

Court File No. 661/89
Court File No. 773/89
Court File No. 811/89

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

B E T W E E N:

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

RESPONDENT FACTUM OF THE CITY OF BURLINGTON

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of Burlington**

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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.
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LIMITED, THE WEST BURLINGTON CITIZENS' GROUP,
THE MILTON AREA CITIZENS' COALITION, THE
HALTON FEDERATION OF AGRICULTURE, WATKIN
AND DOREEN MARTIN, WALTER TOMOSKY, THOMAS
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REED, GRAHAM AND EVELYN GILLIES, SALLY
VERTULIA, RAY AND ANNETTE WINTER, KIP AND
ANNE CHAPUT, WILFRED AND FRED A LAWRENCE,**

BILL AND BEVERLEY KETELAARS, JOHN VITETTA,
STEVE AND SHIRLEY DOLBY, KEN WETTLAUFER,
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

- and -

B E T W E E N:

THE MILTON AREA CITIZENS COALITION, THE HALTON
FEDERATION OF AGRICULTURE, WATKIN AND
DOREEN MARTIN, WALTER TOMOSKY, THOMAS AND
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THE JOINT BOARD (ESTABLISHED UNDER SECTION 4
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THE WEST BURLINGTON CITIZENS' GROUP 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

RESPONDENT FACTUM OF THE CITY OF BURLINGTON

PART 1 - STATEMENT OF FACTS

1. The Respondent, the Corporation of the City of Burlington ("Burlington"), is one of the area municipalities in the Regional Municipality of Halton ("Region"). Burlington opposes the applications for judicial review brought by the Applicants, NSP Investments Limited ("NSP"), the Corporation of the Town of Milton ("Milton") and the Milton Area Citizens' Coalition et. al. (the "Coalition"), respectively, which seek to quash the decision of the Joint Board dated February 24, 1989 together with the Addendum dated March 2, 1989 (the "Decision"). The Joint Board approved an application by the Region for the construction, operation and maintenance of a sanitary landfill site at Site D in Milton. That site was one of two alternatives, the other being landfilling at proposed Site F in Burlington.

A. **Burlington's Position with Respect to Facts in the NSP Factum**

2. Burlington admits in general paragraphs 2 to 29 inclusive, 31, 33 to 37 inclusive, paragraphs 48, 50 to 52 inclusive, 56 to 59 inclusive, 64 and 66 of the NSP factum.

3. With respect to paragraphs 30 and 39, Burlington admits that the Joint Board found that Site F was not hydrogeologically suitable or acceptable as it defined that term. It is to be noted that certain of the witnesses and counsel differed in their opinion or submissions regarding the criteria defining "hydrogeological suitability." The evolution of this term is described later at paragraphs 58 to 65 of this factum. In its reasons, the Joint Board described the major considerations or criteria which it considered of importance in determining "hydrogeological suitability." That term is not found in the enabling statutes giving the Joint Board its jurisdiction.

(i) Reasons of the Joint Board, Burlington Respondent's Record, tab 1, pages 109-112.

4. With respect to paragraphs 32 and 38, these paragraphs are submissions rather than statements of fact. Burlington herein refers the Court to paragraphs 45 to 47 and 54 to 57 later in this factum, where the evidence to support the findings of the Joint Board respecting the selection of Site F is summarized.

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5. Burlington agrees with the submission found in paragraph 40 of NSP's factum. The Joint Board consisted of Mr. H. H. Lancaster, Q.C., a Vice-Chairman of the Ontario Municipal Board with more than 25 years experience and Dr. D.J. Kingham, PhD., a member of the Environmental Assessment Board (the "E.A.B.") and a doctor of science in the area of chemistry. The E.A.B. has had the responsibility for holding hearings respecting approval of landfill sites under the Environmental Protection Act since 1971.

6. Paragraph 41 is a submission repeated later in paragraphs 77(a), 78 and 80 of the NSP factum rather than a statement of fact. Burlington refers the Court to paragraphs 71 to 75 and paragraph 80 in this factum.

7. Paragraph 42 is a submission repeated later at paragraph 79 of the NSP factum. Burlington refers the Court to its submissions at paragraph 92 in this factum.

8. Burlington admits the first sentence of paragraph 43 but states that the remainder of the paragraph constitutes a submission similar to that raised at paragraph 81(a) of the NSP factum. Burlington refers the Court to its submissions with respect to this issue at paragraphs 94 to 100 in this factum.

9. With respect to paragraph 44, Burlington disagrees that all witness were of the opinion that the shale at Site F would have significant attenuation capacity. Burlington refers the Court to its submissions at paragraphs 94 to 100 in this factum.

10. Paragraph 45 is a submission repeated at paragraph 81a of the NSP factum. Burlington refers the Court to paragraphs 94 to 100 in this factum.

11. Burlington admits the first two sentences of paragraph 46 but submits the remaining portion of the paragraph is a submission related to the issue raised at paragraph 77(a) and 78 of the NSP factum. Burlington refers the Court to its submissions at paragraphs 71 to 75 in this factum.

12. With respect to paragraph 49, Burlington states this is a submission repeated at paragraphs 83 and 84 in the NSP factum. Burlington refers the Court to its position at paragraph 107 herein.

13. With respect to paragraph 53, the respondent admits the first sentence. With respect to paragraph 54, Burlington denies that such evidence was uncontroverted. Mr. Feenstra was cross-examined in detail about his first hypothesis and the evidence he gave in reply was the basis of considerable argument. Accordingly Burlington disputes NSP's submission that Mr. Feenstra's evidence was "uncontroverted." This submission is repeated in NSP's factum at paragraph 77(b) Burlington refers the Court to its submissions at paragraphs 76 to 91 herein.

14. With respect to paragraph 55, Burlington admits that no specific finding on Mr. Feenstra's credibility was made but it was clear that the Joint Board rejected his three hypotheses, as the Joint Board was entitled to do. This submission of NSP is repeated at paragraph 79 of the NSP factum. Burlington refers the Court to its submissions at paragraph 92 herein.

15. Burlington admits the first sentence of paragraph 61. The remainder of the paragraph constitutes a submission similar to that raised at paragraph 81(b) of the NSP factum. Burlington refers the Court to its submissions respecting Mr. Feenstra's evidence at paragraphs 101 to 104 of this factum.

16. Burlington admits the first and second sentences of paragraph 62. The third sentence constitutes a submission repeated at paragraphs 81(b) and 82 of the NSP factum. This evidence of Mr. Feenstra was referred to in argument as Mr. Feenstra's third hypothesis. Mr. Feenstra was cross-examined and the merit of this hypothesis was argued at length; Burlington therefore submits the evidence is not uncontroverted. Burlington refers the Court to its position at paragraphs 101 to 104 of this factum.

17. Burlington admits the first sentence of paragraph 63. The second sentence represents a submission related to paragraphs 81(b) and 82 of the NSP factum. Burlington refers the Court to paragraphs 101 to 106 of this factum.

18. Burlington admits the first sentence of paragraph 65 and refers the Court to paragraphs 66 to 70 of this factum.

19. Burlington admits the second sentence of paragraph 67. With respect to the submissions of NSP made in the first sentence and the third sentence, these submissions relate to issues raised at paragraph 76 of the NSP factum. Burlington refers the Court to its position set out at paragraphs 66 to 70 of this factum.

B. Burlington's Position with Respect to Facts in the Milton Factum

20. Burlington generally admits paragraphs 1 to 11, 13, 15, 17 to 40, 42 and 43 of the Milton factum.

21. With respect to paragraph 12, Burlington disagrees with the statement that the issue of possible fracturing arose during Mr. Feenstra's evidence. The subject of possible fracturing in the unweathered upper glacial till arose for the first time in the evidence of Messrs. Sobanski and Beechinor who reported that "the upper till was unfractured and massive" (Exhibit H-39, page i). They further reported that:

"...a landfill constructed at Site D will be founded in the Upper Till. Tests have shown this unit has good attributes for waste disposal. It is fine-grained, has a low hydraulic conductivity (8×10^{-8} cm/s) and the unweathered portion is devoid of higher hydraulic conductivity features such as sand layers or fractures. This glacial deposit forms a natural landfill liner of low hydraulic conductivity over the underlying glacial strata."

(i) Exhibit H-39, Burlington Respondent's Record, tab 2, page viii, (underlining added).

22. Burlington admits the first sentence of paragraph 14, but questions the allegation contained in the second sentence to the effect that at least one fracture extended deep into the unweathered upper till. This allegation was not admitted into evidence by the Joint Board.

23. Burlington admits the first sentence of paragraph 16 but denies that the Region'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" and the remainder of paragraph 16. The Region's evidence with respect to Site D was introduced by Messrs. Sobanski and Beechinor of the Trow Hydrology Consulting firm after extensive tests and studies were undertaken and reviewed by that firm.

(i) Exhibit H-39, Burlington Respondent's Record, tab 2, p. iv.

