

CONSOLIDATED HEARINGS BOARD

IN THE MATTER OF Sections 2 and 3 and 6 (3) of the Consolidated Hearings Act, 1981, S.O. 1981, c.20;

— and —

IN THE MATTER OF Section 12(2) of the Environmental Assessment Act, R.S.O. 1980, c.140;

— and —

IN THE MATTER OF Sections 30, 35 and 38 of the Environmental Protection Act, R.S.O. 1980, c.141, as amended;

— and —

IN THE MATTER OF Sections 24 and 61 (2) of the Ontario Water Resources Act, R.S.O. 1980, c.361, as amended;

— and —

IN THE MATTER OF Section 28 (3) of, and Regulation 164 under, the Conservation Authorities Act, R.S.O. 1980, c.85, as amended;

— and —

IN THE MATTER OF Section 40(12) of the Planning Act, S.O. 1983, c.1, as amended; in connection with site plan control of the sanitary landfill site;

— and —

IN THE MATTER OF Section 22(1) of the Planning Act, 1983 in connection with a referral to this Board by the Honourable Bernard Grandmaitre, Minister of Municipal Affairs, on a request by the Regional Municipality of Halton to amend the Official Plan for the Town of Milton to redesignate a parcel of land comprising Part Lots 3 and 4, Concession 2 N.S. in the Town of Milton from "Agriculture" and "Conservation and Hazard Lands" to permit the construction, operation and maintenance of a landfill site, Minister's File No. 24-OP-0208-A01;

— and —

IN THE MATTER OF Section 34(11) of the Planning Act, 1983 in connection with an appeal to this Board by the Regional Municipality of Halton for an order directing an amendment to By-law 61-85 of the Town of Milton to rezone the lands situated at Lot 3 and part of Lot 4, Concession 2 N.S., in the Town of Milton from "Agriculture" to permit a regional sanitary landfill site and ancillary uses;

— and —

IN THE MATTER OF Section 15(1) of the Planning Act, R.S.O. 1980 ch.379 in connection with a referral by the Honourable Claude F. Bennett, Minister of Housing on a request by Tremaine Britannia Citizen's Group for consideration of part of the Official Plan for the Halton Planning Area with respect to Sections 1 to 5 inclusive, 7, 9 and 10 of Part III D3 Solid Waste Management, Minister's File No. OPC-0026;

— and —

IN THE MATTER OF Section 64 of the Ontario Municipal Board Act, R.S.O. 1980, c.347 as amended in connection with an application by the Regional Municipality of Halton for an order approving:

a) the acquisition of land for the construction, operation and maintenance of a sanitary landfill site to contain 7.96 million cubic metres of waste in the Regional Municipality of Halton and to do so by one of two alternative methods as follows:

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

at an estimated cost of \$12,775,000.00, and the borrowing of money by way of temporary advances not exceeding in the aggregate such estimated cost pending the sale of debentures, and

(b) the issuance of necessary debentures to a maximum of \$12,775,000.00 for a term not to exceed fifteen years;

— and —

IN THE MATTER OF Section 193(5) and Paragraph 84 of Section 210 of the Municipal Act, R.S.O. 1980, c.302, as amended;

— and —

IN THE MATTER OF Sections 6, 7 and 8 of the Expropriations Act, R.S.O. 1980, c.148;

— and —

IN THE MATTER OF an undertaking of the Regional Municipality of Halton to provide facilities for the purpose of receiving, dumping and disposing of waste as required by section 137 of the REGIONAL MUNICIPALITY OF HALTON ACT, R.S.O. 1980, c.436, as amended, by acquiring the land for, constructing, operating and maintaining a landfill to contain 7.96 million cubic metres of waste in the Regional Municipality of Halton.

VOLUME: 25

HELD AT: Oakville, Ontario.

DATE: June 25, 1987.

OFFICIAL REPORTERS

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Toronto, Ontario

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2 Consolidated Hearings Act, 1981, S.O. 1981, c. 20;

- and -

3 IN THE MATTER OF Sections 12(2) of the Environmental
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- and -

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7 amended;

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8 IN THE MATTER OF Sections 24 and 61(2) of the Ontario
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10 IN THE MATTER OF Section 28(3) of, and Regulation 164
11 under, the Conservation Authorities Act, R.S.O. 1980,
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14 S.O. 1983, c.1, as amended; in connection with site
15 plan control of the sanitary landfill site;

- and -

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18 Honourable Bernard Grandmaitre, Minister of Municipal
19 Affairs, on a request by the Regional Municipality of
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21 Milton to redesignate a parcel of land comprising Part
22 Lots 3 and 4, Concession 2 N.S. in the Town of Milton
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at an estimated cost of \$12,775,000.00 and the borrowing of money by way of temporary advances not exceeding in the aggregate such estimated cost pending the sale of debentures, and

(b) the issuance of necessary debentures to a maximum of \$12,775,000.00 for a term not to exceed fifteen years;

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BEFORE:	H. H. Lancaster, Q.C.	-	Chairman
	Dr. D.J. Kingham	-	Member
	S. Tanner	-	Member



Nethercut & Co. Ltd.

Toronto, Ontario

Hearing conducted at The Oakville
Granary Commercial Centre, 105 Robinson
Street, Oakville, Ontario, on
June 25, 1987.

VOLUME 25

APPEARANCES:

T.R. Lederer and H.D. Hodgson	for the Regional Municipality of Halton (Proponent)
J.R. Tidball	for the Ministry of the Environment
T. Vigod J.F. Castrilli	for the West Burlington Citizens Group
D. Estrin, F.E. Leitch and H. Dahme	for the Corporation of the Town of Milton
S.R. Garrod and A. Nurvo	for the Milton Area Citizens Coalition and several affected Milton area landowners
R.B. Tuer, Q.C. E.A. Cronk and F. Perrier	for National Sewer Pipe Limited
L.F. Longo	for Azova Investments Limited
M.J. McQuaid, Q.C. and C.J. Tzekas	for the City of Burlington
C. Mansfield	for the Ministry of Natural Resources
P. Renaud	for Cumis



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APPEARANCES (Cont'd):

1

C. Stevenson

for Framgard Holdings,

2

P. Hancock

Fosseri Investments

3

Limited, Seriphos

Investments Limited and

Topic Investments

4

J.H. Olah

for the Halton Region

5

Conservation Authority

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Per: P.D. McQueen

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1 --- Upon commencing at 11:30 a.m.

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DR. KINGHAM: Thank you. Please
be seated.

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First of all, I would like to say
that Mr. Lancaster is still, as of yesterday
afternoon, in the Intensive Care. We have sent
greetings and wishes for a quick recovery to him
on behalf of all counsel and on behalf of the
members of this Board.

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When we adjourned on Monday, we
felt it would be a good idea for all of us to
check with clients and colleagues as to how we
all might feel about proceeding with this matter.
As you know, we are not here to hear evidence today.
We are here to receive your views as to how counsel
feel about the prospects for the future. You are
all quite familiar, I am sure, with the provisions
of the Consolidated Hearings Act and the decisions
that the Chairman of the Ontario Municipal Board
and the Chairman of the Environmental Assessment
Board may make and hopefully will make very quickly.

But, to assist them, and to assist
us, we felt it would be useful if we could have
your views as to how you would like to see things



1 proceed.

2 I wonder if it is fair for me to
3 state at the outset an assumption that there would
4 be unanimity, we would not like to have to repeat
5 the six weeks that have just proceeded if it were
6 possible to do so in some way that everybody would
7 be happy with. Is that a fair assessment, a
8 desire?

9 MR. McQUAID: Yes.

10 DR. KINGHAM: Having expressed that
11 wish, however, I guess the issue is whether or not
12 that is the feeling of all counsel here and if so,
13 what are the options available to us to see that
14 happen.

15 Having said that, I guess we are
16 open at this stage to hearing any submissions that
17 you may have as to your feelings on the matter and
18 how you would like to see this proceed. Not
19 having any preordained order for this, I think we
20 will start with the counsel for Halton.

21 MR. LEDERER: Thank you, Mr. Chairman.
22 I am going to touch upon some of the things that
23 you have said and therefore, it would be useful if
24 you could have before you, a copy of the
25 Consolidated Hearings Act.



1 DR. KINGHAM: It may be the only
2 one that is missing from this file, although I know
3 we had it in chambers, the retiring room.

4 MR. LEDERER: Mr. Hodgson has
5 probably marked that up in all the appropriate places.

6 DR. KINGHAM: You have the floor,
7 Mr. Lederer.

8 MR. LEDERER: Mr. Chairman, I should
9 start by saying on behalf of everyone that the
10 situation that has arisen here is a matter of some
11 considerable importance as is often the case in
12 hearings of this magnitude.

13 A number of parties who were identi-
14 fied at the outset have not appeared regularly, and
15 I wish to inform the Board we have made some efforts
16 to contact all of them in order that they be advised
17 of the situation. We were able to contact
18 Ms Mansfield of the Ministry of Natural Resources
19 and she is here, at least she was.

20 We contacted two individuals with
21 respect to the Halton Regional Conservation Authority,
22 Mr. Olah, and also Mr. Olah's office is represented
23 by Maureen Galea, , from his office, who is here
24 this morning.

25 Apparently, I am not being heard.



1 I haven't said anything yet.

2 We did contact Mr. Colin Stevenson's
3 secretary. He is with the firm of Goodman and
4 Goodman, who has not been here yet at all, but has
5 clients in proximity to Site D and I think he has
6 had a student or an associate.

7 As far as I know, there is nobody
8 here from that firm.

9 We also contacted the secretary of
10 Mr. Leo Longo, who appeared at the outset of this
11 hearing on behalf of Azova Investments, and also the
12 secretary of Cumis, one of the two companies that
13 owns the property to the west of Site F.

14

15 ARGUMENT BY MR. LEDERER:

16 Mr. Chairman, you will recall at the
17 end of last day I was asked by Ms Tanner what
18 alternatives might be available to you in the cir-
19 cumstances, and I suggested that there really were
20 only two. That you continue as a Joint Board,
21 comprised of only two members, or that the Board
22 dissolves itself and we start again with a new
23 panel.

24 I would like to start these submis-
25 sions where I left off on Monday.



1 The fundamental premise, the route
2 of the submissions I make this morning is as it
3 has been throughout this hearing, that any ruling
4 which causes unreasonable delay is not something
5 which is acceptable or will be supported by the
6 Region. It is simply unpalatable for us. That
7 appears, I suppose, to lead us inexorably to the
8 conclusion that this panel of two members should
9 continue hearing the matter. Certainly the
10 Consolidated Hearings Act, as you suggested, sir,
11 foresees that possibility.

12 Section 4(4) of the Act, indicates
13 that the Joint Board shall be composed of one or
14 more members of either or both of the Environmental
15 Assessment Board and the Ontario Municipal Board.
16 In my submission, it is clear therefore, that there
17 need be no member of the Ontario Municipal Board here
18 at any time during the course of the hearing, nor
19 is there any particular magic to the number 3, that
20 the panel be made up of three members.

21 Section 4(9) deals with the issue
22 of what happens when a vacancy occurs. A majority
23 of the members of the Joint Board constitute a
24 quorum of the Joint Board. Where a vacancy occurs,
25 the members of the Joint Board, the establishing authority



1 that is a defined term, defined in Section 1(a),
2 I believe it is the Chairman of the Ontario Municipal
3 Board and the Environmental Assessment Board.

