowen

that with a liner Site F was hydrogeologically acceptable for landfilling. In fact, Mr. Petrie testified that a liner at Site F would "... provide[s] us with the capacity to predict and monitor the site and, in that sense we believe the liner would make the site environmentally secure and more safe."

NSP's Application Record

Tab 41: Evidence of J. Petrie, Transcript, Vol. 135, p. 32601

Tab 42: Exhibit B-617, pp. 159-160 and 162

35. Further, Mr. Crutcher, whose evidence the Joint Board interpreted in its Decision as questioning the integrity of a liner at Site F, specifically confirmed that he was not concerned with the integrity of a liner at Site F. It was his evidence that:

"... once the site is pregraded essentially to the grades as presented by Mr. Hiraishi [the engineering witness who testified on behalf of the Region], the liner placement is rather straightforward and standard engineering practice and the integrity of the liner, you can have a high assurance on the integrity of the liner and we have, in addition, the ability to monitor that for verification purposes."

NSP's Application Record

Tab 43: Evidence of A. Crutcher, Transcript, Vol. 142, pp. 34397 to 34401

36. In addition to this evidence, the Joint Board also received engineering evidence from two geotechnical engineers called on behalf of the Town of Milton. Mr. Brian Gray testified that he did not have any concerns regarding the integrity of a liner at Site F in respect of the potential for slumping, settlement or other deformation of the material lying below the waste. Mr. Gray gave this evidence specifically in response to questions raised by the Joint Board regarding the integrity of a liner at Site F.

NSP's Application Record

Tab 44: Evidence of B. Gray, Transcript, Vol. 173, pp. 43116-20

37. As detailed in paragraph 26 above, Drs. K. Rowe and D. Charlesworth (on behalf of the Town of Milton), Messrs. J. Hiraishi, S. Feenstra, A. Sobanski and

J. Beechinor (on behalf of the Region), and Mr. P. Bowen (on behalf of the City of Burlington) also gave opinion evidence regarding a liner at Site F. None of these witnesses expressed any concern regarding the integrity of a liner at this Site.

38. There was no engineering or hydrogeological evidence before the Joint Board that a liner at Site F could not be successfully constructed and maintained so as to ensure the safety of the Site were it approved for sanitary landfilling. The evidence of the engineering and hydrogeology experts on this issue was unanimous and to the contrary.

(iv) Substitution By The Joint Board Of Its Own Opinion For That Of Qualified Experts

39. In reaching its Decision that Site F was hydrogeologically "unsuitable" and "unacceptable" for landfilling with or without an engineered liner, the Joint Board rejected the uncontroverted evidence of every hydrogeologist, hydro-geochemist and engineer who testified before it. In doing so, the Joint Board indicated, with particular reference to hydrogeology:

"Many experts were clearly advocates for their clients and often did "disagree as amongst themselves." We felt it our duty therefore, even though one of the final two sites was preferred by more hydrogeologists than the other, to arrive at our own opinion after carefully weighing and considering the evidence of the experts, and availing ourselves of all the assistance they were able to provide."

NSP's Application Record

Tab 1: Decision of the Joint Board, p. 55.

40. Neither member of the two-person panel ultimately comprising the Joint Board in this case is a trained hydrogeologist or hydrogeochemist; however, the Joint Board received evidence from a number of experts in these sciences, as detailed above.

41. In rejecting the uncontroverted evidence of these experts regarding Site F, the Joint Board substituted its own opinion on the hydrogeological suitability of Site F for that of the experts qualified to form and express opinions in

which could allow leachate (contaminated groundwater) to travel through this unit into the granular water-bearing units below. It was the uncontroverted evidence of Mr. Feenstra that the presence of such fractures in the unweathered upper till unit at Site D was of great significance if the engineered hydraulic trap failed because it would result in rapid contamination of the water resource at the Site and impacts on nearby groundwater users.