24. Burlington admits the first sentence of paragraph 41. With respect to the second sentence, it is apparent that the Joint Board required remoulding to achieve a minimum liner of 1 metre.

C. Burlington's Position with Respect to Facts in the Coalition Factum

25. Burlington generally admits paragraphs 1-18, 20, 22, 24-27, 29, 30, 32 and 33 of the Coalition factum.

26. With respect to paragraph 19, Burlington asks the Court to consider the facts found at paragraph 5 earlier.

27. With respect to paragraph 21, it is noted above at paragraph 3 that the definition of "hydrogeological suitability" evolved during the hearing.

28. With respect to paragraph 28, Burlington disagrees that the Joint Board's finding is based on concern about the integrity of the liner or is based expressly on the statement quoted. Burlington refers the Court to the summary of the Joint Board's Reasons at paragraphs 44 to 48 in this factum.

29. Paragraph 35 represents a submission repeated at Issues 1 and 2 of the Coalition factum to the effect that there is no evidence to support the Joint Board's finding. Burlington refers the Court to paragraphs 115 to 116 in this factum.

30. Paragraph 37 represents a submission repeated at Issue 3 in the Coalition's factum. Burlington refers the Court to paragraph 117 to 119 in this factum.

31. Paragraph 38 represents a submission related to Issue 4 in the Coalition's factum. Burlington refers the Court to paragraphs 120 to 132 in this factum.

D. Additional Facts

32. Burlington wishes to add the following facts:

History of Site Selection in Milton

33. Sites D and F were the two candidate areas finally selected by the Region for approval after a "very difficult and tortuous" history which included a number of court challenges and an earlier Ontario Municipal Board hearing.

34. On January 1, 1974, the Regional Municipality of Halton was incorporated and given the responsibility to provide for landfill sites in the Region. In or about January 1975, the Region began studies and investigations leading on March 2, 1977 to the selection of old Site F (now Site E in current selection process) as the Region's preferred landfill site. Old Site F is located close to Site D.

(i) Exhibit B-353, O.M.B. Decision dated June 15, 1979, Burlington Respondent's Record, tab 3, pp. 4-9.

35. On May 4, 1977, that by-law was quashed for non-conformity with Milton's Official Plan.

(i) Re Holmes and Halton (1977), 16 O.R. (2d) 263 (H.C.), at p.265 and 266.

36. Following that decision, the Region passed new by-laws authorizing applications to the Town of Milton to amend its Zoning By-law and Official Plan to allow landfilling at old Site F (now Site E) and authorizing applications to the Ministry of Environment and the O.M.B. for the approval of this site for landfilling and for the approval of the expenditures involved, respectively. On March 29, 1978, these by-laws were quashed for non-conformity with Milton's Official Plan, except insofar as the by-laws authorized applications to amend Milton's Official Plan and Zoning By-law.

(i) Re Holmes and Halton (1978), 19 O.R. (2d) 468 (H.C.).

37. Subsequently, a three-month hearing was conducted before the O.M.B. which considered Milton's refusal to amend its Official Plan and Zoning By-law to allow landfilling at the old Site F (now Site E) as well as the acquisition of the site. On June 15, 1979, the O.M.B. issued its Order approving the Official Plan Amendment and Zoning By-law changes, and approving the expenditures needed to allow landfilling at old Site F (now Site E). Site E is in the same regional "Halton till" plain as Site D selected by the

Joint Board. Milton appealed the O.M.B.'s decision to the Divisional Court and to the Lieutenant Governor in Council by petition. Both appeals were dismissed.

- (i) Exhibit M-155, Figure 3, Burlington Respondent's Record, tab 4; and,
- (ii) Re Halton and Milton (1981), 12 O.M.B.R. 292 (Ont. H.C.), at 294.

38. The Region then applied under the Environmental Protection Act for approval of landfilling at old Site F (now Site E). On February 9, 1981, however, the Minister ordered that the current environmental assessment of this landfilling project be undertaken under the Environmental Assessment Act. The decision under review in these proceedings is the conclusion of this process.

39. On July 3, 1981, Milton applied to the O.M.B. to modify or amend its original order; the O.M.B. refused.

- (i) Milton v. Halton (1981), 13 O.M.B.R. 31 (O.M.B.).

40. Also on July 3, 1981, Milton and its councillors were cited in contempt of court for their failure to amend Milton's Official Plan and Zoning By-law as required by the O.M.B.'s Order.

- (i) Re Halton and Milton (1981), 12 O.M.B.R. 292 (Ont. H.C.).

41. The Region commenced its environmental assessment under the Environmental Assessment Act in 1981. The Region followed an extensive and expensive site selection process originally involving study of some 55 sites, then further and more intense study of six sites leading to the selection of the two candidate sites, Sites D and F, which were the subject of the Joint Board's decision.

42. On the 4th day of March, 1987, after the site selection process described above had been completed, Committee of the Whole of the Region recommended by a vote of 12:11 that "both Site D and Site F are viable and safe as future sanitary landfill sites, but that Site F is marginally preferred as a future landfill site for the reasons set out in the Comparative Analysis Report, January, 1987". The vote by elected members of Council

was 11:11, with the deciding vote in favour of the staff recommendation being cast by the Chairman of the Region.

- (i) Exhibits B-347, B-348, B-349, Burlington Respondent's Record, tab 5.

43. On May 5, 1987 the hearing before the Joint Board began. It should be noted that this was the first hearing before a Joint Board on the application of a Regional corporation for a regional landfill site. Many other regional landfill sites are currently being processed. After sitting 194 days, the hearing ended on November 8, 1988. The Board rendered its decision on February 24, 1989.

Additional Evidence re Site D

44. In its Reasons for Decision, the Board initially analyzed the evidence of hydrogeological issues respecting Site D at pages 60 to 82. In those pages, and later in its Reasons, the Board made a large number of findings and observations respecting Site D as follows:

- (a) There was general agreement amongst the hydrogeologists respecting the extent and uniformity of the strata beneath Site D.

First finding re Site D (FD1) p. 60, (FD2) p. 62, (FD3) p. 63, (FD16) p. 109 (Please note that the Joint Board's findings are numbered in the copy of the Board's Reasons for Decision included as part of Burlington's Respondent Record at tab 1).

- (b) There was a good level of knowledge respecting the sub-surface flow patterns which defined groundwater movement in the area.

(FD4) p. 64, (FD4A) p. 64, (FD5) p. 64, (FD6) p. 65, (FD7) p. 65, (FD8) p. 69, (FD9) p. 71.

- (c) Site D is a site having substantial natural attenuation features as opposed to engineered attenuation features.

(FD11) p. 75.

- (d) A hydraulic trap could be created at Site D whereby all surrounding groundwater would flow into the bottom of the landfill thereby eliminating escape of leachate from the site.

(FD14A) p. 78, (FD14B) p. 79.

- (e) Effective monitoring and contingency measures could be ordered and implemented at Site D.

(FD15) p. 82.

Additional Evidence re Site F

45. The Board carefully analyzed the evidence relating to hydrogeological issues at Site F from pages 83 to 107. In those pages, the Board made an large number of findings and observations respecting Site F as follows:

- (a) There were different opinions among hydrogeologists respecting the extent of uniformity within the strata beneath Site F.

First Finding Re Site F (FF16) pp. 83-85, (FF17) p. 86, (FF20) p. 88, (FF21) p. 88, (FF22) p. 88, (FF23) p. 88, (FF24) p. 89, (FF28) p. 91, (FF29) p. 91, (FF29A) p. 92.

- (b) The knowledge of sub-surface flow pattern at Site F was dependent on the hydrostratigraphic or water transmitting units in the area. The Board had difficulty in determining what the hydrostratigraphic situation was beneath Site F.

(FF19) p. 87, (FF18) p. 87, (FF25) p. 89, (FF26) p. 90, (FF27) p. 90, (FF28) p. 91, (FF29) p. 91, (FF29A) p. 92.

- (c) Leachate loss or exfiltration to the wider environment would occur.

(FF30) p. 93, (FF31) p. 93, (FF37) p. 96, (FF40) p. 103, (FF41) p. 103, (FF44) p. 106.

- (d) There was uncertainty about the place where the leachate that exfiltrates from Site F would surface but it could be near residential areas in the Aldershot community of Burlington.

(FF31A) p. 93, (FF36) p. 95.

- (e) The Board was concerned that no assurance could be given to the public that there would not be significant migration of contaminants away from Site F and was also concerned about the seriousness of the impact of such contaminants.

(FF32) p. 94, (FF35) p. 95, (FF38) p. 97, (FF41) p. 103, (FF45) p. 107.

- (f) The Ministry of Environment policies did not encourage ground water contamination where other alternatives are available.

(FF42) p. 105, (FF43) p. 105.

Conclusion of Joint Board Decision

46. After review of the extensive hydrogeological evidence, the Board began a comparison of the two sites. During this comparison, the Board made a series of new findings. The Board concluded that:

- (a) The Region had undertaken an inappropriate comparison and that Site F should have been screened out earlier in the process.