4 (a) confirm the existence of a
5 vacancy; and

6 (b) establish a number of members
7 that constitute a quorum of the Board.

8 It would appear that the Chairman
9 of these two Boards could confirm the vacancy and
10 make a quorum of one or the two and have the matter
11 proceed with a panel of two.

12 At first blush, I suppose it appears
13 that that could be ... I can indicate to the
14 Board that in seeking instructions with respect to
15 this matter, that we have given considerable thought
16 to whether I should simply stop now and sit down.

17 To do so, however, would presuppose
18 that we accept without concern, the idea that this
19 hearing simply proceed. I can only hope, sir ...

20 A SPEAKER: We cannot hear.

21 MR. LEDERER: I don't know why.

22 I can only hope, sir, that you will
23 understand that I mean absolutely no disrespect
24 in what I am about to say.

25 I have decided, I suppose, that in



1 the circumstances, candour rather than discretion,
2 is the better part of valour. This is an important
3 case. It is important because we are dealing with
4 an essential service. It is important because
5 of the torturous route the Region of Halton has had
6 to travel to get here.

7 I would remind that Board that we
8 have been at this for over 10 years. It is
9 important because of the incredible sums of money
10 that had to be spent up to this point. It is
11 important because the Environmental Assessment Act
12 which is the centrepiece of this proceeding, has
13 been the subject of very little interpretation.

14 Many of the issues and matters of
15 legal interpretation that will arise here have
16 never been canvassed before. My recollection is
17 that Ms Tanner at the outset of this hearing noted
18 that the Board was aware that what happened here
19 was going to have considerable impact in the way
20 future landfill applications are dealt with in the
21 Province of Ontario.

22 With that in mind, I have spent
23 some time considering what it is that we have lost
24 as a result of Mr. Lancaster's illness.

25 Mr. Lancaster has been a member of



1 the Ontario Municipal Board for many years. He
2 has been involved and conducted a large number of
3 hearings. He has, in my submission, the knowledge
4 and understanding and feeling for this kind of
5 process that really comes with experience.

6 Now, I was once told in law school
7 that a term of great respect is what lawyers use
8 when they mean exactly the opposite. I do not
9 use it that way today. With great respect,
10 Dr. Kingham, we all know that you were appointed
11 to this Board just prior to this hearing commencing
12 and have not sat on a Board before. I don't
13 know Ms Tanner's experience with respect to that.
14 My presumption is that as a part-time member, it
15 has not yet been that great.

16 In my submission, this system of
17 decision-making is not operating at its best when
18 the parties involved, frankly I am not certain it
19 is even fair to you, if it asks you to make or
20 deal with these important issues, both procedural
21 and substantive, without the assistance and
22 contribution of a more experienced Board member.

23 It is a little like asking a freshly
24 appointed member of the Supreme Court of Ontario
25 to conduct a Charter of Rights matter as his first



1 trial or conduct an important and complex case.

2 Despite the fact that the
3 Consolidated Hearings Act clearly perceives the
4 possibility, the Region is concerned that this
5 matter, at best, ought not to proceed in the
6 absence of an Ontario Municipal Board member who
7 brings to this the original jurisdiction . to deal
8 with traditional planning issues, meshed matters
9 of municipal finance, both of which will be raised
10 and that is an observation which you, sir, made
11 at the end of the day, with a request or questions
12 as to whether or not planning matters might be in
13 some way segregated out of this hearing.

14 All of this has led us, over the
15 last three days, to take part in efforts to find
16 a compromise that would allow for the appointment
17 of an Ontario Municipal Board member and yet not
18 require us to begin again.

19 It seems clear to me, and I wish
20 to be entirely frank about this, it seems to me
21 that such a proposition is at best problematic.
22 Certainly there is no specific provision allowing
23 for it as there is the confirmation of this panel
24 to continue this hearing.

25 Section 12(3) of the Consolidated



1 Hearings Act gives one example of a section which
2 tends to mitigate against the idea. That is
3 the section which says:

4 "No member of a Joint Board
5 should participate in a decision
6 unless he has heard all the
7 evidence."

8 The most obvious answer would
9 simply be for all parties to consent and over the
10 course of the last three days, we have proposed
11 that the parties consent to the appointment of a
12 new Ontario Municipal Board member, that we
13 adjourn this proceeding for a brief period of
14 time ending no later than the beginning of September.
15 I would remind the Board that we were going to take
16 five weeks off in that period of time in any event.

17 That over the course of that period
18 of time, have the new OMB member review the record
19 at least to the end of Ms Schiff's evidence and
20 the parties then consent to have that evidence form
21 part of the record and in effect to take the word
22 "heard" as it is contained in Section 12(3)
23 interpreted to mean "read."

24 Now, the simple fact is that consent
25 with respect to that proposal has not been



1 forthcoming.

2 We have moved on and looked at the
3 deferrals section of the Consolidated Hearings Act.
4 That section, Mr. Chairman, you will know as
5 Section 5(3).

6 "A Joint Board may defer any
7 matter or part of any matter:
8 (a) to be heard and decided
9 under this Act by the Joint
10 Board, or another Joint Board at
11 another date, or
12 (b) to be decided by the tribunal
13 body or person that but for this
14 Act would have the power or right
15 or duty to deal with the matter
16 or part under any Act set out
17 in the schedule or prescribed
18 in the regulation."

19 We have considered two possibilities.

20 One is that we refer the whole
21 matter to a new panel. When appointed, that
22 panel would consist of the two present members of
23 this Board, plus another member of the Ontario
24 Municipal Board. The problem with this
25 obviously is that it still requires consent, it



1 requires consent of the parties to have the
2 transcript form part of the record and again,
3 consent is not forthcoming.

4 We have also considered another
5 variation of that, I confess this is a bit of an
6 abstraction, a little bit difficult to follow,
7 but what we have considered is whether or not
8 planning matters might be deferred to another
9 Board.

10 In my respectful submission, we
11 cannot segregate planning matters out here in
12 terms of evidence and have two hearings that dealt
13 with largely the same matters. What we would
14 have, in effect, is two Boards, one made up of
15 two people dealing with environmental matters,
16 and another of three dealing with planning matters.
17 In order for us to avoid the delay, it would be
18 necessary for the hearings to be conducted at the
19 same time. That would give us the advantage
20 of having the OMB member here to help us with
21 procedural matters. He or she would have to
22 disassociate him or herself from the decision with
23 respect to the environmental assessment matters.
24 The problem here again is self-evident, it requires
25 consent, it probably requires consent to



1 proceed in one hearing to, in effect, consolidate
2 matters ... Probably again, it requires the
3 consent to have the evidence referred to this Board
4 so again, we don't have the consent. We are
5 here without it and it would appear we cannot
6 proceed in this way.

7 All of this takes me to this:
8 We would like to have a new OMB member appointed.
9 It seems to us, however, that consent is needed
10 and we don't have it. So that really leaves us
11 in this position. We cannot, as I said at the
12 outset, will not support anything that requires
13 us to begin again.

14 My instructions are to do whatever
15 is possible without delay to have an Ontario
16 Municipal Board member introduced to this proceeding.
17 Without consent that does not appear to be possible.
18 That being the case, this matter should proceed
19 with a panel of two, the two present members.
20 If that is the way this develops, and of course
21 we want to hear from everybody else, we have
22 considered whether or not there is any other way
23 of ameliorating the concerns that I have raised.

24 I would ask the Board to proceed
25 in this way, to approach the Attorney-General,



1 perhaps through Mr. Marshall, so that we can have
2 a lawyer here essentially every day, one with
3 experience to assist you with those questions.
4 There is nothing unusual about such a proceeding,
5 or proceeding in that way. There are a number
6 of examples of where it has happened in the past.
7 I can tell you for example that in what I have
8 professionally come to call, in my other life, my years
9 at the office where Mr. Marshall works, I have
10 from time to time been called upon to perform
11 this function.

12 To try and bring this back to what
13 really is the beginning of our problems, it is with
14 some irony that I have reflected over the past few
15 days that the last time I did this, was on a panel
16 on which Mr. Lancaster's wife was a member. I
17 would ask the Board to seriously consider that,
18 and proceed in this way.

19 Thank you.

20 DR. KINGHAM: Thank you,

21 Mr. Lederer. Mr. Leitch.

22 ARGUMENT BY MR. LEITCH:

23 MR. LEITCH: From my accustomed
24 position, Dr. Kingham, I will go second.

25 I can only echo what my friend,
Mr. Lederer, has said about the importance of this



1 case. The difficulty which the Chairman's illness
2 has raised, and I too wish this hearing to continue
3 without their being the necessity of it starting
4 over again and hearing that evidence which we have
5 heard in the past six weeks. My instructions
6 from my client are to do whatever is reasonable to
7 attain that objective. Mr. Lederer has, I
8 think, given a fair review of the powers that
9 you have. I will go over them again, because
10 while I agree with much of what he said, I depart
11 from the necessity of unanimous consent in relation
12 to the appointment of a new member.

13 It will be my submission that the
14 authority exists under the Act in several sections
15 for a new member of the Municipal Board to be
16 appointed to be allowed on terms and conditions,
17 to read the evidence which has already been led
18 and to continue in several capacities from that
19 point forward and I will come to that presently.

20 The starting point, though, is
21 that my client wishes to have the experience and
22 judgment which an Ontario Municipal Board member
23 can bring to the process throughout the process.

24 We were delighted with the compo-
25 sition of the panel. I can say that without



1 reservation. I felt that the panel had all the
2 balance and expertise it needed to determine this
3 important matter for the citizens of Halton.
4 Having said that, when the Chairman became ill
5 there was concern because, as you yourself, sir,
6 expressed on Monday, you wanted us to think about
7 some way in which perhaps the planning issues
8 could be divided from the environmental issues
9 and dealt with separately.

10 I think your expressed concern
11 at that time was right at the heart of the issue
12 which we are faced with now. The heart of the
13 issue is to restore the balance of the panel which
14 the establishing authority had gone to consider-
15 able difficulty to ensure was there. That is
16 our objective to restore that balance and we would
17 consent to any of the modes of doing that that my
18 friend, Mr. Lederer, spoke of. My client is
19 prepared to consent to any reasonable suggestion
20 in terms of restoring balance and getting on with
21 this hearing.

22 Now, turning to the powers which
23 are conferred under the Statute.

24 Firstly, a decision must be made
25 as to whether or not the vacancy which now exists



1 should be confirmed. I am not able to do any more
2 than say that the medical information which you
3 presently have will undoubtedly become clearer as
4 time progresses and I would expect that in a matter
5 of weeks, the prognosis would be less guarded
6 perhaps than it is now.

7 I don't think that it is necessary
8 or even appropriate to have the vacancy confirmed
9 in haste. I say that for two reasons.

10 One is that Mr. Lancaster has heard
11 all the evidence. It would be desirable if he
12 could return to the hearing in health. I think
13 it would be desirable both with respect to the
14 decision to be made and perhaps also from his own
15 personal position. Heart attacks can be
16 crippling both physically and psychologically.
17 It seems to me that there shouldn't be a confirma-
18 tion in haste because it may be that part of his
19 recovery involves his state of mind in relation
20 to a return to work.

21 Of course, I accept this hearing
22 must go on but my friend has pointed out, much of
23 the summer has already been dedicated to time off
24 and we would lose, I think, approximately three
25 weeks' evidence if we let the time pass to see



1 how his medical situation developed.