NSP's Application Record

Tab 59: Exhibit H-936, Reply Witness Statement of S. Feenstra, p. 4, paras. 7 and 8

Tab 1: Decision of the Joint Board, pp. 67 and 112

Tab 60: Evidence of S. Feenstra, Transcript, Vol. 169, pp. 42079-89; 42070-71; 42093-96; Vol. 172, pp. 42840-42

Tab 61: Evidence of J. Petrie, Transcript, Vol. 122, p. 29562

54. It was also Mr. Feenstra's uncontroverted evidence that disregard of the fracturing potential at Site D was tantamount to "gambling with public health and safety".

NSP's Application Record

Tab 62: Evidence of S. Feenstra, Transcript, Vol. 172, pp. 42863 and 42869

55. No adverse credibility finding was made by the Joint Board against Mr. Feenstra.

56. At the conclusion of the Hearing the Joint Board was urged by Counsel for the Region and for the MOE, as well as by various other Counsel, to evaluate the hydrogeological suitability and acceptability of Site D in accordance with Mr. Feenstra's unchallenged reply evidence.

NSP's Application Record

Tab 63: Transcript, Vol. 178, pp. 44240-41 (the Region)
Vol. 180, pp. 44523-25 (the MOE)
Vol. 181, pp. 44882-86; 44889-892; and 44894-96 (the Town of Milton);
Vol. 184, pp. 45667-674 (the Milton Coalition);
and
Vol. 187, pp. 46447-460 (NSP)

57. The Joint Board rejected the evidence regarding the fracturing potential of the unweathered upper till unit at Site D and stated in its Decision:

"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."

NSP's Application Record

Tab 1: Decision of the Joint Board, p. 69

(iii) **Failure To Take Into Account, Consider and Evaluate Essential Evidence**

58. On September 30, 1988, after the Reply evidence of Mr. Feenstra but prior to completion of the Hearing, the Respondent the Town of Milton brought a Motion before the Joint Board seeking leave to call as a further Reply witness one Dr. Nicholas Eyles, a quaternary geologist, to give further evidence regarding the fracturing possibilities at Site D as described by Mr. Feenstra. The Joint Board received a Witness Statement from Dr. Eyles, together with photographs relating to a test pit at Site D, in which Dr. Eyles stated:

"On the basis of this test pit at Site D there are fractures extended 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".

NSP's Application Record

Tab 64: Exhibit M-962, Witness Statement of Dr. N. Eyles, p. 3

59. The Joint Board on September 30, 1988 declined to receive the proposed evidence to be given by Dr. Eyles.

NSP's Application Record

Tab 65: Transcript Vol. 176, pp. 43846-43850

60. Mr. Feenstra also testified that the construction of a landfill at Site D could itself induce fractures in the unweathered upper till unit at the Site. It was

even Sob. contradicted

his uncontradicted evidence that the possibility of the inducement of fractures or the opening of existing fractures consequent upon introduction of a landfill at the Site should be studied in detail by a geotechnical engineer prior to construction of a landfill at Site D.

NSP's Application Record

Tab 66: Evidence of S. Feenstra, Transcript, Vol. 169, p. 42121-22; Vol. 172, pp. 42884-85

61. No evidence was led before the Joint Board from any engineer as to the consequences for the safe operation of the hydraulic trap in the event of fractures being induced by introduction of a landfill at Site D. The Joint Board failed to evaluate, in reaching its Decision on the hydrogeological suitability and acceptability of Site D, the evidence of Mr. Feenstra concerning the inducement of fractures at Site D and the implications thereof. Rather, the Joint Board only commented on what it regarded as the inappropriate timing by the Region for introduction of this evidence.

NSP's Application Record

Tab 1: Decision of the Joint Board, p. 70

62. Mr. Feenstra also testified that the presence of a landfill at Site D could cast a precipitation shadow on the ground beneath it, thereby preventing the underlying water table from being replenished and causing depletion of the water resource in the environs of Site D. He also indicated that drought in the area of Site D could have a similar effect. It was Mr. Feenstra's uncontroverted evidence that reductions in the groundwater levels at Site D could result in short or long-term failure of the hydraulic trap.