First final conclusion in the Joint Board's comparison of the two sites (FC46) p. 107, (FC47) p. 108, (FC48) p. 108.

- (b) That the probability of the leachate losses at Site D was low although consequences of such loss were greater than at Site F, and that the probability of leachate loss at Site F was a virtual certainty although the consequences were judged low.

(F48A) p. 198.

- (c) That fresh water had penetrated from the surface to considerable depth and moved towards Aldershot (an older section of Burlington with a total population of approximately 20,000 persons) in which area it has emerged to the surface. The Board noted the implications of such observations could not be ignored.

(FF50) p. 108.

- (d) That the weakly fractured mass shale unit at Site F postulated by Messrs. Sobanski and Beechinor, the Region's consultants, cannot exist.

(FF49) p. 108.

- (e) That Site F may possess similar characteristics along lines parallel to its length but not its width. The Board noted the implications of such a possibility in the context of leachate exfiltration and interception could not be ignored.

(FF57) p. 109.

- (f) That even with the engineered systems in operation at Site F, there would be contaminant losses; only volume and input were the subject of disagreement.

(FF53) p. 109.

- (g) That it (the Board) was not satisfied that a liner beneath Site F would not become fractured.

(FF54) p. 109.

- (h) That the losses of leachate would vary depending on where the water table existed.

(FF55) p. 109.

- (i) That the cost benefit aspects of a liner solution at F could not be ignored.

(FF56) p. 109.

- (j) That the leachate losses would be in the range of 1,000 to 12,000 gallons per day with the most likely loss in the neighbourhood of 5,000 gallons per day.

(FF52) p. 109, (FF57) p. 110.

47. The Board then moved to items "amongst the many factors," judged to be of considerable significance in assessing the hydrogeological suitability of the sites. The Board found:

- (a) The general hydrogeology of D was more comprehensible than the complex hydrogeology of F.

(FF56) pp. 109-110.

- (b) D was designed not to release any contaminants unto to the general environment whereas F would release between 1,000 to 12,000 gallons of leachate per day into the surrounding environment with the most likely estimate being approximately 5,000 gallons of per day.

(FF57) p. 110.

- (c) The natural containment of Site D was preferable to the engineered attenuation at F.

(FF58) p. 110.

- (d) That in the event of failure, the contaminant pathways at D were predictable whereas pathways from F were not and would be confused with the existing plumes from the adjoining sites.

(FF59) p. 111.

- (e) That the proposed landfilling use at D would have no impact on surface waters while the situation was not proven at Site F.

(FF60) p. 111.

- (f) In the event of failure of the hydraulic trap any contaminant escaping from Site D could be intercepted; the Board was concerned that such escape from Site F might not be intercepted because of the complexity of the strata.

(FF62) p. 112.

- (g) That the contingency methods proposed for use at Site D were standard, whereas the complexity of Site F left the Board with concern about the effectiveness of the contingency measures proposed at Site F.

(FF63) p. 112.

48. The Board concluded "having considered these matters, among other things, the Board finds that Site F is not hydrogeologically suitable for landfilling, but Site D is hydrogeologically suitable. On the basis of this finding with respect to hydrogeology, other findings in the Public Health and Safety category, and findings in other categories, it approves the undertaking to landfill at Site D only."

- (i) Reasons of the Joint Board, Burlington Respondent's Record, tab 1, p. 112.

49. Subsequently in March of 1989, NSP, Milton and the Coalition filed applications or petitions to the Lieutenant Governor-in-Council pursuant to s.13 of the Consolidated Hearings Act, 1981, S.O. 1981; c.20. These applications were dismissed.

- (i) Order in Council, Burlington Respondent's Record, tab 6.

50. By applications dated June 30, 1989, July 26, 1989 and August 8, 1989 respectively, NSP, Milton and the Coalition applied for Judicial Review.

PART IIA - POSITION OF RESPONDENT BURLINGTON RE APPLICANT NSP'S ISSUES

Issue 1 - Whether There Is Any Evidence to Support the finding that Site F is Hydrogeologically Unsuitable and Unacceptable. (para 73 - 75, NSP Factum)

51. It is clear that in reviewing the decision of an administrative tribunal, a court will not interfere with the findings of fact made by the tribunal unless there was a complete lack of any logically probative evidence which could rationally have been adduced by the tribunal in support of its findings, or in making such findings the tribunal acted in bad faith or failed to observe the provisions of natural justice.

- (i) Re Keeprite Workers' Independent Union et al. and Keeprite Products Ltd. (1980), 29 O.R. (2d) 513 (C.A.), pp. 519-520.
- (ii) Re Cadillac Fairview Corp. Ltd. et al. and Retail, Wholesale and Department Store Union et al. (1987), 62 O.R. (2d) 337 (Div. Ct.), at p. 348.

52. When reviewing the decision of an administrative tribunal, the trend in the law of judicial review is to limit the scope of review to matters of jurisdiction in the narrow sense and to those errors of law which approximate jurisdictional issues in the broadest sense. Within its assigned field, the tribunal must remain supreme and its decisions on issues of fact, provided there is some evidence to support them, are beyond judicial intervention. Questions of procedure and evidence are within the tribunal's exclusive domain, save only where the conduct of the tribunal in relation to these and many other matters becomes unfair to a party in the sense of the traditions of natural justice.

- (i) Douglas Aircraft Co. of Canada Ltd. v. McConnell et al., [1980] 1 S.C.R. 245, per Estey, J. at p. 275 and 277.

53. Burlington respectfully submits the Joint Board had substantial evidence for approving the undertaking to landfill at Site D rather than at Site F.

Evidence Re Exfiltration of Leachate

54. The Joint Board was presented with extensive and conflicting evidence respecting Site F. But all witnesses agreed that there would be leachate loss from Site F. That loss results from the mechanism whereby precipitation falling on the site infiltrates into the fill, then finds its way to the base of the landfill.

(i) Reasons of the Joint Board, Burlington Respondent's Record, tab 1, (FF16) p.83-84,(FF53) p.109.

55. The amount of exfiltration, or amount of leachate escaping from any site, depends on the amount of infiltration from rain and snow which percolates through the waste and reaches the bottom of the landfill where either it meets clay, in the case of Site D, or fractured shale in the case of Site F.

56. During the presentation of evidence various estimates of the amount of possible exfiltration of leachate from Site F into the shale were given to the Board by the hydrogeologists. These estimates are as follows:

HYDROGEOLOGIST

EXFILTRATION ESTIMATES

(a) Sobanski (for Region) (Exhibit H-40, p.74) (Transcript, Vol. 36, p.7976 to 7979)	14 mm/year or, 2,200,000 gallons/year (550 tank trucks/year)
(b) Sobanski (Exhibit H-40, p.75)	22.5 mm/year
(c) Sobanski (Transcript, Vol. 36, p.7954-7955)	2.3 mm/year
(d) Dr. K. Cartwright (Report for NSP) (Exhibit N-748, p.5)	"probably to less than 1 inch" per year (25.4 mm/year)

- (e) Mr. S. Feenstra (for Region) 10-20 mm/year
(Exhibit H-936 p.16)
(para. 49)
- (f) Dr. Charlesworth (for Milton) "Nobody really knows."
(Transcript, Vol. 92,
p.21936, l.12)
- (g) Paul Bowen (for WBCG) "6000 gal./day"
(Transcript, Vol. 160, pp.38916 "10-20 mm/year most probable but could
and 38920) be from 5± to 30 to 40 mm/year"
- (h) J. Petrie (for Burlington) 50 mm/year
(Transcript, Vol. 134,
p.32595, l.9-25)
- (i) all of the aforesaid references are contained in the Burlington
Respondent's Record, at tab 7.

57. The Joint Board concluded at page 110 of its Reasons that "Site D is described by the proponent as intended to release no contaminants to the wider environment. Site F is expected to release between 1,000 gallons per day and 12,000 gallons per day with the engineered containment system working. The most likely losses would be in the neighbourhood of 5,000 gallons per day." This finding is supported by the estimates given in paragraph 56 above. To understand the significance of the potential losses, consider that an oil tanker commonly seen on the highway holds 4,000 gallons. The potential losses, therefore, represent something greater than a tank truck a day.

Evolution of the Term "Hydrogeologically Suitable"

58. The term "hydrogeologically suitable" is not a defined term in any statute or text book. Prior to the use of this term by Messrs. Crutcher and Petrie, the hydrogeologists called by Burlington, in their reports Exhibits B-617 and B-618 and their testimony, no attempt had been made to define exactly what was meant by a "hydrogeologically suitable" site. Messrs. Crutcher and Petrie were the first witnesses who testified as to the criteria that would constitute "hydrogeological suitability".

- (i) Exhibits B-617, Exhibit B-618, Burlington Respondent's Record, tab 8, at p.6 and p.139, and at p.4 and p.110, respectively.