2 Once it is necessary for the
3 vacancy to be confirmed, it is my submission that
4 you can do essentially two things. The
5 establishing authority can confirm the existence
6 and then order that the hearing continue with the
7 remaining members of the panel and can then est-
8 ablish the number of members to constitute a quorum
9 and matters can proceed. That authority is in
10 Section 4 of the Consolidated Hearings Act.

11 The other authority is contained
12 in Section 5 which is the deferral section. I
13 think that a combination of the powers in Section 5
14 and the other powers under the Act is an answer.
15 It is my submission that it does not require consent
16 and I say so for this reason.

17 Section 5(3) gives the Board the
18 authority to defer a matter or part of a matter
19 in two ways. (3)(a) is the first way. The
20 matter or part of a matter can be deferred to be
21 heard and decided under the Act by the Joint Board
22 or another Joint Board at another date.

23 Now, in essence, that allows you
24 to hear parts of the matters before you at one
25 time and consecutively hear other parts of the



1 matter if it is your choice to do that. It gives
2 flexibility as to how you hear the case. Under
3 Subsection (3) (b), you have the power to take matters
4 which are of one kind and return them to the
5 tribunal from whence they came. There, what
6 I understand the Act to say is that you can split
7 matters of planning and my friend suggested that
8 you could constitute a new Joint Board which would
9 hear the planning matters as a three-person Board
10 and the present Board would continue as a two-
11 member Board and hear the environmental matters,
12 if I can call them that.

13 That is not the only way you can
14 do it. There is a lot more flexibility and it is
15 my submission that you also defer the planning
16 issues to a single member of the Ontario Municipal
17 Board, sitting as a single member of the Ontario
18 Municipal Board, but also sitting with you in the
19 course of this hearing.

20 When you do that, or any combination
21 of those things which allows you to fill the chair
22 that I perceive makes you and my client feel
23 uncomfortable, you can put terms and conditions
24 on how the matter will proceed, and the authority
25 for that is in Section 5(4) where it says that



1 the Joint Board may impose such terms and condi-
2 tions or give directions or both in respect of the
3 proceedings or matter the Board considers
4 proper.

5 The Board, tribunal, body or
6 person to whom the matter is deferred has the
7 power to decide the matter in accordance with the
8 terms. If you feel that the better course is
9 to separate out the planning issues and defer them
10 to a member of the Municipal Board you can do so
11 in a safety net of conditions which could make this
12 case go forward, safe from review in the courts.
13 I think that that is something that is a real
14 possibility and something to be avoided.

15 Another matter of assistance which
16 you might consider in relation to the part of the
17 case that has already been heard is Section 10 of
18 the Act which gives you the power to appoint persons
19 having technical, special knowledge of any matter
20 which would require that he report to the Board and
21 here are the words which I specifically want to
22 refer to and to assist the Board in any capacity
23 in respect of any matter before it.

24 My submission is that used creatively
25 that is a section which allows you to clothe the



1 person who fills the empty chair with a legal right
2 to look at the matters which have gone before and
3 to give you advice and assistance with respect to
4 them even though that person may not be able to
5 take part in the decision.

6 I have a feeling of unease with
7 respect to the turn of events in the case because,
8 having been familiar with this matter for a number
9 of years, and having a general familiarity with
10 administrative matters, there is a real potential
11 for delay in this case.

12 It is my submission that what the
13 Board should do is move to head off that delay.
14 Sometimes it is necessary to have a short delay
15 to do that. My friend, Eleanor Cronk, is going to
16 speak more fully to this aspect of the submission
17 than I will, but under the Act you have the right
18 to state a case to the court for direction. It
19 is my submission that you should consider whether
20 you ought to state the case as to the decision that
21 is to be made as to how we proceed from here,
22 assuming that that case can be stated in an
23 expeditious way and dealt with in an expeditious
24 way.

25 The section that I am referring to



1 is Section 11, which gives you the right to
2 state a case and direct it to the Divisional Court
3 on any question that in the opinion of the Board
4 is a question of law requiring the Divisional
5 Court to hear it to determine the stated case.

6 This is an important decision in
7 this case and it is my submission that if you
8 wish to use the array of powers in the Act to
9 fill the chair that you want to fill that you
10 should consider stating a case to the court so
11 that the legal decision which you may request as
12 to how you proceed, you would have authority from
13 the court and that, in my submission, would save
14 a great deal of time.

15 I think those essentially are
16 the submissions I will make at this time. I
17 think Eleanor Cronk will develop that point more
18 fully.

19 Thank you.

20 DR. KINGHAM: Thank you,
21 Mr. Leitch. Do you want to proceed?

22 MR. MARSHALL: Mr. Chairman, if I
23 can intervene, would it be possible for me for
24 the purposes of clarification so that I understand
25 -- so that the Board is better informed about



1 some of those submissions, if I could engage
2 in some brief sort of interchange with counsel
3 after they have made their submissions.

4 MS CRONK: Sir, if I could make
5 a suggestion in anticipation perhaps of what
6 Mr. Marshall's concerns might be. If we would
7 be permitted to make our submissions to you, then
8 obviously, as adviser and counsel to the Board,
9 Mr. Marshall might have inquiries that could be
10 answered to be of assistance to you and indeed to
11 make his own submissions. But, I think it would
12 be appropriate in my submission for you to hear
13 what we have to say at this time so that some of
14 your inquiries may be in fact answered, Mr. Marshall,
15 rather than interjecting.

16 MR. MARSHALL: That is fine.

17 DR. KINGHAM: I think we will go
18 that route. In fact, we would like to hear the
19 views of all counsel, and of course that gives
20 you a clean-up spot, Mr. Marshall.

21 MS CRONK: Usually, you have to
22 fight for that, but that was a freebie.

23 DR. KINGHAM: Ms Cronk.
24
25



1 ARGUMENT BY MS CRONK:

2 Dr. Kingham, Ms Tanner, you have
3 had the -- I hope the assistance of Mr. Lederer
4 and Mr. Leitch as to what procedural options may
5 in fact be available to you under the Act.

6 Clearly, from the submissions made
7 by Mr. Leitch, you know that I am going to urge
8 upon you a serious consideration of one of those
9 as being the preferred course given all of the
10 circumstances.

11 Before addressing that, if I could
12 just back up briefly for one moment.

13 The issue, the threshold issue,
14 if I could describe it that way, is whether given
15 the unfortunate circumstances that we have, this
16 Board has legal jurisdiction to continue as a panel
17 of two. Very serious consideration has been
18 given to that issue by all counsel in the room
19 and my position, so that it is clear from the
20 outset, is that the Consolidated Hearings Act
21 makes it very clear that a quorum of two is now
22 constituted and that a decision of that quorum
23 is a decision of the Joint Board and that therefore
24 as a technical jurisdictional matter under the
25 Act, this panel would have the legal authority to



1 proceed, but it is also my submission to you,
2 and I suspect you will hear a number of submissions
3 on that issue, so I tell you now that at least for
4 me, that is not in dispute. That is an area of
5 agreement. But in my submission to you, the
6 matter doesn't end there because although tech-
7 nically that is the case under the Statute, the
8 Statute has been drafted specifically to take a
9 contingency of this kind into mind. Many aren't
10 but this one does have provisions of that kind.

11 The problem that arises in this
12 case is that jurisdiction may be lost although it
13 exists in the first instance under the Statute,
14 if the appropriate type of expertise required to
15 decide the full matters before you, is absent for
16 the balance of the hearing.

17 I say that -- perhaps the best way
18 to characterize the legal issue before you, in
19 my terms is this. The issue is not whether you
20 can proceed in a jurisdictional sense, but in my
21 submission, in the circumstances of this case
22 whether you ought to proceed. That is the real
23 issue in my submission.

24 The reason for that is, certainly
25 as Ms Tanner and perhaps you, sir, Dr. Kingham,



1 will be aware, there are many cases where the issue
2 of natural justice and fairness arises and where
3 it can be said in administrative law that the
4 proceedings of the tribunal have, although
5 inadvertently and unintentionally, deprived all
6 the parties to the hearing a fair consideration
7 of each and every matter of which the Board is
8 seized, jurisdiction can be lost although it is
9 there technically in the first instance.

10 My concern in this case, if I could
11 put it to you very clearly, is that were this
12 Board to decide now to continue as a panel of two
13 and rely on the quorum provisions of the Act,
14 challenge could be brought by way of judicial
15 review to the Divisional Court by any party to
16 these proceedings.

17 The substance of the argument would
18 be that the absence of Ontario Municipal Board input
19 to the decisions which you have to make to a
20 consideration of weeks and weeks of evidence, would
21 deprive the parties to the hearing of a full and
22 fair hearing. That argument exists, I don't
23 pass on the merits, there are counsel today who
24 made that determination for you, but I tell you
25 in my submission, it is available.



1 In the context of the complexity and importance of
2 this hearing, that is a very real problem because
3 if a judicial review challenge were to be brought,
4 it could be brought now, it could be brought later
5 after many more weeks of evidence were heard.

6 If lost, it could be appealed, if
7 the appeal were successful, it could be 15 weeks
8 of evidence, 18 weeks of evidence, not 6. A
9 very practical problem that goes directly to jurisdiction.

10 As many in the room will know, there
11 is a procedure that exists that permits an applicant
12 seeking judicial review, to seek an order from the
13 courts to stay the proceedings of the Board pending
14 the outcome of that judicial review application.

15 So, in talking about a potential
16 for a court challenge, you could be talking about
17 a challenge that took the forum of seeking
18 judicial review, but also an interim order of
19 prohibition preventing this Board from continuing
20 pending the outcome of the judicial review applica-
21 tion which itself is subject to appeal.

22 Without going through extensive
23 submissions on administrative law, the delay
24 implications on that are simply horrendous.

25 Having said that, if I could get



1 back to something that Mr. Lederer said, and I
2 speak for all counsel, I believe, and they will
3 correct me quickly if I don't. A very genuine
4 effort has been made over the last 48 hours to
5 try and arrive at some compromise position that
6 will provide procedural, and in my submission,
7 substantive fairness to all the parties to the
8 hearing, but minimize delay.

9 We came very close. Mr. Lederer
10 said that consent was not forthcoming. I am not
11 going to dwell on the details of it, but I would
12 make it clear that consent was forthcoming from
13 many but not from all.

14 That leaves us then in this position
15 -- I have suggested to you the **issue** is not
16 a jurisdictional one and whether you have the
17 authority to proceed, it's whether rather in the
18 circumstances of this case, the planning issues
19 that are here, should proceed. You have before
20 you, the Notice of Hearing, and I don't propose
21 to take considerable time going through it, but
22 a scant glance at the Notice of Hearing will
23 identify for you that there is not one, not two,
24 not three, but a myriad of issues that either
25 directly are planning issues, or are collateral



1 to planning determinations, decision-making in the
2 context of the Statutory Powers Procedures Act.

3 That being the case, the composition
4 of the Board to deal with the planning issues is
5 essential. I suggest then really to you that
6 the Board should not be proceeding as a panel of
7 two at this time if there is another alternative
8 available that could first be explored to see if
9 it would provide procedural protection and in my
10 submission there is none.