NSP's Application Record

Tab 59: Exhibit H-936, Reply Witness Statement of S. Feenstra, p. 5-7, paras. 12, 13, 15 and 17

Tab 67: Evidence of S. Feenstra, Transcript, Vol. 172, p. 42879

63. The Joint Board in its Decision acknowledged that fractures in the unweathered upper till at Site D might bring on failure of the hydraulic trap

which, if coupled with declining water levels, could cause rapid contamination of the water resource at the Site. The Joint Board failed, however, to consider or evaluate the implications of these events on the adequacy of the engineering design proposed for Site D and, further, failed to consider the unchallenged evidence of Mr. Feenstra that the design proposed by the Region for Site D was inadequate and, to accommodate these potential events, would have to be re-evaluated.

NSP's Application Record

Tab 68: Evidence of S. Feenstra, Transcript, Vol. 172,
pp 42914-915; pp. 42919 and 42921

Tab 1: Decision of the Joint Board, pp. 70 and 79

(iv) **Absence of Engineering Evidence Regarding The Adequacy
And Effectiveness Of A Liner At Site D**

64. It was the evidence before the Joint Board that there were a number of design options available to address the various concerns identified in the evidence regarding the unweathered upper till unit at Site D. Mr. Feenstra proposed, as one of these options, that the construction of a liner at the base of the landfill would be adequate to respond to the consequences of fracturing in the unweathered upper till unit.

NSP's Application Record

Tab 59: Exhibit H-936, Reply Witness Statement of S.
Feenstra pp. 4-5, paras. 9 and 10

65. Mr. Feenstra was not qualified before the Joint Board as an expert in engineering or landfill design but rather, as an expert in hydrogeology and hydrogeochemistry. The only design for Site D about which the Joint Board received any engineering evidence whatsoever did not include a liner. There was no engineering or landfill design evidence before the Joint Board regarding the design requirements and safety implications of a liner of the type proposed by Mr. Feenstra.

NSP's Application Record

Tab 59: Exhibit H-936, Reply Witness Statement of S.
Feenstra, p. 18, para. 55

66. It was the position of the MOE at the conclusion of the Hearing that the possibility of fracturing extending through the unweathered upper till at Site D should be accepted by the Joint Board and, further, that the most appropriate additional level of engineering to accommodate this possibility was an engineered liner at the base of the Site.

NSP's Application Record

Tab 39: Final Written Submissions of the MOE, p. 11,
para. 29

67. The Joint Board in its Decision did not take into account the evidence regarding the need for a liner at Site D or the lack of engineering evidence regarding such a liner. Further, the Joint Board rejected the evidence of Mr. Feenstra regarding fracturing in the unweathered upper till unit at the Site. Notwithstanding that it had failed to address itself to the need for a liner at Site D and the engineering and hydrogeologic implications of such a liner at the Site, the Joint Board in Condition 5.4 of the Conditions which it ordered should attach to the Certificate of Approval to be issued for Site D, required that a liner should be constructed at the Site in certain events.

contingency

NSP's Application Record

Tab 1: Decision of the Joint Board, p. 183

PART III: THE ISSUES RAISED AND STATEMENT OF THE LAW

68. The first issue regarding the Joint Board's Decision is whether the Joint Board acted unreasonably and breached the rules of natural justice or made a jurisdictional error in finding that Site F was hydrogeologically "unsuitable" and "unacceptable" for landfilling and that, in the public health and safety category overall, Site F was "clearly unacceptable", even with an engineered liner, when:

- was,*
- (i) there was no expert evidence to support these findings;
 - (ii) in so doing, the Joint Board rejected unanimous, uncontroverted expert evidence to the contrary;
- not uncontroverted*

- (iii) in so doing, the Joint Board failed to make adverse credibility findings against the experts whose uncontroverted evidence it rejected; sd.
- (iv) in so doing, the Joint Board substituted its own opinion on the hydrogeological, hydrogeochemical and engineering suitability and acceptability of the Site for that of all of the experts who were competent and qualified to give opinion evidence on these issues; and
- (v) in so doing, the Joint Board failed to take into account, consider or evaluate essential evidence relevant to the hydrogeological suitability and acceptability of Site F for landfilling.