59. After thirty days of testimony, when asked to summarize his views on Site F, Mr. Petrie testified that:

"In consideration of all I have learned from the new data provided since I have been here and the additional interpretations considered, in my mind the site is poorly defined and I feel it cannot be easily monitored and I cannot make predictions regarding the rate and patterns of contaminant migration that may occur at this site and with respect to the criteria we developed on hydrogeologic suitability. I believe Site F is not hydrogeologically suitable."

- (i) Transcript, Vol. 135, Burlington Respondent's Record, tab 9, p.32598-32601.

60. Mr. Petrie and Mr. Crutcher testified that construction of a liner would make the site hydrogeologically suitable but it was established in cross-examination that even with a liner Site F would leak.

- (i) Reasons of the Joint Board, Burlington Respondent's Record, tab 1, p.109 (FF52), (FF53) and (FF55); and,
- (ii) Transcript, Vol. 114, Burlington Respondent's Record, tab 10, p. 27571-88.

61. During argument, Mr. Estrin, counsel for the Town of Milton, and Mr. Tidball, counsel for the Ministry of Environment, both submitted their suggestions as to the criteria that would establish "hydrogeological suitability." Ms. Cronk, counsel for NSP, did the same in her submissions.

- (i) Transcript, Vol. 179, Burlington Respondent's Record, tab 11, p.44505 (argument of Mr. Tidball);
- (ii) Transcript, Vol. 187, Burlington Respondent's Record, tab 12, p.46522 (argument of Ms. Cronk); and,
- (iii) Written summary submitted in argument entitled "Suggested Criteria for Acceptance of Landfilling", Burlington Respondent's Record, tab 13.

62. The Joint Board, as it is submitted it was entitled to do, concluded there were seven factors that it considered to be of significance in defining "hydrogeological suitability." The Joint Board went on to weigh the evidence as against each of those factors (Reasons, p. 109 to 112) and arrived at its decision "after carefully weighing and considering the evidence of the experts and availing itself of all the assistance they were able to provide" (Reasons, p.55).

63. Furthermore, the unchallenged evidence of Mr. Paul Bowen, a hydrogeologist and geotechnical engineer called by the West Burlington Citizens' Group, was to the effect that the leachate discharge from Site F would represent an intentional

uncontrolled source of contamination to the environment. In contrast, there was evidence that the hydraulic trap at Site D would collect all contamination.

- (i) Evidence of P. Bowen, Transcript, Vol. 160, Burlington Respondent's Record, tab 14, pp.38863, 38918, 38928-30;
- (ii) Exhibit WB - 906, Burlington Respondent's Record, tab 15, p.13; and,
- (iii) Evidence of S. Feenstra, Transcript, Vol. 46, Burlington Respondent's Record, tab 16, p.10333.

64. When one examines the process the Joint Board followed as summarized at paragraphs 44 to 47 earlier, it appears clear that in the final analysis the Joint Board was very concerned about the environmental impacts from the loss of leachate to the environment if Site F were selected, even though the amount of loss from Site F is uncertain as is the direction it would take and where it would end up.

65. Contrary to the NSP submissions in paragraphs 68 and 73-75 of its factum, it is therefore submitted that the Joint Board's finding on the hydrogeological suitability of Site F was supported by the evidence before it and the Joint Board was entitled to define the factors that constitute such hydrogeologic suitability. In addition, the Joint Board conclusion involved a finding of fact flowing from 91 days of hydrogeological evidence and no error of law is apparent. Accordingly, it is respectfully submitted that the Joint Board's decision should not be quashed as submitted in paragraphs 85 and 86 of the NSP application.

Issue 2 - Whether There is Any Evidence Re Adequacy and Effectiveness of Liner at Site D (para. 65, 73 and 76, NSP Factum)

66. In his reply evidence, Mr. Feenstra testified that a liner of recompacted natural clay till could be constructed at Site D as a contingency in certain circumstances. His witness statement was distributed on August 23rd, 1988 and his evidence was given on August 29, 1988. No objection was taken to the introduction of his evidence (which included the recommendation of a liner at Site D) by counsel for NSP, Milton or the Coalition. Previously, Mr. Feenstra had testified on the suitability of clay till for liners at landfills.

67. Mr. Feenstra was cross-examined by counsel for the Town of Milton on the 12th day of September, 1988, and the issue of the appropriateness of landfilling at Site D with use of a recompacted clay liner was not raised in this cross-examination.

(i) Transcript, Vol. 175.

68. On the 13th day of September, 1988, the two expert geotechnical engineers who had been called earlier by the Town of Milton, Mr. Brian Gray and Dr. K. Rowe, returned to the witness box to be cross-examined. Since their departure from the witness box on the 22nd day of August, 1988, they had an ample opportunity to review Mr. Feenstra's witness statement and the transcript of his evidence-in-chief. Furthermore, Mr. Feenstra had specifically discussed his witness statement with Dr. Rowe before the 12th of September, 1988 (transcript, volume 175, page 43707). On the 13th day of September, 1988, neither counsel for the Town of Milton, nor any other party, asked any questions of Mr. Gray or Dr. Rowe concerning the inadequacy of using a liner at Site D.

(i) Transcript, Vol. 176.

69. Mr. Feenstra stated that prior to testifying in reply he discussed his proposed design options with four hydrogeologists and three geotechnical engineers. In addition, two of those professionals, Dr. Rowe and Mr. Gray, who were qualified to comment on liner designs, were in the witness box on the 13th of September 1988, the day after Mr. Feenstra concluded his evidence. No criticism of Mr. Feenstra's solutions was raised by those witnesses, nor was Mr. Feenstra cross-examined on this issue by counsel for Milton and NSP. It should also be noted that to that point there had been extensive evidence on construction of a liner, a standard form of protection in landfills.

(i) Transcript, Vol. 172, Burlington Respondent's Record, tab 17, p. 42897; and,

(ii) Vol. 175, Burlington Respondent's Record, tab 18, p.43706-7.

70. It is respectfully submitted that there was evidence to support the finding of the Joint Board and the decision ought not to be quashed.

Issue 3 - Whether There is Error in the Board's Decision Based on a Rejection Of "Uncontroverted" Evidence Regarding Site F (para. 46, 77(a), and 78, NSP Factum)

71. The Joint Board, as the trier of fact, was responsible for examining and weighing the evidence presented to it, including the weight to be given to the opinion evidence of the expert witnesses. This statement is confirmed by certain arguments made to the Joint Board by counsel for NSP. In her argument, Ms. E.A. Cronk, counsel for NSP, filed a Book of Authorities Concerning the Assessment of Credibility. The book contained ten cases with the relevant passages highlighted.

- (i) Transcript, Vol. 186, Burlington Respondent's Record, tab 19, pp.46181, 46192, 46194-95.

72. Ms. Cronk made submissions to the Board outlining the responsibility of the Board as the fact-finder in the circumstances before it. At page 54-55 of the decision, the Joint Board quotes from the cases submitted to it. All of the quotes cited by the Joint Board are from the cases put to the Board by Ms. Cronk and three of the four quotes represent highlighted portions which she put to the Joint Board; the fourth immediately followed a highlighted portion.

- (i) Reasons of the Joint Board, Burlington Respondent's Record, tab 1, pp.54-55.
- (ii) Holland v. Prince Edward Island School Board Regional Administrative Unit No 4 (1986), 59 Nfld. & P.E.I.R. 6 (P.E.I.S.C.), per McQuaid, J. at 13.
- (iii) Bennett v. Peattie (1925), 57 O.L.R. 232 (Ont. C.A.), per Middleton, J.A. at p.242.
- (iv) Sunnyside Nursing Home v. Builders Contract Management Ltd. et al., [1985] 4 W.W.R. 97 (Sask. Q.B.), per Walker, J. at p.125.

73. The second of these excerpts was the foundation for the following conclusion reached by the Board:

"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."

- (i) Reasons of the Joint Board, Burlington Respondent's Record, tab 1, p.55.

74. This is a direct adoption by the Board of a highlighted passage relied upon and put to the Board by Ms. Cronk. It is Burlington's position that the Joint Board applied the proper legal principle.

75. The evidence of the hydrogeologists respecting Site F, as noted in paragraphs 45 to 48 above, was not "uncontroverted". There was controversy about the amount of leachate, its direction of flow and its ultimate destination. In addition, there was argument about which site ought to be approved by the Joint Board. All of this evidence and argument was weighed and considered by the Joint Board as it was legally required to do. Included in that consideration was the position of the Ministry of the Environment.

- (i) Dictionary excerpts "uncontroverted"; and,
- (ii) Reasons of the Joint Board, Burlington Respondent's Record, tab 1, p.55, 110 (FF56).

Issue 4 - Whether the Joint Board Erred in Rejecting "Uncontroverted" Evidence Respecting the First Feenstra Hypothesis re Fracturing Of Unweathered Upper Till at Site D (para. 77(b), 78 NSP)

76. With respect to site D, NSP submits the Joint Board erred in rejecting the "uncontroverted" evidence of S. Feenstra regarding the fracturing potential of the unweathered upper till unit at Site D. This evidence was introduced on the 169th day of the hearing as the first of three new hypotheses. It is submitted that such evidence cannot be characterized as "uncontroverted" in light of the circumstances respecting the earlier test by Milton on the site, the cross-examination, other evidence before the Joint Board, and the argument. The Joint Board was clearly asked to reject these hypotheses in argument.