11 Let me suggest that there is more
12 than the problem of expertise. I share all of
13 the comments Mr. Lederer made in the sense of the
14 reasons for which these remarks are being made and
15 in respect of which they are being generated. It
16 is more than a problem of does the Board, if it
17 continues, have the expertise and therefore the
18 jurisdiction to proceed.

19 Let me suggest two practical
20 problems that might arise.

21 The first is, that were the panel,
22 to continue, of two, somewhere down the line it is
23 possible we could have an expert decision
24 contrareviewed at the end of the day. Certainly
25 no one in this room would suggest that that was



1 going to be the situation and they would assure
2 their clients it was not going to be.

3 Similarly, the Board is in that
4 position as well. The law is very clear that
5 in the event of a split decision, circumstances
6 of this kind, a rehearing is mandatory. That
7 would mean quite simply that we could go through
8 this entire hearing, hear all the evidence and on
9 a bona fide good faith rational exploration of
10 the evidence and in the decision-making process it
11 might come to that. It might not, but it is
12 a possibility that as counsel, we are obliged to
13 consider for our clients and I feel obliged to
14 bring it to your attention.

15 There is also another practical
16 point. Contingencies sometimes arise, and some-
17 times they don't. If you had asked me four weeks
18 ago, I didn't think we would be dealing with this
19 one. That is if a panel of two were to continue
20 there is no safety net in terms of further evidence
21 where one of the two remaining members become
22 unable to serve for a period of time during the
23 course of the hearing and again we would have a
24 major problem. That is the danger of a panel
25 of two.



1 Having said all that, I return again
2 to the legal position that this panel as a quorum
3 of two has jurisdiction to proceed. My concern
4 is you may lose that jurisdiction given the
5 circumstances of this case.

6 We did explore, amongst counsel,
7 a number of possible solutions. I subscribe to
8 the submissions that Mr. Leitch has made to you
9 concerning deferrment powers under Section 5 of
10 the Act and indeed the proposal that you defer not
11 part but all of the matters that are now before
12 you, to a new Board, the composition of which would
13 include the two present members and a third member
14 from the Ontario Municipal Board is very attractive,
15 procedurally understandable, in my submission.

16
17 First, is the problem of the exper-
18 tise and the divided view at the end of the day
19 and the possibility of further inability to serve.
20 All of those problems disappear. Procedurally,
21 in my submission, you have the clear legal authority,
22 jurisdiction, to do that under the Act. You
23 could proceed in that fashion, but that doesn't
24 solve Mr. Lederer's concern and my client's and
25 everyone else's in the room, what do we do then



1 about starting again after six weeks of evidence,
2 how do we handle that, and you are driven back
3 time and time again to the proposal that transcripts
4 of the evidence to date -- at least those witnesses
5 whose evidence has been completed, should be used
6 and read by that third member. Could I put that
7 in a context for you?

8 The use of transcripts for that
9 purpose is not only not unprecedented, but it is
10 not abnormal. In a courtroom situation, could
11 I give you the benefit of a recent example?

12 I know there are distinctions to
13 be made between the functionings of a Board of
14 this kind and the court, but nonetheless, in the recent
15 Catholic School Funding case, it went before the
16 Ontario Court of Appeal. Mr. Justice Holden
17 was a member of the original panel who heard
18 argument.

19 Argument had been addressed before
20 him for two-and-a-half days when he was unexpectedly
21 taken ill. Mr. Justice Corey assumed his position
22 on the panel and with the consent of the parties,
23 Mr. Justice Corey read the transcripts of argument
24 to that point before the case proceeded and
25 obviously, a decision has been rendered and it



1 has now been taken to the Supreme Court of Canada
2 as you are probably aware. The authority to do
3 that in a court situation is found under the
4 Courts of Justice Act and to the extent of my
5 analogy, it may be of assistance to you. I would
6 simply like to provide to you the section of the
7 Act.

8 Section 133 of the Courts of
9 Justice Act provides for the appointment or
10 introduction of a new judge in the circumstances
11 where a judge has become incapacitated or is
12 unable to proceed to complete the hearing. The
13 various -- that appointment or introduction is made
14 by the Chief Judge of the applicable court and
15 it can happen in situations where a judge has
16 commenced a hearing together with other judges.

17 I am looking at Subsection (3)
18 and is for any reason unable to participate in the
19 giving of the decision or does not participate in
20 the giving of the decision or dies before the
21 decision is given. The authority exists for
22 the remaining judges to complete the hearing and
23 give a decision of the court, but if the judges
24 are equally divided, the parties may make a motion to
25 the Chief Judge for an order that the matter be reheard.



1 Similarly, judges sitting alone
2 and commences on a hearing and is unable to continue,
3 a motion may be made for the matter to be reheard,
4 but the section I would like you to look at in
5 particular, if you would, is Subsection (7).

6 It essentially provides that where
7 an order for a rehearing is made, a Chief Judge
8 may direct a rehearing be conducted on the transcript
9 of evidence taken at the original hearing, subject
10 to the discretion of the court at the rehearing
11 to recall the witness or require further evidence.

12 Leaving aside just for the moment
13 the issue of consent and how you might do it
14 without consent, that is the procedure that I urge
15 you to follow in this case. The Ontario Municipal
16 Board member would form part of the new panel which
17 would have provided to him or her, a complete set
18 of the transcripts of the completed evidence to date
19 and if he or she or any other member of the panel
20 when the hearing resumes, felt it appropriate to
21 recall the witness or any parties, that option is
22 available.

23 I referred you to the Catholic
24 School Funding case simply to demonstrate that the pro-
25 cedure in this province is not unprecedented. In situations



1 requiring it, it has in fact been followed.

2 Those after me will be quick to
3 point out. Ms Cronk, yes that occurred on consent,
4 yes it was so and it is why consent was sought.
5 We tried to get that over the past few days.

6 In my submission, however, this
7 Board has absolute jurisdiction under its Statute
8 on its own procedure in its own process. You
9 will find that in Section 7 of the Act. It makes
10 it very clear, Section 7(3) that subject to this
11 Act and the regulations a Joint Board may determine
12 its own practice and procedure. Where that not
13 there, this Board is subject to the Statutory
14 Powers Procedures Act and I can provide you with
15 those sections, but I don't think it is necessary.
16 The same jurisdiction is given.

17 You have clear control over your own process and
18 your own procedure. The manner of receipt of evidence
19 and the manner of dealing with any potential
20 prejudice that may attach to the receipt of evidence
21 is a process -- is a procedural issue and it is
22 within the jurisdiction of this Board under both
23 Statutes. The Consolidated Hearings Act and the Statutory
24 Powers Procedures Act to regulate whether evidence
25 will be received in the mode of transcripts and I



1 give you the ~~pro~~visions of the Courts of Justice Act,
2 not because they apply to this Board, but because
3 there is an analogous procedure that clearly has
4 been designed to prevent any prejudice and you will
5 note that it does not contemplate the requirement
6 of consent.

7 Section 133 requires that the Chief
8 Judge impose that and there are procedural protections
9 in the event that consent is forthcoming. It does
10 not say the procedure can only be followed where consent is
11 available.

12 Having said that, I am not entirely
13 happy in urging upon you that procedure be followed
14 where consent is not forthcoming when I think in
15 my submission there is another alternative that you
16 can look to.

17 I have indicated to you already that
18 a decision by the establishing authority for this
19 panel to continue alone could be subject to a court
20 challenge. The decision, I have to tell you in
21 fairness as well, the decision to defer all of the
22 matters before you to a new panel comprised in the
23 way I have suggested with the use of transcript
24 evidence could be similarly challenged. That
25 challenge would go by way of judicial review.
There are jurisdictional arguments that could be



1 made, procedural fairness, natural justice, subject
2 to appeal.

3 Again, subject to the same problem
4 of potential delay. It seems to me then that
5 the solution I am urging upon you is that you seek
6 directions from the court as to the fairest method
7 of proceeding in the circumstances.

8 As it happens, this is not always
9 the case, but as it happens under the Statute which
10 governs you, this Board, there is a mechanism
11 available. It is the mechanism that Mr. Leitch
12 had referred to. That is the referral of a stated
13 case to the Divisional Court.

14 If you could briefly look at Section
15 11 -- Section 11(1) provides for the mechanism of
16 stating the case. Certainly, as most of us know,
17 that simply means that you compose a question for
18 the court, the Divisional Court in this instance
19 to determine. Traditional mode is in a "yes" or
20 "no" answer but the nature of the question is a
21 method of seeking directions or stating or posing
22 a question to the court.

23 Subsection (1) provides that a Joint
24 Board may state a case in writing for the opinion
25 of the Divisional Court upon any question that, in



1 the opinion of this Board is a question of law.

2 On a practical level, we have had
3 to consider how quickly that could be done. What
4 is the advantage of doing it? The Divisional
5 Court, I can inform the panel, is sitting for two
6 weeks in the month of July and two weeks in the
7 month of August. There is provision, as the
8 panel will know, for a sufficiently urgent and
9 in exceptional cases where a single member of the
10 Divisional Court can entertain urgent
11 applications.

12 The procedure that could be followed,
13 I am suggesting to you, is that you consider,
14 that your own counsel, together with counsel rep-
15 resenting major parties would speak to the Chief
16 Justice to have the matter heard by a member of the
17 Divisional Court during the July sittings or at the
18 very worst during the August sittings, so that
19 directions could be obtained before the end of the
20 summer.

21 If that procedure is followed, in
22 my submission, it has a number of advantages.

23 First, it minimizes the possibility
24 of court challenge by whatever other decision was
25 made if the panel continues alone.



1 Too, if the matter is deferred they
2 are all vulnerable to a court challenge. This
3 approach would minimize that.

4 Secondly, it minimizes the loss
5 of time involved, because as Mr. Leitch has already
6 alluded to, between now and September 1st, we had
7 four weeks of hearing time left in any event as
8 the summer holidays were scheduled. As it
9 happens, because the court will be in session, it
10 is sitting, this matter could be dealt with and
11 the decision could be available. In matters of
12 urgency, it is not uncommon to be dealt with this
13 quickly. A decision to have the matter dealt
14 with before we are required to resume, depending
15 on the outcome, that would allow the establishing
16 authority to make its decision as to the appropriate
17 manner in which to proceed and all of that could
18 happen before September.

19 If it were to be the case that the
20 court confirmed you had jurisdiction to introduce
21 now, a member of the Ontario Municipal Board, that
22 would allow reading time and the transcripts could
23 be available and that process could start.

24 The time, from a merits point of
25 view, in my submission, given the very serious



1 concerns that parties have as to either of the
2 two approaches I have put before you of proceeding
3 in either fashion and given the very serious
4 possibility that a court challenge would later
5 be brought at a time when considerable cost,
6 incremental cost from where we are today, would be
7 incurred. I would urge upon you most strongly,
8 that you consider seeking court directions as
9 to your jurisdiction under various alternatives.

10 The language of the questions to
11 be posed, is a matter for the Board's determination.
12 You have control over the case you state and
13 entertain submissions from counsel as to what the
14 language of this question should be and of course
15 you have your own adviser available to assist you
16 should you feel that appropriate.