69. 2 A further issue regarding the Joint Board's Decision is whether the Joint Board breached the rules of natural justice, procedural fairness or fundamental justice or made a jurisdictional error by developing and relying upon its own criteria for assessing the hydrogeological suitability of Site F for landfilling, without prior disclosure to, and without affording the parties to be affected thereby an opportunity to make comment on, these criteria. *

70. 3 The third issue regarding the Joint Board's Decision is whether the Joint Board acted unreasonably and breached the rules of natural justice or made a jurisdictional error in finding that Site D was hydrogeologically "acceptable" and "suitable" for landfilling when:

- (i) in so doing, the Joint Board rejected uncontroverted expert hydrogeological and hydrogeochemical evidence regarding the suitability and safety of Site D for landfilling; what
- (ii) in so doing, the Joint Board failed in one instance to hear and consider and failed in other instances to consider, take into account or evaluate essential evidence relevant to the hydrogeological suitability and acceptability of Site D for landfilling; and
- (iii) there was no engineering evidence of any kind before the Joint Board establishing the adequacy and effectiveness of the liner which the Joint Board directed should be constructed at Site D in certain events. >

71. The Joint Board in this case was established under Section 4 of the *Consolidated Hearings Act, 1981*, S.O. 1981, c. 20 (the "Act") and, pursuant

thereto, was composed of one member of each of the Environmental Assessment and the Ontario Municipal Boards. Pursuant to Subsection 4(11) of the Act, the Joint Board had the authority and the duty, *inter alia*:

- (a) to hold a hearing in respect of and to consider the matters that could be considered at the hearings specified in the notice to the Hearings Registrar under section 3; and
- (b) to make and issue a decision in respect of matters considered by the Joint Board.

72. In deciding the applications before it, in accordance with the matters set out in the Region's notice to the Hearings Registrar, the Joint Board was exercising a statutory power of decision.

Judicial Review Procedure Act, R.S.O. 1980, c. 224, Section 1(g)

ABSENCE OF EVIDENCE TO SUPPORT KEY FINDINGS

73. The Joint Board found that Site F was hydrogeologically "unsuitable" and "unacceptable" for landfilling and that it was "clearly unacceptable" for landfilling overall in the public health and safety category, even with an engineered liner. In the case of Site D, the Joint Board's Decision that the Site was "suitable" and "acceptable" for landfilling was premised on construction of an engineered liner at the Site in certain events. Thus, the Joint Board implicitly found that such a liner would be adequate and effective to render Site D safe for landfilling. There was no expert evidence before the Joint Board from persons competent and qualified to give such evidence to support any of these findings.

74. When an administrative tribunal, in the exercise of a statutory power of decision, makes findings on a fundamental issue which are not supported by the evidence the findings are unreasonable and constitute a reviewable jurisdictional error.

lots of findings

Skogman v. The Queen, [1984] 2 S.C.R. 93, 101 and 104 per Estey, J.

Blanchard v. Data Control Canada Ltd., [1984] 2 S.C.R. 476, 494-495 per Lamer, J.

Douglas Aircraft of Canada Ltd. v. McConnell, [1980] 1 S.C.R. 245, 277 per Estey, J.

Paulson v. Canadian Pension Commission (1985), 62 N.R. 75 (F.C.A.), 76 per Urie, J.