- (i) Transcript, Vol. 191, Burlington Respondent's Record, tab 20, p.47388 to 47414.

77. On September 30th, 1988, the 176th day of the hearing, Milton sought to call evidence of a Dr. N. Eyles, a quaternary geologist, respecting the possibility of fractures

at Site D extending below the weathered upper till into the unweathered upper till. The evidence offered to the Board was that on April 6th, 1988, a T-shaped trench 6 to 7 metres long at the base and 1.5 metres wide, was excavated on Site D to a depth of approximately 8.2 metres. This test pit was excavated on the lands of Mr. and Mrs. W. Martin, one of the landowners in the MACC. The test pit program was supervised by Dr. David Charlesworth, the senior hydrogeologist for the Town of Milton. Observations were taken over a two day period beginning April 6th, 1988 and concluding at approximately 3:30 on Thursday, April 7th. No notice of this testing was given to the Region, the City or the Ministry of the Environment, so no observations were made by any hydrogeologists other than those retained by the Town of Milton, Dr. Charlesworth, his assistant Janet Haynes and an invited observer, Dr. N. Eyles, the quaternary geologist.

- (i) Ex. M-962, Eyles Witness Statement, Burlington Respondent's Record, tab 21;
- (ii) Transcript, Vol. 176.

78. Dr. David Charlesworth, the hydrogeologist for the Town of Milton, was called and testified from the 25th day of January, 1988 to the 23rd day of February, 1988. While Dr. Charlesworth questioned the comment of Messrs. Sobanski and Beechinor quoted above at paragraph 21 respecting the absence of sand layers, he did not suggest that there were any fractures in the unweathered upper till.

- (i) Exhibit M-438, Burlington Respondent's Record, tab 22, pp.4-3, 8-1, 8-3.

79. Subsequently, on April 6th and 7th, 1988, Dr. Charlesworth supervised the test pit program described in paragraph 77. Dr. Charlesworth and his assistant, Janet Haynes, were active throughout the hearing in advising Mr. David Estrin, the solicitor for the Town responsible for hydrogeological issues, on these issues and in assisting Mr. Estrin during his cross-examination of subsequent hydrogeological witnesses.

80. Mr. Stephen R. Garrod, solicitor for Mr. and Mrs. W. Martin and the Coalition, arranged for permission for the excavation of the test pit on Mr. and Mrs. W. Martin's land.

81. The City of Burlington's main hydrogeological witness, Mr. John Petrie, began testifying on the 14th day of March, 1988. Mr. Garrod cross-examined Mr. Petrie on April 8th and 11th, 1988. Mr. Garrod touched on the possibility but did not press the issue of fractures in the unweathered upper till during his cross-examination. Mr. Garrod was followed immediately by Mr. Estrin, who began cross-examining on the 11th of April. On April 12th, 1988, Mr. Estrin asked Mr. Petrie a series of questions respecting whether one could determine if there were vertical fracturing in the unweathered till. During the exchange Mr. Petrie said: "I have not been provided with evidence of fracturing at Site D in any way, shape or form". Mr. Estrin did not make any attempt to confront Mr. Petrie with the test pit results that had been obtained just 4 days before, nor did he do so in the remaining six days of his cross-examination of Mr. Petrie.

(i) Transcript, Vol. 122, Burlington Respondent's Record, tab 23, p.29566.

82. On the 8th day of August, 1988, Mr. Paul Bowen, a hydrogeologist, called by Ms. Vigod, solicitor for the West Burlington Citizens' Group (hereinafter the "WBCG"), gave evidence to the effect that "all investigators, Trow (Messrs. Sobanski and Beechinor) Conestoga Rovers (Messrs. Crutcher and Petrie) and Dr. Charlesworth are in agreement with what I would call the general stratigraphic characterization of the site [Site D]". Again, neither Mr. Estrin nor any counsel in the same interest sought to demonstrate to Mr. Bowen that fractures were indicated or suggested by the test pit dug on April 6th-7th, 1988.

(i) Transcript, Vol. 160, Burlington Respondent's Record, tab 24, p.38906.

83. Mr. Feenstra testified about his hypothesis respecting fractures in the unweathered upper till on the 29th day of August, 1988. On this occasion, Mr. Estrin and any counsel in the same interest had another opportunity to present any relevant evidence from the April 6th-7th test pit program but neither sought to ask Mr. Feenstra about the test pit excavated on April 6th-7th, 1988.

(i) Transcript, Vol. 169.

84. Finally, on August 22nd, 1988, Milton was given a right of reply to the evidence introduced by the City of Burlington. Mr. Estrin called Brian R. Gray, a geotechnical engineer and Dr. K. Rowe, a mathematical modeller and geotechnical engineer, who had earlier given evidence with Dr. Charlesworth. Neither Dr.

Charlesworth, Milton's hydrogeologist, nor Ms. J. Haynes, his assistant, were called to testify in reply.

85. On September 30th, 1988, almost 5 months after the excavation of the test pit, Milton sought to seek leave to adduce evidence about the test pit. The Town attempted to present the evidence through a Dr. N. Eyles, the quaternary geologist, who was not retained by the Town but was an observer at the invitation of Dr. Charlesworth. The photographs produced by the Town of Milton show Dr. Charlesworth in the test pit examining the features of the side walls which Dr. Eyles was to be called to testify about. No explanation was offered or given as to why Dr. Charlesworth or Ms. Haynes were not called to testify to the evidence sought to be adduced.

- (i) Exhibit M-924, photographs, Burlington Respondent's Record, tab 25.

86. In the first instance, based on the sequence of facts above, it is submitted that the Board was entitled to conclude that those persons representing Milton concerned with the presentation of hydrogeological evidence respecting deficiencies at Site D, Dr. Charlesworth, Ms. J. Haynes, Dr. Rowe and Mr. Estrin, must have completely dismissed any concerns respecting fracturing of the unweathered upper till as a result of their test pit observations taken April 6th and 7th, 1987. As the Board properly noted, "had such evidence supported the existence of features in the unweathered upper till, we would have expected them to invite other experts to observe the test and report it promptly" (Reasons, page 70). If there had been any real weight to the test pit results, it is submitted that Mr. Estrin would have presented such evidence first hand by calling Dr. Charlesworth or Ms. Haynes.

87. Furthermore, the Joint Board did analyse the evidence concerning Site D at length from pages 60 to 82 of the decision and specifically referred to evidence which contradicted the first Feenstra hypothesis respecting the possibility of fractures in the unweathered upper till. The evidence of earlier witnesses including that of Mr. Sobanski, the lead hydrogeologist for the Region, was that the unweathered upper till was unfractured.

- (i) Reasons of the Joint Board, Burlington Respondent's Record, tab 1, p.64, 65, 67-69.

88. Mr. Feenstra admitted that he had discussed this hypothesis with Mr. Sobanski, and that Mr. Sobanski disagreed with it.

(i) Transcript, Vol. 174, Burlington Respondent's Record, tab 26, p.43301.

89. Furthermore, as submitted in argument, the first Feenstra hypothesis was based upon a master's project of a hydrogeological student at the University of Waterloo who was studying Sarnia till located over 100 miles away from Site D. Mr. Feenstra did not make any first hand observations of any of the fractures referred to in the thesis nor was he able to verify the accuracy of the data contained in it. Further, it was admitted that the Sarnia soils were different from those at Site D.

(i) Transcript, Vol. 174 and Vol. 175, Burlington Respondent's Record, tab 26, at p.43288-43309 and p.43524-43526, 43550-43565 and p.43662, respectively.

90. The Board also had before it evidence that Gartner Lee Associates, a geological-hydrogeological firm retained by the Ontario Waste Management Corporation, had identified and selected Site D as one of its final three sites, out of a review of more than 152 sites in the Golden Horseshoe area, suitable for the potential development of a physical - chemical treatment and/or incinerator facility. Their nomenclature referred to the site as Site P1-1N; their report stated:

"The Ontario Waste Management Corporation (OWMC) site selection process to locate facilities for treating hazardous wastes and disposing of the treated waste residues has been a phased process which began in 1981. Initial studies identified 261 hydrogeologic areas throughout southern Ontario which were grouped into six zones. Within the Golden Horseshoe, zone 1 and 2 lands were considered most favourable for facility siting. Twenty candidate areas were identified within the zone 1 and 2 lands in the Golden Horseshoe in 1983. A total of 152 sites were identified in these twenty candidate areas in 1984 and this number was subsequently reduced in stages to sixteen potential sites and finally to eight candidate sites through the application of various constraints, screening processes, and ranking systems based on multidisciplinary factors. ...