17 I strongly urge upon you that you
18 consider that option, thank you.

19 DR. KINGHAM: Thank you very much,
20 Ms Cronk.

21 Mr. Garrod.

22
23 ARGUMENT BY MR. GARROD:

24 Thank you, sir. I will try not
25 to be repetitive. I do have some submissions



1 I want to bring to your attention that have not
2 been emphasized in the way that I would like to
3 emphasize them.

4 I agree with the points that have
5 been made to you regarding the importance of this
6 case both in the public interest as has been
7 indicated and as a precedent for future cases
8 of this sort. I would also like to draw to
9 your attention, it is also very important from
10 the point of view of certain individuals,
11 particularly my clients who, if you will recall,
12 will be expropriated in the event that Site "D"
13 is approved as a result of this process.

14 As I have, I think, made it clear
15 previously, my clients do not want to lose their
16 homes and properties and in my submission, they are
17 entitled to a process that is as fair and as
18 balanced as can reasonably be achieved under all
19 of the circumstances. It is for those reasons
20 that I urge upon you, the solution, a solution
21 that would involve filling the vacant chair with
22 an experienced member of the Ontario Municipal
23 Board.

24 It is my submission that the right
25 to expropriate people in our society is an



1 extraordinary power that is given, that people's
2 rights are protected under Statute in a way that
3 does not protect other rights that are not
4 considered as fundamental. I think that is
5 an indication of the seriousness with which our
6 society views the displacement of people from
7 their properties and homes against their will.
8 I think that is -- ties in with the argument
9 very strongly that this must be a fair and
10 balanced process and give complete and proper
11 consideration to those interests as well as the
12 larger public interest that is involved here.

13 As Mr. Leitch indicated, my
14 clients were also very pleased with the original
15 makeup of this panel. They felt that there was
16 a good blend of expertise, a good balance to
17 consider the various environmental and planning
18 matters that you are charged with. There is a
19 considerable amount of concern that that balance
20 has been disrupted in a way that could prejudice
21 the outcome of their case before you.

22 Much of our case is a planning
23 case and in those sorts of traditional terms,
24 much of the case is, of course, also are environ-
25 mental and technical.



1 I have taken the opportunity to do
2 a brief review of the notice that was given by the
3 proponent to the Hearings Registrar and of the
4 12 hearings that are listed in that notice that
5 are or may be required, and that are being con-
6 solidated in this matter. By my count, there
7 are six of those twelve which are matters which
8 would normally be heard and determined by the
9 Ontario Municipal Board. Three of them are
10 matters that would normally be heard and determined
11 or recommendations made by the Environmental
12 Assessment Board and the other three are -- if you
13 like -- miscellaneous matters, one of which the
14 Environmental Appeal Board would normally deal
15 with and one of which would be dealt with by the
16 Conservation Authority and one by an Inquiry
17 Officer.

18 I think it becomes clear from a
19 review of that that there is at least a very
20 substantial component of this matter that is before
21 the Joint Board, that is OMB turf or territory,
22 if I can put in those terms, matters which the
23 unique experience of the Ontario Municipal Board
24 members would normally be brought to bear.

25 It is my submission with respect



1 to administrative tribunals generally. The
2 purpose in having a number of distinctive
3 administrative tribunals is that each tribunal
4 develops a unique expertise and experience that
5 it can bring to bear and results in better
6 decision-making on the balance. That is why
7 we have specialized tribunals such as the
8 Environmental Assessment Board, such as the Ontario
9 Municipal Board and the multiple variety of others
10 that we have in this province.

11 If that specialization is not
12 important, we would not need all those different
13 Boards. We could in fact proceed with one
14 administrative Tribunal Board in the Province
15 of Ontario to hear all such matters. We could,
16 for example, there would be no need for a unique
17 Board like the Ontario Municipal Board, or a
18 unique Board that was the Environmental Assessment
19 Board, if it was considered unnecessary to have
20 those specializations.

21 If this Board, as it is sitting
22 here today, was considered sufficient to hear a
23 matter of the type of complexity that is before
24 you in this application, that so completely blends
25 planning and environmental matters, if this Board



1 in its present composition here today was adequate
2 for that task, there would be, in my submission,
3 a very good argument in future cases that there
4 would be no real need for that balance.

5 I think that would be a bad
6 precedent and direction for matters to take.

7 This is -- I think -- a particularly
8 complex matter. There are certainly others that
9 have been as complex in many ways, but there are
10 few, I think, that would be more complex if any.
11 I doubt whether there would be many in the future
12 that would be more complex. If there are any
13 cases which require the type of balance, blend
14 of expertise, in my submission, it is this one.
15 You have been pointed out Section 4(4) of the
16 Consolidated Hearings Act, which does allow the
17 Joint Board to be constituted by one or more members
18 of either or both Boards.

19 Ms Cronk indicated technically
20 that does, I think, legally allow the Board to be
21 constituted from either -- a panel to be constituted
22 from either Board alone. However, in my
23 submission, that must always be subject to the
24 considerations of fairness which Ms Cronk put
25 forward to you. If the circumstances are such



1 that that would be an unfair way to constitute
2 the Board, it is my submission that would result
3 in a loss of jurisdiction and I agree with Ms Cronk
4 in those submissions.

5 There are no doubt instances where the
6 issues before a Joint Board would be such that there would
7 be no significant unfairness in constituting the
8 Joint Board entirely from one Board or the other.
9 Matters, for example, where the only approvals that
10 were being sought were matters of the Environmental
11 Assessment Act, Environmental Protection Act,
12 perhaps Ontario Water Resources Act, things that
13 were normally dealt with, if you like, by panels
14 of the Environmental Assessment Board alone.
15 Those matters could be consolidated under the Act
16 and a Joint Board constituted with simply members
17 from the Environmental Assessment Board. I
18 don't believe there would be a reasonable argument
19 that was unfair.

20 Similarly, there will be matters
21 under the Planning Act, the Ontario Municipal Board
22 would normally deal with and obviously a Board
23 drawn from that Board without concerns regarding
24 fairness. That is not this case.

25 In my submission, in this case



1 given the complexity and the blend of those issues,
2 it would be unfair, unbalanced, at least there is
3 a very good argument, I believe, for a Board to
4 be constituted simply from one Board or the other.

5 I can tell you, Mr. Chairman, I
6 believe that if a Board, if a proposal were made
7 at the first instance to have a panel from only
8 one Board or the other in this case, I do not
9 believe I would be alone in making submissions that
10 that was not a fair constitution.

11 It is therefore my position,
12 Mr. Chairman, and I have consulted with all my
13 clients to the extent that that is possible when
14 you are representing a number of ratepayers groups
15 as well as individuals, but I have spent a
16 considerable amount of time in the last couple
17 of days to keep people in my groups and the
18 individuals I represent informed.

19 It is my position, arising out
20 of that, that we search -- that every possible
21 avenue be explored to reconstitute this Board
22 to restore the balance that it originally had
23 and this having been so unfortunately lost.

24 We are prepared to consent to any
25 of the arrangements that have been put before you,



1 suggested to you by Mr. Lederer, Mr. Leitch,
2 and Ms Cronk.

3 Our objective is to have this
4 matter decided by a full Board with as much balance
5 and expertise in the issues that are important
6 in terms of the future of my clients as is
7 possible.

8 I don't want to dwell in detail
9 on the merits of the particular options that are
10 available to you. Those have been outlined by
11 both Mr. Leitch and Ms Cronk in some detail.
12 I just indicate to you that I agree with their
13 positions and note that there are a number of ways
14 a creative solution can be obtained here.

15 There are a number of ways that
16 my clients' rights can be protected as well as
17 the interests of the public in terms of time,
18 expenditure and so on.

19 I would like to add that, given
20 the potential for court challenges to the various
21 courses of action, that I do support Ms Cronk's
22 recommendation to you about a stated case. I
23 think that is a wise and prudent course of action
24 in the circumstances. I think it is my submis-
25 sion that we all have the responsibility to try



1 to make this matter work the best way that it can.
2 Many of the matters which require consent, as
3 Ms Cronk has indicated, are merely procedural in
4 nature and it may well be the case that consent
5 -- if consent is not forthcoming, that those are
6 matters that the Board cannot impose -- impose
7 things which are not substantively unfair but
8 could impose procedures as long as the Board
9 itself was satisfied that those were fair pro-
10 cedures. If somebody took issue with that they
11 would have a challenge to try to make it out.

12 In my submission to you, the types
13 of procedures that a new Board member would receive
14 new evidence from transcript evidence and the right
15 to recall certain witnesses if he or she felt it
16 necessary to clarify certain points is eminently
17 fair.

18 It is one reflected, as Ms Cronk
19 said, in ... I think that would be a completely
20 fair way of proceeding from a process point of
21 view.

22 I do want to indicate that as much as
23 my clients would like to see this matter remedied by
24 a new member of the Board from the Ontario Municipal
25 Board be added, I feel we must reserve our right



1 to object to any suggestion that the Board continue
2 without that kind of constitution.

3 It would therefore be my position
4 that in the event that it is impossible, for
5 whatever reason, we are prepared to co-operate to
6 the fullest. If it is impossible for any reason
7 to reconstitute this Board to fill the vacancy,
8 then in my submission, the only fair way to proceed
9 from the point of view of the risk that my clients
10 face, is to start over. I say that very
11 reluctantly, but in the scale of things, I think
12 that, as Mr. Lederer has indicated, this matter
13 has been proceeding for approximately 10 years.
14 There are many millions of dollars that have
15 been spent to bring us to this point in time.
16 We have, we face the prospect of losing six weeks
17 and I don't deny some considerable amount of money.

18 My clients of course as well are
19 with limited resources and do not desire that to
20 happen. Neither do they desire to have an
21 increase in risk, no matter how slight, of proceeding
22 with a process that may not be as balanced as they
23 perceive it should be.

24 So, it must be our position that
25 if some kind of reasonable accommodation cannot be



1 achieved, our position would be that reluctantly
2 and unfortunately, the process should start again.

3 I don't believe that given the
4 potential for court challenges or any other course
5 of action it may well be that in the long run that
6 might turn out to be not only the most cost-effective
7 but the most time-saving procedure.

8 Those are my submissions,
9 Mr. Chairman.

10 DR. KINGHAM: Thank you, Mr. Garrod.
11 Mr. McQuaid.

12
13 ARGUMENT BY MR. McQUAID:

14 Dr. Kingham, Ms Tanner, in
15 considering what submissions to make to the two of
16 you about how we ought to proceed, Burlington is
17 submitting we ought to proceed.

18 I tried to analyse the two or
19 three criteria which you have heard reference to
20 and which have been alluded to this morning and
21 have been alluded to in the past by various counsel
22 on behalf of our municipalities. The criteria
23 have been, one, the Region has indicated they do
24 not want delay.
25



1 Secondly, we are all conscious of
2 the fact, particularly those of us who represent
3 municipal councils that costs should be kept to
4 a minimum.

5 There are three sets of taxpayers'
6 costs paid by municipalities and in addition we
7 have the ratepayers' funding of counsel as well.

8 A third item, which I think is of
9 important consideration and has been and certainly
10 the instructions I have been given, is that we are
11 to co-operate as a constituent municipality of the
12 Region, in getting a decision, an early decision
13 in these proceedings.

14 Now, having looked at that, I tried
15 to analyse both the jurisdiction that the Board has
16 and your respective Chairman, as it were, or the
17 respective Chairman of the two Boards as establishing
18 authorities, particularly in light of trying to
19 establish what is the responsible position from the
20 point of view of the Board as well as the parties
21 before you, the Region and municipalities, the
22 ratepayers' solicitors.