Securicor Investigations & Security Ltd. v. Ontario Labour Relations Board (1985), 10 Admin. L.R. 189 (Ont. Div. Ct.), 192

Re Keeprite Workers' Independent Union et al. and Keeprite Products Ltd. (1980), 29 O.R. (2d) 513 (Ont. C.A.; leave to appeal to the S.C.C. refused 35 N.R. 85n), 519-522

75. The determination of Site F's hydrogeological suitability and acceptability for landfilling was essential to the Joint Board's Decision as to which of Sites F and D should be approved for landfilling. It is submitted that the Joint Board's findings on this issue were both contrary to and not supported by any expert evidence and, accordingly, warrant intervention by this Court.

Compensation
Sarco Canada Limited v. Anti-Dumping Tribunal, [1979] 1 F.C. 247 (F.C.A.), 254 per Heald, J.

Cape Breton Development Corp. v. Penny (No. 2) (1977), 76 D.L.R. (3d) 186 (N.S.S.C.), 188

Ashbridge Investments Ltd. v. Minister of Housing and Local Government, [1965] 1 W.L.R. 1320 (C.A.), 1326 per Lord Denning, M.R.

Edwards (Inspector of Taxes) v. Bairstow et al., [1956] A.C. 14 (H.L.), 36

76. Similarly, in light of the evidence of S. Feenstra, the determination (expressly or implicitly) that a liner at Site D would be adequate and effective to address the implications of fracturing at that Site was fundamental to a decision that Site D was "acceptable" and "suitable" for landfilling. There was no engineering evidence before the Joint Board to support the finding that a liner at Site D would be adequate and effective for this purpose.

REJECTION OF UNCONTROVERTED EXPERT EVIDENCE

77. In arriving at its Decision to approve landfilling at Site D and to deny approval to landfilling at Site F, the Joint Board rejected:

- (a) in the case of Site F, the uncontroverted opinion evidence of all of the experts qualified and competent to give such evidence that, with an engineered liner, Site F would be "acceptable" and "suitable" for landfilling; and
- (b) in the case of Site D, the uncontroverted hydrogeological and hydrogeochemical evidence of S. Feenstra regarding the fracturing potential of the unweathered upper till unit at the Site.

not uncontroverted

78. The uncontroverted evidence of experts, when given by persons qualified and competent to give it on relevant issues, should not be rejected and cannot be ignored.

Policy override

Ontario Central Airlines Ltd. v. Gustafson, [1957] O.W.N. 340 (Ont. C.A.)

Lee v. Corporation of the City of North York (1986), 15 O.A.C. 145 (Ont. Div. Ct.), 147 per Steele, J.

FAILURE TO MAKE ADVERSE CREDIBILITY FINDINGS AGAINST THE EXPERTS WHOSE UNCONTROVERTED EVIDENCE WAS REJECTED

79. It is respectfully submitted that it is an error of law for a trier of fact to reject uncontroverted relevant evidence without making clear findings as to credibility.

Dowlut v. Commissioner of Social Services (1985), 11 Admin. L.R. 54 (Ont. Div. Ct.)

Re Pitts and Director of Family Benefits Branch of the Ministry of Community and Social Services (1985) 51 O.R. (2d) 302 (Ont. Div. Ct.), 310-313

Szuts v. Commissioner of Social Services, unreported, February 11, 1986 (Ont. Div. Ct.)

Burton v. Minister of Community and Social Services (1985), 10 O.A.C. 263 (Ont. Div. Ct.)

all SARB cases

SUBSTITUTION BY THE JOINT BOARD OF ITS OWN OPINION FOR THAT OF QUALIFIED EXPERTS

80. The Joint Board, in reaching its conclusion as to which of Sites F and D should be approved for landfilling, was required to base its findings on the evidence before it. In such circumstances a tribunal cannot substitute its own opinion for the evidence. To do so, in the absence of supporting evidence,

constitutes jurisdictional error and results in the denial of the right to a fair hearing.