... This Gartner Lee Associates Limited (GLAL) report documents and interprets available geologic, hydrogeologic, and geotechnical information for Site P1-1N and serve as the data source for input to the Phase 4A comparison study...." (Exhibit M-155, p.1)

91. Based upon its analysis of the evidence and its findings of fact respecting the action of groundwater around site D, it is clear that the Joint Board did not ignore the issue and that its conclusions are not grounds for an order quashing its decision. It is submitted that the Joint Board was entitled to reject Mr. Feenstra's first hypothesis.

(i) Exhibit H - 936, Burlington Respondent's Record, tab 27, p.17.

Issue 5 - Whether the Joint Board Erred in Failing to Make Adverse Credibility Findings (para. 79, NSP Factum)

92. There is no principle in Canadian administrative law that a trier of fact is required to make explicit findings with regard to credibility when rejecting the evidence of a witness. Such a requirement would serve to move the standard of review up to that of an appeal rather than one of judicial review. Even if such principle exists it would be confined to a situation where there is a statutory right of appeal which would allow an appellate court to question the correctness of the Joint Board's decision.

- (i) Reid and David, Administrative Law and Practice, 2nd edition, at p.268;
- (ii) Woolaston v. Minister of Manpower and Immigration, [1973] S.C.R. 102, at p.108;
- (iii) Service Employees International Union, Local No. 333 v. Nipawin Dist. Staff Nurses Association et al., [1975] 1 S.C.R. 382, at p.391;
- (iv) Whitehouse v. Jordan et al., [1981] 1 All E.R. 267 (H.L.), per Lord Edmund-Davies, at p.276;
- (v) Kindler v. Canada (Minister of Justice), [1987] 2 F.C. 145 (T.D.) at p.154-155.

Issue 6 - Whether the Joint Board Erred in Substituting Its Own Opinion (para. 80, NSP Factum)

93. For the reasons explained in paragraphs 71 to 74 above, the Board concluded its responsibility was "...to arrive at [its] own opinion after carefully weighing and considering the evidence of the experts...". This is a quote from a case submitted by

counsel for NSP and correctly summarizes the relevant law. Accordingly, it is respectfully submitted that NSP cannot be heard to complain when the Joint Board followed principles which are correct in law and which were put to the Joint Board by its own counsel.

- (i) Reasons of the Joint Board, Burlington Respondent's Record, tab 1, p.55.

Issue 7 - Whether the Joint Board Erred in Failing to Consider Evidence re Attenuation at Site F (para. 81(a), NSP Factum)

94. The Joint Board was required under the provisions of the Environment Assessment Act to select a site which provided for the protection and conservation and wise management of the environment. Broad policy decisions were involved in a long and complex hearing.

- (i) Environmental Assessment Act, R.S.O. 1980, c.140, as amended, s.2.

95. For the reasons summarized at paragraphs 54 to 57, as well as 63 and 64 earlier, the Joint Board was most concerned about the release of contaminants to the environment, especially when the ultimate destination and quantities of such contaminants were unknown.

96. Evidence was led during the course of the hearing to the effect that the attenuation of leachate might occur by certain mechanisms such as matrix diffusion, dispersion and absorption. The resulting attenuation from these factors, however, could not be quantified.

97. The testimony varied as to the effect these mechanisms would have in reducing contamination and the evidence varied considerably as to the importance of these factors. Much of the evidence respecting the importance of attenuation was dependent on the opinions of the hydrostratigraphy of Site F and, in particular, whether the strata was homogeneous and layered or so severely fractured and heterogeneous that the mechanisms or factors could not be counted on.

- (i) Evidence of Petrie, Vol. 131, Burlington Respondent's Record, tab 28, p.31.

98. Dr. Charlesworth, the hydrogeologist and Dr. Rowe, a geotechnical engineer and mathematical modeller, both called by Milton, placed considerable reliance on the attenuation of the leachate as it moved through the shale at Site F. This evidence was based upon their theory that the shale at Site F was homogeneous and on certain estimates of the size of the fractures and the spacing of such fractures. The Board rejected their theory of the site's hydrostratigraphy when it found that the fractures in the shale were heterogeneous. And, it is respectfully submitted the basis for acceptance of the Charlesworth/Rowe hypothesis of attenuation of leachate at Site F fell with that finding.

(i) Reasons of the Joint Board, Burlington Respondent's Record, tab 1, p.97 (FF38), p.98 (FF39), p.99-101, p.110.

99. With regard to the other documentary evidence respecting possible attenuation characteristics of the shale at Site F, relied on by NSP and referred to at paragraph 45 of its factum, it is to be noted that the authors of these earlier documents or reports were not called. Further, the Joint Board noted that the amount of data upon which these earlier reports were based was less than that presented to it. Although the Board did refer to at least one of the earlier reports, Exhibit N-470, it is apparent from its overall review of the evidence that these earlier reports were of limited assistance to the Joint Board. For example, the Board specifically found that analysis of the pumping test data suggested that strata may have "similar characteristics along lines parallel to the length of the site but not across the site" and that the implications of such a finding could not be ignored.

(i) Reasons of the Joint Board, Burlington Respondent's Record, tab 1, p.55, p.87, p.109.

100. Given the complexity of the issues before it, it is respectfully submitted that the Joint Board properly discharged its responsibility under the relevant enabling legislation and no error of law is demonstrated to warrant quashing of the Joint Board's decision based upon this issue.

Issue 8 - Failure To Refer to, Consider or Evaluate "Uncontroverted" Evidence of Feenstra Re Inducement of Fracturing Upon Introduction Of Landfill (para. 81(b) NSP)

101. Failure to include a specific matter of evidence does not, however, lead to the conclusion that it was not considered and the tribunal need not make explicit findings on each constituent element leading to its final conclusion.

- (i) Reid and David, Administrative Law and Practice, 2nd edition, at p.268;
- (ii) Woolaston v. Minister of Manpower and Immigration, [1973] S.C.R. 102, at p.108;
- (iii) Service Employees International Union, Local No. 333 v. Nipawin Dist. Staff Nurses Association et al., [1975] 1 S.C.R. 382, at p.391;
- (iv) Kindler v. Canada (Minister of Justice), [1987] 2 F.C. 145 (T.D.) at p. 154-155.

102. The second of the Feenstra hypotheses introduced in reply was to the effect that the construction of the landfill could itself induce fractures in the unweathered upper till by the heaving effect and relief of stress that would occur with excavation. The hypothesis was one dealing with an aspect not specifically within Mr. Feenstra's area of expertise.

- (i) Evidence of S. Feenstra, Vol. 169, Burlington Respondent's Record, tab 29, p.42120-21.

103. Mr. Feenstra testified on this hypothesis in chief on August 29th, 1988. No cross-examination of this issue was undertaken by counsel for Milton. Subsequently, Milton introduced two geotechnical engineers, Mr. Gray and Dr. Rowe, who were qualified to support this hypothesis. Neither was called to comment on this issue by counsel for Milton, the Coalition, or NSP.

104. It is respectfully submitted that the Board was entitled to disregard the evidence of Mr. Feenstra, who was testifying outside of his area of expertise, especially in circumstances where counsel in the same interest declined to ask qualified geotechnical witnesses to comment on such a hypothesis.

Issue 9 - Whether the Joint Board Erred in Failing To Consider Evidence Re The Depletion Of Water Resource (para. 81(b), NSP Factum)

105. The third hypothesis introduced in reply by Mr. Feenstra was characterized as the "shadow effect" and involved concern about depletion of the water resource at the site arising from construction of the landfill itself. Such construction might prevent the water table from being replenished, thereby affecting the containment of the leachate. The Joint Board rejected this hypothesis, as it was entitled to do, and noted other evidence regarding methods by which compensation for the water table might occur. Mr. Feenstra also indicated that a simple remedy would maintain the desired hydraulic pressure in the granular units beneath Site D. The Joint Board's Conditions of Approval allow for introduction of such remedy if required. There is no error of law on this issue that would warrant questioning the Joint Board's decision.

- (i) Reasons of the Joint Board, Burlington Respondent's Record, tab 1, p.70-71 and 79;
- (ii) Exhibit H-936, Feenstra Witness Statement, Burlington Respondent's Record, tab 27, at p.7.

Issue 10 - Whether the Joint Board Erred in Failing to Reject, Consider or Evaluate the Evidence of Dr. Eyles (para. 81(b), NSP Factum)

106. The circumstances leading up to the attempt to present the evidence are summarized at paragraphs 77 to 85 above. Dr. Eyles was a geologist who was only asked to observe the test conducted on Site D. He was not a hydrogeologist, nor was he recognized as such by the Joint Board. Dr. Eyles was therefore unqualified to give evidence on the significance of any fractures. No attempt was made to introduce the evidence proposed to be given by Dr. Eyles through Dr. Charlesworth, the hydrogeologist who conducted the test and who could comment on its hydrogeologic significance. In the circumstances, the Joint Board was correct in its decision not to receive this evidence.