23 So, I bring those criteria forward
24 at the outset. Now, you have heard reference
25 to the fact that legally it would appear there is



1 good consensus. I think there is total consensus.
2 I may stand to be corrected, but I think there is
3 total consensus that there is clear jurisdiction
4 for this panel, a quorum of this panel, the two
5 members of this panel, to continue. That is
6 legally clear from the fact that under Section 4(7)
7 (ix), a majority constitutes a quorum. That
8 where a vacancy occurs the Statute seems to con-
9 template that the Board members -- that the Board
10 Chairman -- may confirm the existence of the vacancy
11 and then may say what the number of the quorum is.

12 If the two of you were to continue,
13 then some decision would have to be made as to what
14 is a quorum. I would submit in the circumstances
15 it could probably be two. It could be one. I
16 may say at the outset, Ms Cronk may have established
17 or raised a concern about what would happen if one
18 of the two of you -- God forbid something should
19 happen. That is, as Mr. Reesman said more recent-
20 ly, "A bridge I will jump off when I get to."
21 Let us not worry about that one.

22 This is the first time in 22 years
23 that I have had a member of a Board or of a court
24 actually be sick or take ill in a serious situation
25 such as Mr. Lancaster's situation during the course



1 of proceedings. It does not happen that often.

2 So, to come back to the main point,
3 it is clear you have jurisdiction to carry on.
4 When I analysed the issues that you would be called
5 upon to consider and you have had some of the issues,
6 some of the witnesses and so on to this point, when
7 you start to look at the issues that would have to
8 be addressed if the two of you were to continue.
9 They can be broken down into procedural aspects,
10 procedural issues, factual issues, and legal issues.
11 I call them legal issues arising from the nature
12 of the 12 headings that Mr. Garrod just alluded to.

13 To a large extent, the main
14 procedural issue which had to be addressed was
15 what order out of the starting gate we would be
16 when we were going to cross-examine witnesses. We
17 seem to have ironed that one out. I don't think
18 that would be one in any event that if it came up
19 that the two members would not be able to deal with.

20 When it comes to the legal issues,
21 the factual issues, I have absolutely no qualms
22 and I suppose I disassociate myself from the earlier
23 counsel who expressed any concerns about the two of
24 you being able to handle issues, either of a
25 factual or legal nature of the type that you may



1 encounter in this particular proceedings.

2 So, what I really propose to say
3 at the outset to give you more clear direction, my
4 position on behalf of the City is that you should
5 continue, that the submission we are making is that
6 the Joint Board should continue with the two members.
7 I think that it is not absolutely essential as
8 I read Subsection (9) where a vacancy occurs the
9 establishing authority may confirm the existence,
10 whether that is absolutely essential, could be
11 debated, but I think it would be sensible to do
12 so, and of course we should establish, the establish-
13 ing authority should establish the number of members
14 that constitutes a quorum of the Board. In my
15 submission, it would be the two of you.

16 Now, having said that, I have looked
17 through the issues that are remaining, the expertise
18 and so on that is remaining. Particularly, because
19 I am conscious as well being counsel to the City,
20 that there was the aspect of the OMB involvement
21 as well as the Environmental Assessment Board.

22 While those criteria I have indicated
23 are important, it is also important to make sure
24 that there is -- that the issues are going to be
25 handled. Although, I might say we are not, as



1 counsel, in a position to comment or not comment
2 on whether we are delighted that you were appointed
3 or not. Legally, we have to be delighted. We
4 cannot gerrymander or pick the members of the Board
5 at any time. The law is such that the OMB
6 Chairman or the Joint Chairman decides, the
7 presumption is that the proceedings will be handled
8 adequately by whoever is appointed.

9 So, importantly in this particular
10 situation, I have no qualms in saying that there
11 are not complicated legal issues in my mind, either
12 arising out of the Environmental Act or out of
13 the Ontario Municipal Act that could not be dealt
14 with by the two of you in the subsequent proceedings.
15 Most of the issues that are going to be dealt with
16 are factual, findings of fact, not legal, great
17 legal issues.

18 You will have to sift witnesses
19 which have been seen and heard by you, cross-
20 examined, you have to sift the various sciences
21 and disciplines but not legal issues. Those
22 are fact-binding issues.

23 In my submission, this Board, as
24 presently constituted, is adequately, more than
25 adequately able to deal with those factual, basic



1 factual issues. When it comes down to that you can down
2 the headings -- I just went down the headings,
3 that Mr. Garrod indicated he had. I did not
4 get the same number as it were, environmental
5 versus planning issues. I suppose we could have
6 disagreement over that. There are, there is
7 really, the Town of Milton Official Plan, and it's
8 only by-law issue, there is the debenture issue.
9 Those particular matters, in my submission, follow
10 the determination of environmental in way of sifting
11 the environmental issues. These are not compli-
12 cated drafting of documents of Official Plan or a
13 consolidated by-law or something of that nature.

14 These zoning matters or planning
15 matters follow, in my submission, in the event of
16 whether you decide it is "D" or "F" or "D" and "F"
17 or whatever is available to you at the time you are
18 finished. It follows your selection of site.
19 That is really what it comes down to. What this
20 hearing boils down to is you are fact-finding based
21 on the various consultants and disciplines that you
22 have submitted, that will be submitted to you.

23 With respect to the expropriation
24 aspect which Mr. Garrod referred to, that flows as
25 well, from the process. The site selection or site



1 approval process. The decision to expropriate
2 has effectively been made by the Regional Municipality
3 by the Council when they put forward these two
4 sites. It is my submission that implicitly they
5 contemplated that there would be expropriations
6 either of them.

7 That is not something that you would
8 decide, nor does an Ontario Municipal Board member
9 ever get involved in that. The Ontario Municipal
10 Board only gets involved in the determination of
11 quantum so that to bring the expropriation aspect
12 into it is something that requires expertise and does
13 not withstand the light of day.

14 Having said that I have looked at
15 it from a point of view, made my submissions from
16 the point of view of those criteria and I balance
17 those against the issues that we are likely to
18 encounter or likely to be encountered by the Board
19 in further submissions and hearings of witnesses
20 and so on, I have no qualms in saying on behalf
21 of the City that we would ask that you continue
22 and I want to make it clear also that there is
23 other reasons for that.

24 Now, Mr. Lederer, one aspect that
25 I can very much agree with the submissions he made.



1 That he said at the outset that there were only
2 really two alternatives. He said continue,
3 the two of you to continue or to start again with
4 a new panel. That is the way I took it down.
5 He indicated that, the way I understood it, that
6 some other proposition of adding a Board member was
7 problematic. That is a word that means, as I
8 understand it, raises problems. I am not sure
9 sometimes that problematic will always mean exactly
10 that, but I agree if it means it in the context of it
11 raises serious problems, that is the case.

12 I am not going to give you a lot of
13 law, because it is not necessary, but the reason for
14 that is this: There is a principle in common law,
15 independent really, or underlying the Consolidated
16 Joint Board Hearing Act or any other Act that may be
17 referred to, and that is, those propositions such
18 as natural justice, or you must hear the party who
19 gives evidence and so on, which is the principle
20 I will be alluding to very shortly, principles which
21 have developed as it were, at common law in many
22 cases independent of the Statute.

23 It is our position that the aspect
24 of appointing a Board member and proceeding by
25 letting that Board member read transcripts may very



1 well offend one of these common law rules that I
2 have just alluded to.

3 Let me hand out, if I could, these
4 cases so that you have, I will give them to you in
5 the order I will be referring to them.

6 The first case I will be referring
7 to is the case called Doyle v. RTPC. It is a
8 decision of the Federal Court of Appeal 1985 and
9 the second case, is a case called Rosenfeld and
10 College of Physicians and Surgeons.

11 Now, I place these cases in front
12 of the Board because of my concern with respect to
13 this aspect of adding a Board member, allowing the
14 reading of transcripts and as it were, continuing
15 on with the proceedings.

16 I am going to state or submit that
17 there are three principles that these two cases
18 support. The first one is that there is a maxim
19 at common law, and I quote:

20 "He or she who decides must
21 hear ..."

22 is to be applied to this Joint Board. So the
23 first person who decides must hear the evidence
24 is really what it boils down to and that would
25 have to be applied to the Joint Board.



1 Secondly, that that maxim is a
2 rule which directly affects the jurisdiction of
3 the Joint Board.

4 In other words, it goes to the
5 very jurisdiction of the tribunal or whatever
6 constituted Joint Board it is, and third, it is
7 fundamental that waiver or consent cannot remedy
8 a nullity nor give jurisdiction.

9 Now, I refer you to -- for the
10 first two points -- to the majority decision of
11 Mr. Justice Pratte in the Doyle case.

12 Just to give you a little background,
13 this was a case involving Mr. Doyle, who was a
14 Director of Canadian Javelin many years ago
15 involving, I think it was a refinery or certain
16 activities that he was carrying on in the Maritimes.

17 The Restrictive Trade Practices
18 Commission heard hearings, or held hearings to
19 determine whether there had been alleged fraud by
20 Mr. Doyle on Canadian Javelin Limited. In the
21 course of it, the hearing, it was found that two
22 of the three Commissioners who signed the report
23 were absent several of the hearing dates. They
24 hadn't heard the submissions and afterwards,
25 Mr. Doyle, through his solicitor applied to set aside



1 the report on the ground that the person who
2 decides must hear.

3 Now, the issue came up whether it
4 was a judicial body or not and the court found it
5 didn't matter under that act. They appeared to
6 be making recommendations, but it still applied.
7 They also said that even though Mr. Doyle had been
8 given notice of the hearings, he was in Panama
9 at this point in time and he did not take part in
10 the proceedings, that that did not constitute a
11 waiver. Though he wasn't there, the fact that
12 the two members had not been there to hear was such
13 that it went to the absolute jurisdiction, and if
14 I could refer you to page 221, you will see the
15 actual reference that I think is important. Page
16 221, the left hand column, the lower portion, you
17 will see number 8. Wouldn't you know, is your
18 copy a bad one? At the bottom, or the top it
19 says:

20 "The important issue is whether
21 the maxim 'he' ..."

22 and then over at the top it says:

23 "... who decides must hear."

24 I am sorry for that, and then that
25 other sentence, the continuation of the sentence is



1 "invoked by the ...", so to continue the sentence,
2 it goes on:

3 "... invoked by the applicant
4 should be applied here."

5 This is just a statement really of
6 the rule that I have indicated and then if you would
7 look -- let me, I will pick it up:

8 "This maxim expresses a well known
9 rule according to which, where a
10 tribunal is responsible for hearing
11 and deciding a case, only those
12 members of the tribunal who heard the
13 case may take part in the decision.
14 It has sometimes been said that this
15 rule is a corollary of the audi
16 alteram partes rule. ... This is true
17 to the extent a litigant is not
18 truly 'heard' unless he is heard by
19 the person who will be deciding his
20 case. In my view, however, the
21 rule expresses more than that; it is
22 a rule which actually affects the
23 judge's jurisdiction."

24 That is the key part there of

25 Mr. Justice Pratte:



1 " ... it is a rule which actually
2 affects the judge's jurisdiction ..."

3 In other words, the parties by
4 reaching some compromise or consent here really
5 cannot give jurisdiction where the tribunal or a
6 judge doesn't have it. This rule goes to the
7 actual jurisdiction itself of the judge and the
8 tribunal.