S.A. De Smith, Judicial Review of Administrative Action (4th ed.) pp. 203-212

Re Reddall and College of Nurses of Ontario (1983) 42 O.R. (2d) 412 (C.A.), 416-417

David v. Minister of Natural Resources (1976), 15 A.P.R. 300 (N.B.S.C.)

FAILURE TO REFER TO, CONSIDER OR EVALUATE ESSENTIAL EVIDENCE

81. In making its findings regarding the "suitability" and "acceptability" of Sites F and D for landfilling the Joint Board failed to refer to, consider or evaluate essential evidence on fundamental issues, namely:

- (a) in the case of Site F, the highly relevant evidence regarding the attenuation characteristics of the shale at Site F and regarding the need for a liner at the Site; and
- (b) in the case of Site D, the uncontroverted evidence of S. Feenstra regarding the inducement of fracturing upon introduction of a landfill and the depletion of the water resource at the Site and, further, the Witness Statement of Dr. N. Eyles regarding the existence of fractures at the Site.

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82. It is submitted that a trier of fact cannot ignore, nor fail to evaluate nor forget a relevant portion or portions of the evidence. Rather, the trier of fact must consider all of the evidence. Failure to do so results in a denial of natural justice and jurisdictional error.

194 DAYS

Ontario Public Service Employees Union et al. v. Ministry of Correctional Services (1984), 2 O.A.C. 351 (Ont. Div. Ct.), 358

Oakwood Development Ltd. v. Rural Municipality of St. Francois Xavier, [1985] 2 S.C.R. 164, 174

Villarroel v. Minister of Employment and Immigration, [1979] 31 N.R. 50 (F.C.A.), 53 and 55

S.A. De Smith, supra, pp. 126-139 and 407

USE AND RELIANCE ON UNDISCLOSED CRITERIA FOR THE
DETERMINATION OF HYDROGEOLOGIC SUITABILITY

83. A party's right to appear at and to receive a fair hearing includes a fair opportunity to answer anything contrary to the party's interest and a right to make submissions with regard to the matters on which the trier of fact proposes to base its decision.

Sarco Canada Limited v. Anti-Dumping Tribunal, *supra*, 263

S.A. De Smith, *supra*, pp. 203-212

Service Employees' International Union, Local 333 v. Nipawin District Staff Nurses Association et al., [1975] 1 S.C.R. 382, 388-89 per Dickson, J.

84. In this case, it is respectfully submitted that the development and use by the Joint Board of undisclosed criteria to assess the hydrogeologic suitability of Site F, without prior disclosure to and without affording the parties to be affected thereby an opportunity to comment thereon, constituted a denial of the right to a fair hearing and offended the rule of *audi alteram partem*. Such a denial and jurisdictional error renders the decision of the Joint Board unsupportable, whether or not a fair hearing would likely have resulted in a different decision.

College of Physicians and Surgeons of Ontario v. Petrie (1989), 68 O.R. (2d) 100 (Ont. Div. Ct.)

Corporation of the Town of Flamborough et al. v. National Energy Board et al. (1987), 81 N.R. 229 (F.C.A.), 232

Danakas v. War Veterans Board (1985), 10 Admin. L.R. 110 (F.C.A.)

Vance v. Hardit Corp. et al. (1985), 18 Admin. L.R. 111 (Ont. Div. Ct.), 116

PART IV:

RELIEF SOUGHT

85. NSP respectfully requests that the Decision of the Joint Board regarding the suitability and acceptability of Site F for landfilling, dated February 24, 1989, as amended March 2, 1989, be quashed.

86. NSP further respectfully requests that the Decision of the Joint Board regarding the suitability and acceptability of Site D for landfilling, dated February 24, 1989, as amended March 2, 1989, be quashed.

87. In the alternative, NSP respectfully requests an Order remitting the matters referred to in paragraphs 85 and 86 hereof back to the Joint Board for hearing and consideration in accordance with proper principles and the rules of natural justice.