- (i) Transcript, Vol. 176, Burlington Respondent's Record, tab 30, pp.43823-24
- (ii) Transcript, Vol 176, Burlington Respondent's Record, tab 30, pp.43846-49

Issue 11 - Whether the Joint Board Erred in its Use And Reliance On Undisclosed Criteria (para. 83, NSP Factum)

107. As noted at paragraphs 58 to 61, supra the witnesses and counsel offered evidence and submissions respecting the criteria that ought to be considered by the Joint

Board to determine what would constitute "hydrogeological suitability". All counsel were given full opportunity to make submissions on what the criteria ought to be in evidence and in argument. No error occurred in the Joint Board's decision regarding the criteria which ought to be included. This was an appropriate exercise of the jurisdiction given to the Joint Board by its governing legislation with which this Court should decline to interfere.

- (i) Douglas Aircraft Co. of Canada Ltd. v. McConnell et al., [1980]
1 S.C.R. 245, per Estey, J. at p. 275 and 277.

PART IIB - POSITION OF RESPONDENT BURLINGTON RE APPLICANT MILTON'S ISSUE

Issue 1 - Did the Joint Board deny the Applicant natural justice or lose jurisdiction by rejecting the Feenstra fracturing hypothesis and denying Milton's request to lead evidence of field testing which related to the existence of those fractures? (p.44, Milton Factum)

108. With respect to the rejection of the first Feenstra hypothesis, Burlington repeats its submissions respecting NSP, Issue 1 at paragraphs 51 to 65, supra.

109. With respect to the Joint Board's denial of Milton's request to lead evidence of field testing, in the first instance, based on the sequence of evidence set out at paragraphs 77 to 85, above, it is submitted that the Joint Board was entitled to its conclusion.

110. Secondly, as noted at paragraph 106 above, the evidence was sought to be introduced through an unqualified witness who could not assist the Joint Board on assessing the hydrogeological significance of the evidence.

111. The Joint Board was justified in ruling as it did on this matter and was fully entitled to do so. In making such ruling, no error of law was committed by the Joint Board, nor was Milton denied any of the provisions of natural justice.

Issue 2 - Whether to Board decline jurisdiction or denied the applicant natural justice in the alleged delegation of decision making to the Director of Approvals in respect of the investigation of fracturing during the excavation of the landfill at Site D (p.45-46, Milton Factum)

112. It is submitted that the structure of the approvals process established under the Environmental Protection Act contemplates that issues of final design are to be left to be implemented by the Director of Approvals of the Ministry of the Environment. No loss of jurisdiction or error of law occurred as a result of the Joint Board's imposition of Conditions of Approval.

- (i) Environmental Protection Act, R.S.O. 1980, c.144, as amended, s.33(4).

Issue 3 - Whether the Board denied the Applicant's natural justice or made an error of law on the face of the Record by rejecting the fracturing hypotheses of the proponents reply witness, Feenstra, while at the same time designing conditions which accept the "reasonable possibility of fracturing" (para. 47, Milton Factum).

113. Burlington repeats its submissions at Issue 4, paragraphs 76 to 91 above respecting the rejection of the first Feenstra hypothesis relating to fracturing of the unweathered upper till at Site D. By providing a contingency plan even though it rejected the hypothesis, the Joint Board acted in a prudent and justified manner. No error of law was committed by the Joint Board, nor was Milton denied any of the provisions of natural justice.

Issue 4 - Whether the Joint Board should have found the environmental assessment was inconclusive or unsatisfactory (para. 48, Milton Factum)

114. There was substantial evidence before the Joint Board with respect to Site D as the Joint Board indicated on September 16, 1989 and as repeated at para. 25 of the Milton factum. Moreover, the Joint Board was entitled to determine the amount and degree of evidence required to discharge its statutory function.

- (i) Miller vs. Minister of Housing (1968), 1 W.L.R. 992 (C.A.), and,
- (ii) Statutory Powers Procedure Act, R.S.O. 1980, c.484, s.15.

PART IIC - RESPONSE OF BURLINGTON TO ISSUES RAISED BY THE COALITION

Issue 1 - Whether rejection of expert evidence and substitution of the Joint Board's own opinion constitutes denial of natural justice (para. 39, Coalition Factum).

115. Burlington refers the Court to paragraphs 71 to 74 of this factum. No denial of natural justice has occurred.

Issue 2 - Whether the Joint Board's finding as noted at paragraph 40 of the Coalition Factum represents error of law or denial of natural justice (para. 40, Coalition Factum).

116. Burlington refers the Court to paragraphs 44 to 48 in this factum where the Joint Board's reasoning is summarized. The finding complained of was only one comment in the Joint Board's over-all lengthy consideration of the evidence.

Issue 3 - Whether it is a denial of natural justice for the Joint Board to ignore or reject Ministry of Environment policies and to apply its own criteria without notice and opportunity to make submissions (para. 41, Coalition Factum).

117. With respect to the issue of ignoring or rejecting Ministry policies, Burlington submits that Dr. Hughes, the Ministry of the Environment witness, was called to present two policies of the Ministry respecting groundwater. He was not able to relate these policies directly to the sites before the Joint Board, nor was he familiar with the newly emerging policies of the Ministry such as the MSIA program issued in 1986 and currently being implemented.

- (i) Hughes Witness Statement, Ex. 928, Burlington Respondent's Record, tab 31;
- (ii) Transcript, Vol 167, Burlington Respondent's Record, tab 32, p.41727 to p.41728 and p.41766;
- (iii) Ex. 930, Burlington Respondent's Record, tab 33, foreward and p.27;
- (iv) Ex. 154, Burlington Respondent's Record, tab 34, (1984, 1986); and,
- (v) Ex. 928, Burlington Respondent's Record, tab 35, (1987)

118. The Joint Board reviewed Sites D and F against the policies of the Ministry of the Environment pursuant to the Environment Assessment Act. The Joint Board concluded that a total containment site, Site D, was the preferable one in all the circumstances of the specific case before it. That was a finding that the Board was entitled to make. Such finding is consistent with the larger policy objectives of the Government of Ontario.

119. Furthermore, Milton, NSP and the Coalition applied to the Lieutenant-Governor in Council to rescind or vary the Joint Board's decision. The question whether the Joint Board's reasons conflict with Ministry policy was specifically raised in the application of NSP at paragraphs 2 and 3. These applications were dismissed.

- (i) NSP Application to Cabinet, Burlington Respondent's Record, tab 36, paragraph 2, 3;
- (ii) Order-in-Council, Burlington Respondent's Record, tab 6.

Issue 4 - Whether there was a duty on the Joint Board under the Expropriations Act (paragraphs 42, 44-46 and 56-63, Coalition Factum)

120. The Joint Board was aware of its obligations under the Expropriations Act R.S.O. 1980, c. 148 (the "Expropriations Act"). At page 6 of its Reasons for Decision it stated: "[t]he purpose of the hearing was to provide evidence to the Joint Board with respect to this undertaking, to enable the Joint Board to make decisions regarding, among other things,...(e) whether the taking of lands is fair, sound and reasonably necessary in achieving the objectives of the applicant...". The Joint Board's formal decision specifically approved the acquisition of lands pursuant to sections 6, 7 and 8 of the Expropriations Act.

- (i) Reasons of the Joint Board, Burlington Respondent's Record, tab 1, at pages 6 and 150.

121. The implications of creating a landfill at either Site "D" or Site "F", and in particular, the effect that this might have on the property owners in and around the two candidate sites was one of the major issues dealt with at the hearing. The Joint Board

recognized the "special and direct interest" of the landowners in and around Site "D" at the very outset of the hearing by granting them party status.

- (i) Reasons of the Joint Board, Burlington Respondent's Record, tab 1, at page 2 and 3.

122. The Joint Board heard and duly noted the evidence of almost every homeowner directly affected by the expropriation of land at Site "D". In addition, the Board heard the evidence of 28 persons from the community around Site D and the evidence of approximately 33 other lay witnesses who appeared to express their personal concerns about the selection of one or the other of the sites.

- (i) Reasons of Joint Board, Burlington Respondent's Record, tab 1, at pages 22-28, inclusive.

123. The Joint Board also heard expert evidence on how the location of a landfill might impact on the cultural conditions at the candidate sites (Dr. Pearce, an archaeologist and Mr. Scott, an expert in heritage features); expert evidence on the social impacts of the proposed undertaking (Dr. M. Schiff and Professor R. Lang); expert evidence on the nuisance concerns that might arise at either site (Dr. E. Koczkur, an expert on matters of air quality; Mr. J. E. Coulter, an expert in acoustics; Mr. Wright, an expert on visual impact); as well as expert planning evidence (Messrs. Kentridge and Kauffman, on behalf of the Coalition; Mr. M. Bacon, on behalf of N.S.P.; Messrs. Stagl and Zsadanyi, on behalf of the Town of Milton; Mr. I. MacNaughton, on behalf of the City of Burlington; and, Mr. P. Walker, on behalf of the Region of Halton).

- (i) Reasons of the Joint Board, Burlington Respondent's Record, tab 1, at pages 14-16, 16-22, 29-35, and 122-136.