9 In the second case that I put in
10 front of you, if I could ask you to just refer to
11 page 456, I believe it is, that is Mr. Justice
12 Fraser's case, Rosenfeld and College of Physicians.

13 I might say, just to give you a
14 little bit of background, this was a case again
15 where the Council of the College of Physicians and
16 Surgeons, the composition had changed and certain
17 members had not been there at both meetings of the
18 Committee and the question came up whether the
19 presence of members of a Committee, the absence
20 of them and so on invalidated the proceedings.
21 And, going over to page -- the middle of page --
22 I'm sorry, going over to page 456, the question
23 came up whether there had been some contact with
24 the Appellant's solicitor, particularly you see
25 that first full paragraph about a third of the way



1 down 456:

2 "Counsel for the College submitted
3 that the appellant, by his counsel's
4 conduct at the March 12th hearing
5 had waived his right to object to
6 the jurisdiction. It is fundamen-
7 tal that waiver cannot remedy a
8 nullity nor can it give jurisdiction:
9 (and the case is cited there)
10 Holmstead and Gale, ... and the
11 cases there cited;..."

12 I bring that forward at this point
13 for the third proposition I was putting to you, that
14 my concern really I suspect one of the reasons
15 Mr. Lederer has said that the alternatives were
16 open to you of continuing or wiping everything out
17 and starting all over. Anything in between is
18 problematic. It is based on these principles I
19 have just been putting to the Board, In the situa-
20 tion you are faced with, these problems can be
21 raised.

22 So, when we get back to sort of
23 where we are as municipalities with the need to
24 get a decision or the need to save costs,
25 with the need to -- the fact that we have had the



1 amount of evidence we have had, I don't think there
2 is any question. We have no alternative but to
3 say we do not want to start over.

4 So, we are, in my submission, driven
5 back to the point that the Board ought to continue
6 and Mr. -- I've forgotten -- I guess it was
7 Mr. Leitch indicated the Board does have the ability
8 to add expertise under Section 14, I am sorry, under
9 Section 10. Although, I would -- and you also
10 have the ability of course to call on Mr. Marshall,
11 the need has been from time to time for somebody
12 else from the Attorney-General's office, although
13 I would caution the Board, and I am sure Mr. Marshall
14 will as well. Some of the cases, it is obvious,
15 can the counsel -- even the counsel alone before
16 a Joint Board such as this, retire with the Board
17 members when you are deliberating issues.

18 You would take submissions and so on
19 but you have to be somewhat careful about whether
20 counsel actually takes part in the decision-
21 making and the decision reasons and findings that
22 may come out.

23 So, I would certainly caution you
24 -- I think Mr. Leitch used the expressed to use
25 a creative use of the -- I think it was Section 10.



1 DR. KINGHAM: It is Section 10.

2 MR. McQUAID: I would be very
3 cautious in terms of using that section to go to
4 the jurisdictional aspects, if I can put it that
5 way. There is no question, however, that if it
6 was a question of specific planning issues and
7 you were not satisfied, although I can't perceive
8 of it happening, but it is quite possible.

9 If there was some area of expertise
10 either planning or economic, whatever the issue
11 might be, and the Board felt it needed that expertise
12 it could call on and get legal representations
13 beyond those that you are getting from the process,
14 parties, participants, from Mr. Marshall. All
15 those bases are covered.

16 It has also been my impression,
17 I make this submission, that by the time a witness
18 is through here, whether it be a planning witness
19 or whatever witness it might be and they have run
20 the gauntlet of all of our cross-examinations that
21 the issues are very well covered.

22 You have, as it were, just about
23 every combination you might think of focused
24 in that particular witness. While the scientific
25 evidence, for example, we're midway with one



1 scientist, we are not finished yet, and the
2 scientific evidence may not take place until you
3 hear design or other aspects of it, and so on.

4 It is my submission, that by the
5 time you have heard from the hydrogeologist, you
6 have just heard the Region's case at this point,
7 by the time you have heard Milton's case,
8 Burlington's case, the hydrogeologists that might
9 be called by the ratepayer groups, all of these
10 scientific issues will be well covered and all of
11 these factual issues will be well explained. You
12 will have the problem then, of sorting out which
13 of those you will make findings on.

14 That is, in my submission, something
15 that this Board, as currently constituted, will be
16 well able to handle. You have the benefit of
17 the submissions of all of us. It may seem
18 overwhelming from day to day, but I suggest all
19 of these things will be well canvassed by the time
20 the various parties have made their particular
21 submissions.

22 Having said all that, it is my
23 submission that we should continue right where we
24 are and start as soon as possible.

25 You have heard allusions to two



1 aspects.

2 One, you ought to have a stated
3 case.

4 Now, I should say from my experience,
5 Mr. Marshall can make his submissions to you on
6 this particular aspect, but it has been -- particul-
7 arly with the number of parties that we have here,
8 that for the number of parties that sit around --
9 I haven't heard what the specific question or
10 questions are that the stated case is going to be
11 on.

12 It is very clear that you have the
13 jurisdiction to carry on. It is when we
14 get into some hybrid, or something of that nature,
15 that presumably there is some question that is
16 raised.

17 Well, I don't think the Board needs
18 to take the time, or in my submission, is there
19 anything really of a significant nature that has to
20 go to court. No stated case can be raised that
21 is just going over to the courts to sort of say
22 "What do you think we should do in these circum-
23 stances?" The two Board members here, perhaps
24 its policy aspects, the establishing authority
25



1 has to get involved, but the decision has to be
2 made by effectively the quorum of the Board as
3 currently constituted together with the establishing
4 authority.

5 The court would not received a
6 sort of "What do you think we should be doing in
7 circumstances such as this?" series of questions.
8 A decision has to be made by this panel and the
9 establishing authority as to what we are going to do.

10 If that is the case, if that
11 decision is made, then I think that he or she,
12 and I refer to Ms Cronk in this case in particular.
13 If they have some serious question about the
14 decision that has been made by this panel, then
15 they should have the carriage and resonsibility
16 of determining whether they are really going to
17 take it to a court proceeding or not. It has
18 aspects in terms of whether or not they really
19 feel that strongly about it, whether or not the
20 Municipal Council or clients really will instruct
21 them to do that.

22 We will get over the perception of
23 fear or threat, or however you may wish to
24 characterize it.

25 I would hope that -- as a matter of



1 fact, the reason that I urge this on the Board is
2 that I feel the Statute is so clear, that there is
3 no stated case that needs to be made. That, in
4 my submission, is a sideshow that is completely
5 unnecessary.

6 If anyone wants to start a side-
7 show, they should have the responsibility of
8 carrying it forward, getting instructions or
9 whatever costs or aspects are duly associated with
10 it. If there is delay, we will do whatever we
11 can to bring that matter on as soon as possible and
12 get back in keeping with what the Board's final
13 decision, the ultimate Board decision might be.

14 I submit the panel should not
15 be concerned about that aspect of the matter
16 because two or three people said we should go off
17 and have some sort of court motion. That can
18 happen at any time.

19 I submit that as a practical matter
20 -- I am sorry, the Board should not be involved
21 in stating the case. Let the party who is
22 concerned about that have the carriage of those
23 proceedings. That is the most efficient way
24 and in my experience, before the Ontario Municipal
25 Board, the Board has shied away generally from



1 stated case, because when there is only two parties,
2 a municipality and a ratepayer group
3 or a developer, even to get even two parties
4 to agree on the stated case, is more administratively
5 unproductive than just letting the one party who
6 feels strongly about it, say what the issue is and
7 carry on and responding parties can add any
8 embellishments as to what the issues are and the
9 responses and so on. So, I would urge you not
10 to get involved in a stated case of some academic nature
11 for both practical reasons and for the other aspects
12 that I have alluded to.

13 Those are really my submissions.
14 I have absolutely no qualms in summary in saying
15 that the two members of the Board should carry on
16 with all the matters that have to be dealt with
17 and determining, for all of the reasons -- that is
18 the best road for all of us.

19 DR. KINGHAM: Thank you,
20 Mr. McQuaid. You all have been going much
21 longer than we have with your deliberations,
22 starting earlier this morning. We are prepared
23 to hear the rest of the submissions non-stop,
24 provided that meets with the approval of all of
25 you here and it may require postponing lunches.



1 If that is the case, we will proceed.

2 Ms Vigod.

3
4 ARGUMENT BY MS VIGOD:

5 Dr. Kingham, Ms Tanner, it is our
6 submission that there are three possible routes which
7 the Board can take.

8 The first one, we submit, is legal
9 and reasonable.

10 The second is legal, but perhaps
11 unreasonable and the third is wrong in law,
12 unreasonable and prejudicial.

13 The first option, which we strongly
14 support, is that the Board in its present form
15 continue with the hearing. I think we have
16 heard submissions on this. The Consolidated
17 Hearings Act clearly allows this possibility. I
18 won't repeat Section 4, but I think it is very
19 clear that the Board may be composed of one or more
20 members of either or both Boards. It is very
21 clear.

22 Then, Section 4(9) provides for
23 the confirming of the existence of the vacancy,
24 the section we have already discussed. As well,
25 this panel on its own can continue -- can decide



1 to continue as two members.

2 We also point out that the Board
3 members, once they are appointed to the Joint Board
4 sit there wearing their separate hats as members
5 of the EAB or members of the OMB, but sit there as
6 Joint Board members making decisions on all matters
7 before it.

8 I believe Mr. Lederer in his opening
9 remarks alluded to this fact, and if I could just
10 quote him for a moment. He says:

11 "Assuming that I understand the
12 course of the hearings as a result
13 of your appointment by the Chairman
14 of the OMB, but you don't sit here
15 as a member of the OMB, you are
16 now a panel, a Joint Board whose
17 power and authority arises not from
18 the legislation you would normally
19 operate under, but rather from the
20 Consolidated Hearings Act."

21 MR. LEDERER: I don't disagree with
22 that, Mr. Chairman. Actually, I think it is
23 rather profound.

24 MS VIGOD: From the evidence
25 adduced or proposed to be adduced at this hearing,



1 it is evident that the prime hearing matters before
2 this Board are matters covered by the Environmental
3 Assessment Act and the Environmental Protection Act.

4 The Planning members form a small
5 part of the approval sought in this hearing.

6 For example, again Mr. Lederer's
7 position at the beginning of this hearing was that
8 the Region's Official Plan is not an undertaking
9 for which he is seeking approval. It is clear
10 by both the approval sought and the evidence adduced
11 to date and the evidence proposed to be adduced
12 that environmental issues are the prime issues.

13 In our submission, this tribunal
14 is both legally competent to proceed as a
15 two-member Board and is technically competent to
16 review the evidence put before it.

17 To the extent the plan is presumed
18 to be an issue, requiring the Board to address
19 itself during the hearing, I believe other counsel
20 have alluded to the possibility of appointing an
21 expert under Section 10 or again, the suggestion
22 of having counsel appear on a more regular basis
23 and we would certainly suggest these are open for
24 the Board to pursue.

25 The second option which we feel



1 is reasonable given the circumstances and that is
2 the option for the Chairman of the two Boards to
3 constitute a new Joint Board to start the hearing
4 all over again.

5 It is our feeling to do this when
6 the hearing has already run for 24 days, is too
7 costly, both in terms of time and dollars involved
8 for all parties.