88. NSP further respectfully requests its costs of this Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED:

October 30, 1989



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TO: See Attached Distribution List

SCHEDULE "A"

LIST OF AUTHORITIES

1. Skogman v. The Queen, [1984] 2 S.C.R. 93
2. Blanchard v. Data Control Canada Ltd., [1984] 2 S.C.R. 476
3. Douglas Aircraft of Canada Ltd. v. McConnell, [1980] 1 S.C.R. 245
4. Paulson v. Canadian Pension Commission (1985), 62 N.R. 75 (F.C.A.)
5. Securicor Investigations & Security Ltd. v. Ontario Labour Relations Board (1985), 10 Admin. L.R. 189 (Ont. Div. Ct.)
6. Re Keeprite Workers' Independent Union et al. and Keeprite Products Ltd. (1980), 29 O.R. (2d) 513 (Ont. C.A.; leave to appeal to the S.C.C. refused 35 N.R. 85n)
7. Sarco Canada Limited v. Anti-Dumping Tribunal, [1979] 1 F.C. 247 (F.C.A.)
8. Cape Breton Development Corp. v. Penny (No. 2) (1977), 76 D.L.R. (3d) 186 (N.S.S.C.)
9. Ashbridge Investments Ltd. v. Minister of Housing and Local Government, [1965] 1 W.L.R. 1320 (C.A.)
10. Edwards (Inspector of Taxes) v. Bairstow et al., [1956] A.C. 14 (H.L.)
11. Ontario Central Airlines Ltd. v. Gustafson, [1957] O.W.N. 340 (Ont. C.A.)
12. Lee v. Corporation of the City of North York (1986), 15 O.A.C. 145 (Ont. Div. Ct.)
13. Dowlut v. Commissioner of Social Services (1985), 11 Admin. L.R. 54 (Ont. Div. Ct.)
14. Re Pitts and Director of Family Benefits Branch of the Ministry of Community and Social Services (1985) 51 O.R. (2d) 302 (Ont. Div. Ct.)
15. Szuts v. Commissioner of Social Services, unreported, February 11, 1986 (Ont. Div. Ct.)
16. Burton v. Minister of Community and Social Services (1985), 10 O.A.C. 263 (Ont. Div. Ct.)

17. S. A. De Smith, Judicial Review of Administrative Action (4th ed.), pp. 203-212, 126-139 and 407
18. Re Reddall and College of Nurses of Ontario (1983) 42 O.R. (2d) 412 (C.A.)
19. David v. Minister of Natural Resources (1976), 15 A.P.R. 300 (N.B.S.C.)
20. Ontario Public Service Employees Union et al. v. Ministry of Correctional Services (1984), 2 O.A.C. 351 (Ont. Div. Ct.)
21. Oakwood Development Ltd. v. Rural Municipality of St. Francois Xavier, [1985] 2 S.C.R. 164
22. Villarroel v. Minister of Employment and Immigration, [1979] 31 N.R. 50 (F.C.A.)
23. Service Employees' International Union, Local 333 v. Nipawin District Staff Nurses Association et al., [1975] 1 S.C.R. 382
24. College of Physicians and Surgeons of Ontario v. Petrie (1989), 68 O.R. (2d) 100 (Ont. Div. Ct.)
25. Corporation of the Town of Flamborough et al. v. National Energy Board et al. (1987), 81 N.R. 229 (F.C.A.)
26. Danakas v. War Veterans Board (1985), 10 Admin. L.R. 110 (F.C.A.)
27. Vance v. Hardit Corp. et al. (1985), 18 Admin. L.R. 111 (Ont. Div. Ct.)