124. The evidence relating to the aforesaid issues consumed more hearing time (and a larger portion of the Joint Board's Reasons for Decision) than any other issue, with the exception of hydrogeology.

125. The Joint Board concluded that the establishment of a landfill site at either location would create serious social impacts, which it described as "severe for a small number of people" at Site D.

- (i) Reasons of the Joint Board, Burlington Respondent's Record, tab 1, at p.28.

126. The Expropriations Act required the Board to consider whether the proposed expropriation was "fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority" (the Expropriations Act, s. 7(5)). In this case, one of the "objectives" of the Region of Halton (and probably the most important objective) was to establish the safest landfill site it reasonably could. No party took issue with the primacy of this objective. The Joint Board concluded that this objective could not be satisfied at Site F, but that it could be satisfied at Site D. No party presented the Board with any other alternative for the accomplishment of this important and necessary public work.

127. Having concluded that this objective could only be satisfied by the placement of the landfill at Site D, it was reasonable for the Board to approve the expropriations it did. No party argued that the particular expropriations proposed at Site D were not "fair, sound or reasonably necessary" to the establishment of a landfill at that location; indeed, counsel for the applicants argued (and the Joint Board agreed) that certain property owners in the vicinity of Site D should be given the option of compelling the Region to acquire their properties - even though such acquisitions are not essential for the establishment of a landfill at that location.

- (i) Conditions of Approval, Condition 16, Reasons of the Joint Board, Burlington Respondent's Record, tab 1, at p.193.

128. In this particular case, the Joint Board exhaustively considered the adequacy of the two alternative sites which were presented to it. It also considered in great detail the conflicts between the private and public interests which existed at each location. It is therefore submitted that the Joint Board complied with the requirements set out in the Karn and Parkins cases.

- (i) Karn et al. v. Ontario Hydro et al. (1977), 11 L.C.R. 1 (C.A.);
and,
- (ii) Re Parkins and the Queen (1978), 14 L.C.R. 328.

129. The Expropriations Act does not require that the inquiry officer's report be in any particular form, nor does it require such reports to contain any special terminology. Under the Expropriations Act, it is not necessary for the inquiry officer to discuss in minute detail a consideration of all of the factors relating to the expropriation; rather, it is sufficient if it appears that the inquiry officer considered the relevant factors, applied the test set out in the Expropriations Act, and came to a conclusion as to whether the proposed expropriation was reasonably defensible.

- (i) Re Parkins and the Queen (1978), 13 L.C.R. 306 (H.C.J.), per Cory, J. at p.316; and,
- (ii) Re Parkins and the Queen et al. (1978) 14 L.C.R. 327 (C.A.), per MacKinnon, J.A. at p.332.

130. An approving authority is neither a judicial nor a quasi-judicial body, and it is invested with the widest discretionary power to determine whether an expropriation should proceed. Absent bad faith, the decisions of approving authorities are not subject to judicial review.

- (i) Walters et al. v. Essex County Board of Education (1974), 5 L.C.R. 144 (S.C.C.), per Laskin, J. at p.150;
- (ii) Zaichuk v. Ontario Water Resources Commission (1974), 5 L.C.R. 151 (C.A.), per Jessup, J.A. at p.151.
- (iii) Re Buttery Construction Ltd. and City of Windsor (1979), 17 L.C.R. 33 (Div. Ct.), per Pennell, J. at p.44.

131. In a consolidated hearing, the Joint Board acts as both the inquiry officer and the approving authority. The provisions of the Expropriations Act requiring the inquiry officer to "report" to the approving authority, and those requiring the approving authority to "consider" the report of the inquiry officer, must be read in the context of such a consolidation.

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

132. When the decision of the Joint Board is read as a whole, there can be no doubt that it considered the implications of the proposed expropriations and that it implicitly concluded that such expropriations were fair, sound and reasonably necessary in the achievement of the Region's objectives.

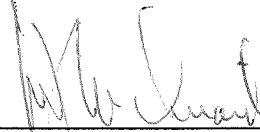
PART III: ADDITIONAL ISSUES

133. There are no additional issues.

PART IV: ORDER SOUGHT

134. For the reasons aforesaid, Burlington respectfully requests that the applications of NSP, Milton and the Coalition be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



M. J. McQuaid



C. J. Tzekas
of Counsel for City of Burlington

SCHEDULE "A": LIST OF AUTHORITIES

1. Re Holmes and Halton (1977), 16 O.R. (2d) 263 (H.C.)
2. Re Holmes and Halton (1978), 19 O.R. (2d) 468 (H.C.)
3. Re Halton and Milton (1981), 12 O.M.B.R. 292 (Ont. H.C.)
4. Milton v. Halton (1981), 13 O.M.B.R. 31 (O.M.B.)
5. Re Keeprite Workers' Independent Union et al. and Keeprite Products Ltd. (1980), 29 O.R. (2d) 513 (C.A.)
6. Re Cadillac Fairview Corp. Ltd. et al. and Retail, Wholesale and Department Store Union et al. (1987), 62 O.R. (2d) 337 (Div. Ct.)
7. Douglas Aircraft Co. of Canada Ltd. v. McConnell et al., [1980] 1 S.C.R. 245
8. Holland v. Prince Edward Island School Board Regional Administrative Unit No 4 (1986), 59 Nfld. & P.E.I.R. 6 (P.E.I.S.C.)
9. Bennett v. Peattie (1925), 57 O.L.R. 232 (Ont. C.A.)
10. Sunnyside Nursing Home v. Builders Contract Management Ltd. et al., [1985] 4 W.W.R. 97 (Sask. Q.B.)
11. Woolaston v. Minister of Manpower and Immigration, [1973] S.C.R. 102
12. Service Employees International Union, Local No. 333 v. Nipawin Dist. Staff Nurses Association et al., [1975] 1 S.C.R. 382
13. Whitehouse v. Jordan et al., [1981] 1 All E.R. 267 (H.L.)
14. Kindler v. Canada (Minister of Justice), [1987] 2 F.C. 145 (T.D.)
15. Miller vs Minister of Housing (1968), 1 W.L.R. 992 (C.A.)
16. Karn et al. v. Ontario Hydro et al. (1977), 11 L.C.R. 1 (C.A.)
17. Re Parkins and the Queen (1978), 14 L.C.R. 328
18. Re Parkins and the Queen (1978), 13 L.C.R. 306 (H.C.J.)
19. Walters et al. v. Essex County Board of Education (1974), 5 L.C.R. 144 (S.C.C.)
20. Zaichuk v. Ontario Water Resources Commission (1974), 5 L.C.R. 151 (C.A.)
21. Re Buttery Construction Ltd. and City of Windsor (1979), 17 L.C.R. 33 (Div. Ct.)

SCHEDULE "B": STATUTES

1. Environmental Assessment Act, R.S.O. 1980, c. 140, as amended, s. 2:

"2. The purpose of this Act is 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".

2. Environmental Protection Act, R.S.O. 1980, c. 144, as amended, s. 33(4):

"(4) The Environmental Assessment Board shall serve notice of its decision, together with reasons therefor, on the parties to the hearing, and the Director shall implement the decision. 1988".

3. Statutory Powers Procedure Act, R.S.O. 1980, c. 484, s. 15

"15.(1) Subject to subsections (2) and (3), a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,

(a) any oral testimony; and

(b) any document or other thing,

relevant to the subject matter of the proceedings and may act on such evidence, but the tribunal may exclude anything unduly repetitious.

(2) Nothing is admissible in evidence at a hearing,

(a) that would be inadmissible in a court by reason of any privilege under the law of evidence; or

(b) that is inadmissible by the statute under which the proceedings arise or any other statute.

(3) Nothing in subsection (1) overrides the provisions of any Act expressly limiting the extent to or purposes for which any oral testimony, documents or things may be admitted or used in evidence in any proceedings.

(4) Where a tribunal is satisfied as to their authenticity, a copy of a document or other thing may be admitted as evidence at a hearing.

(5) Where a document has been filed in evidence at a hearing, the tribunal may, or the person producing it or entitled to it may with the leave of the tribunal, cause the document to be photocopied and the tribunal may authorize the photocopy to be filed in evidence in the place of the document filed and release the document filed, or may furnish to the person producing it or the person entitled to it a photocopy of the document filed certified by a member of the tribunal.

(6) A document purporting to be a copy of a document filed in evidence at a hearing, certified to be a true copy thereof by a member of the tribunal,

is admissible in evidence in proceedings in which the document is admissible as evidence of the document."

4. Expropriations Act, R.S.O. 1980, c. 148, as amended, s. 7(5):

"(5) The hearing shall be by means of an inquiry conducted by the inquiry officer who shall inquire into whether the taking of the lands or any part of the lands of an owner or of more than one owner of the same lands is fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority".

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

"(7) The standards and criteria in or under an Act specified in a notice under section 3 that relate to the undertaking specified in the notice apply with necessary modifications in respect of a decision that may be made by a joint board under this Act."

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