SCHEDULE "B"

RELEVANT PROVISIONS OF STATUTES

Judicial Review Procedure Act, R.S.O. 1980, c. 224, Subsections 1(g), 2(1), 2(3) and 2(4):

1. In this Act,

(g) "statutory power" means a power or right conferred by or under a statute,

(i) to make any regulation, rule, by-law or order, or to give any other direction having force as subordinate legislation,

(ii) to exercise a statutory power of decision,

(iii) to require any person or party to do or to refrain from doing any act or thing that, but for such requirement, such person or party would not be required by law to do or to refrain from doing,

(iv) to do any act or thing that would, but for such power or right, be a breach of the legal rights of any person or party. 1971, c. 48, s. 1; 1972, c. 1, s. 104 (6).

Applications
for
judicial
review

2.—(1) On an application by way of originating notice, which may be styled "Notice of Application for Judicial Review", the court may, notwithstanding any right of appeal, by order grant any relief that the applicant would be entitled to in any one or more of the following:

1. Proceedings by way of application for an order in the nature of mandamus, prohibition or certiorari.

2. Proceedings by way of an action for a declaration or for an injunction, or both, in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power.

Lack of
evidence

(3) Where the findings of fact of a tribunal made in the exercise of a statutory power of decision are required by any statute or law to be based exclusively on evidence admissible before it and on facts of which it may take notice and there is no such evidence and there are no such facts to support findings of fact made by the tribunal in making a decision in the exercise of such power, the court may set aside the decision on an application for judicial review.

Power to
set aside

(4) Where the applicant on an application for judicial review is entitled to a judgment declaring that a decision made in the exercise of a statutory power of decision is unauthorized or otherwise invalid, the court may, in the place of such declaration, set aside the decision.

The Consolidated Hearings Act, 1981, S.O. 1981, c. 20, Section 4:

Joint board 4.—(1) Upon receipt of notice in accordance with section 3, the Hearings Registrar shall refer the matter to the chairman of the Environmental Assessment Board and the chairman of the Ontario Municipal Board.

Establish-
ment (2) Where a matter is referred under subsection 1, the chairman of the Environmental Assessment Board and the chairman of the Ontario Municipal Board together by order shall establish the joint board and together shall determine the composition of the joint board.

Idem (3) Where either of the chairmen mentioned in subsection 2 is unable to act or the office of chairman is vacant, a vice-chairman of the board shall act as and have all the powers of the chairman for the purposes of this Act.

(4) The joint board shall be composed of one or more members of either or both of the Environmental Assessment Board and the Ontario Municipal Board. Composition

(5) The establishing authority may change the composition of a joint board that has not commenced to hold a hearing. Change of composition

(6) The establishing authority by order, Appointment of members, chairman and vice-chairman
(a) shall appoint the members of the joint board; and
(b) shall appoint the chairman and may appoint a vice-chairman of the joint board from the members of the joint board.

(7) Where the chairman of a joint board is absent or unable to act or the office of chairman is vacant, the vice-chairman of the joint board shall act as and have all the powers of the chairman. Authority of vice-chairman

(8) Where a joint board commences to hold a hearing under this Act and the term of office on the Environmental Assessment Board or the Ontario Municipal Board of a member sitting for the joint hearing expires or is terminated before the proceeding is disposed of, the member shall remain a member of the joint board for the purpose of completing the disposition of the proceeding in the same manner as if his term of office had not expired or been terminated. Continuation on expiry of membership

(9) A majority of the members of a joint board constitutes a quorum of the joint board, but where a vacancy occurs in the membership of a joint board the establishing authority by order, Quorum

(a) may confirm the existence of the vacancy; and
(b) may establish the number of members that constitute a quorum of the joint board.

(10) The decision of a majority of the members of a joint ^{Decision} board presiding at a hearing is the decision of the joint board.

(11) The joint board has the authority and the duty, <sup>Powers of
joint board</sup>

- (a) to hold a hearing in respect of and to consider the matters that could be considered at the hearings specified in the notice to the Hearings Registrar under section 3; and
- (b) to make and issue a decision in respect of matters considered by the joint board.

DISTRIBUTION LIST

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