9 From my client's point of view,
10 the additional cost would be a real hardship and
11 an unnecessary one. We believe that the first
12 option as clearly contemplated by the legislation
13 is the appropriate course to follow.

14 The third possible route is the one
15 put forward, I guess, by the Milton groups and also
16 alluded to by the Region. It is this route that
17 we would submit is wrong in law, unreasonable and
18 highly prejudicial.

19 The proposal is to bring in a new
20 member of the Ontario Municipal Board to sit on
21 the continuation of this hearing. I think it
22 is our opinion that this action violates the rules
23 of natural justice and should not be pursued.

24 Mr. McQuaid has already put to you
25



1 a number of cases that I will refer to just briefly
2 and I have one additional case.

3 This is a decision of the Ontario
4 Court of Appeal in re Ramm and The Public Account-
5 ants Council for the Province of Ontario.

6 The law in this area is very clear.
7 When an oral hearing is provided for by the Statute
8 as it is under the Consolidated Hearings Act
9 the courts require that the ultimate decision-
10 makers be present throughout the course of the
11 proceedings. The principle of this maxim is
12 referred to by Mr. McQuaid. He who decides must
13 hear.

14 The basic principle that the
15 decision-makers should be able to assess the
16 evidence as it is presented, including the demeanour
17 of the witnesses including the demeanour under
18 cross-examination so they will be able to weigh
19 all the evidence in reaching a decision is evident
20 in this matter.

21 Members of multi-member tribunals
22 lose their right to participate in the final
23 decision on a matter should they be absent for
24 part of the hearing. This would be a case here
25 if the new OMB member was brought into the hearing



1 after 24 days of evidence had already occurred.
2 The courts from the Supreme Court of Canada right
3 down and right across the country have quashed
4 decisions made by tribunals including Boards making
5 land use and development decisions where any member
6 was not present to hear all the evidence but
7 yet participated in the decision-making. This
8 would be the situation should be Milton option be
9 followed.

10 I will just deal briefly with the
11 cases. The re Ramm case involved a hearing
12 into a licensed accountant.

13 At the first hearing, 12 members
14 of the Public Accounts Council were present but
15 when it reconvened, only 11 were present, two of
16 whom were not present at the previous hearing.
17 I just refer you to page 222 of that decision, the
18 top paragraph, the left-hand side, the court states:

19 "It is well established that it
20 is not merely of some importance
21 but of fundamental importance, that
22 'justice should not only be done
23 but should manifestly and undoubted-
24 ly be seen to be done.' In a
25 word, it is irrelevant to inquire



1 whether two members of the Council
2 who were not present at the earlier
3 hearing took part in the proceeding
4 in the Council's deliberation on
5 the subsequent hearing. What is
6 objectionable is their presence
7 during the consultation when they
8 were in a position which made it
9 impossible for them to discuss in
10 a judicial way, the evidence that
11 had been given on oath days before
12 and in their absence and on which
13 a finding must be based."

14 The report goes on to cite from
15 the English authority Rex v. Huntingdon Confirming
16 Authority which sets out the principle further.

17 The next case is one already
18 alluded to by Mr. McQuaid, the Rosenfeld case
19 and again, I just stress this point that the court
20 held that the failure to object had no bearing
21 and it was an issue of jurisdiction and that the
22 decision was therefore a nullity.

23 Important in this case refers to
24 both the Ramm case and the English case and also
25 to an overture of the Supreme Court of Canada in



1 Mehr v. Law Society of Upper Canada where the judges
2 there refer approvingly to the English case.

3 Finally, the Doyle case that
4 Mr. McQuaid dealt with in a fair bit of detail
5 already.

6 One additional point I would like
7 to make there is found on page -- it is the second
8 page of the decision, that while there were
9 transcripts in this case and the reference is to
10 the bottom of that page where the report says:

11 "It is not disputed that the
12 Commission had the benefit of
13 stenographic transcription
14 services, but the court held this
15 was not enough. The fact that
16 the Commissioners (this is found
17 on) ..."

18 DR. KINGHAM: Can you refer to the
19 paragraph numbers on the pages?

20 MS VIGOD: That is the bottom of
21 paragraph 5, and then if you refer to the paragraph
22 10 on the following page, the court states in the
23 middle of paragraph 10:

24 "... the fact that the commissioners
25 were able to review the evidence,



1 despite their absence from the
2 hearings, does not mean that the
3 applicant's application should
4 not be granted since the important
5 thing is to determine whether the
6 three commissioners reviewed the
7 evidence in the manner prescribed
8 by law."

9 So again, the courts set aside the
10 Commissioners' report even though in this case,
11 and in this case the Board was only a recommendatory
12 and not a decision-making Board, which the Joint
13 Board here is.

14 There are a number of cases involving
15 other tribunals in other provinces. The only
16 one -- I don't have copies of it, but I would give
17 the citation of is the Prince Edward Island Supreme
18 Court decision of 1978, which I will have to get
19 you. Unfortunately, that has been cut off the
20 top.

21 The reason I cite that case is it
22 involved a land use commission and a similar
23 situation where the Board changed throughout the
24 court of the hearing and again that decision was
25 quashed by the courts.



1 In summary, the law is very clear.

2 A new member of the Board cannot make a decision
3 where he has not heard all the evidence.

4 Transcript does not meet this requirement as a
5 new Board member would not be in a position to
6 assess the evidence and the experts' demeanour
7 in this case, which has gone on for 24 days.

8 Further, in this case it is our
9 submission that the transcript may be unintelligible
10 in parts. Witnesses constantly have been
11 referring to maps and cross-sections and the
12 transcripts are peppered with "over heres" and
13 "over theres." We are talking about 6000 pages.

14 Finally, we feel we would be
15 prejudiced in this case where one of three Board
16 members would have to rely on a transcript review.

17 Most witnesses to date, have been
18 taking a position that their site is the preferred
19 one. While we believe that through cross-
20 examination there have been -- I say this, some
21 admissions, the assessment of the witnesses
22 demeanour in answering questions is important and
23 would be lost to any new member.

24 Therefore, while it is our
25 submission and the case law states the Milton



1 course of action is beyond the Board's jurisdiction
2 and is a nullity even if consent is possible, we
3 would not consent to this procedure. We feel
4 that the Consolidated Hearings Act clearly allows
5 us to proceed with the hearing with the two existing
6 Board members and this is the most appropriate course
7 of action to take.

8 I would just like to deal briefly
9 with a number of submissions raised by my friends.

10 First of all, Ms Cronk referred you
11 to Section 133 of the Courts of Justice Act and
12 urged you to consider that as a possible process
13 in using transcripts on rehearing.

14 It is our submission that that
15 Section 12 of the Consolidated Hearings Act which
16 is the relative legislation for this Board, states
17 clearly in the matter of rehearing, Section 12(3)
18 that no member of a Joint Board shall participate
19 in a decision of the Joint Board following upon a
20 Joint Board hearing unless he was present throughout
21 the entire hearing and heard the evidence and
22 arguments of the parties.

23 It is my submission that the
24 Statute here is the governing document and Section
25 133 does not really help us out in this situation.



1 Further, Ms Cronk says if a split
2 decision of two members continued I think it is
3 fair to say that there have been numerous Joint
4 Board sittings of two members and this has not been
5 a constraint to them sitting. I don't think it
6 should be a consideration in deciding now how to
7 proceed.

8 Again, Mr. Leitch has -- there has
9 been some suggestion of somehow separating out
10 planning evidence.

11 I submit that we have not heard
12 how this could or would take place. It is
13 my submission, first of all, the case is the City
14 of Westminster case established in the mid-seventies
15 that Planning Act evidence in fact included enviro-
16 nmental evidence in matters involving both aspects
17 and that therefore it would be very hard to separate
18 out those types of issues.

19 As well, we have evidence today of
20 social impact, visual impact that again can be
21 considered both planning and environmental matters
22 and are clearly matters dealt with in the
23 Environmental Assessment Act in the broad defini-
24 tion of the environment.

25 Again, Ms Cronk referred to a recent



1 case where a judge took ill and another judge took
2 his place, but that was a case involving material
3 and no real live witnesses had appeared at the trial.

4 So again, in that respect, that
5 analogy would not stand up in this case.

6 In conclusion, we feel that the
7 appropriate method that should be followed is that
8 the two sitting members continue with this hearing
9 as on the original schedule.

10 DR. KINGHAM: Thank you, Ms Vigod.
11 Mr. Tidball?

12
13 ARGUMENT BY MR. TIDBALL:

14 Dr. Kingham, Ms Tanner, I doubt
15 whether there is very much more to say in all of
16 this. I think you have heard all of the positions
17 canvassed fairly fully.

18 Let me try to add a few things
19 though that might assist you in your deliberations.

20 First of all, I should say that
21 it is our position that this Board should continue
22 as constituted, with two members. If I might
23 deal first of all, with the option that nobody seems
24 to like and I suppose if that means anything it
25 means that that isn't the one that this Board would



1 choose but that option would be simply starting
2 all over again. This Board finishing the hearing
3 now and starting all over again.

4 We have heard some submissions
5 regarding the cost of that and the reasonableness
6 of that position. Let me just add, I am not
7 sure whether Mr. Lederer mentioned this or not, but
8 you have heard some evidence, and I am sure you will
9 hear more if you choose to go on, about the critical
10 position the Region of Halton is in with
11 waste disposal, I would assume a delay of some
12 months that this might mean, would be absolutely
13 crucial to the Region. You ought to keep that
14 in mind.

15 I agree with everyone else on
16 the option that I am saying you should follow. I
17 agree with everyone else that your jurisdiction
18 is crystal-clear and that you can continue pursuant
19 to Section 9(4). In fact, Mr. McQuaid mentioned
20 this but I might go a little bit further.

21 I think it is quite clear you don't
22 have to necessarily consult the two Chairmen of
23 the Boards. It is clear that if you read
24 Subsection 9, you can almost read it as two
25 sentences because it says a majority of the members



1 of the Joint Board constitutes a quorum of the
2 Joint Board. The two of you constitute and are
3 a quorum. If you then go down to Subsection 10
4 it says:

5 "A decision of the majority of
6 the members is a decision of the
7 Joint Board."

8 You can continue. Now, I agree
9 with Mr. McQuaid, it is only reasonable and it is
10 only practical that the Chairmen should consider
11 this matter and should confirm the vacancy and
12 establish the quorum. That makes sense for a
13 continuation of the hearing.

14 Given the fact that the jurisdiction
15 is so clear that you should continue, I am a little
16 perplexed by Ms Cronk's submission to you that yes,
17 you can start but at some point perhaps 30 seconds
18 later or somewhere along these lines there is the
19 possibility that someone could challenge your
20 jurisdiction because you have then essentially
21 gone off the rails and somehow lost jurisdiction.

22 I gather the argument has something
23 to do with the constitution of the Board which would
24 somehow contravene the doctrines of natural justice
25 and procedural fairness. I will reiterate



1 something Ms Cronk said. You are going to have
2 to take advice, I suppose, from Mr. Marshall on
3 this but I am at a loss to understand how the
4 constitution of this Board, given that it is
5 properly constituted under the Act, can at all
6 violate the doctrine of procedural fairness or
7 the doctrine of natural justice. I will leave
8 it at that.

9 I don't have cases. I can
10 research the area more extensively for this
11 particular issue, but I can tell you with some
12 certainty that I cannot see how you can be caught in
13 either of those doctrines and continue.

14 On the broader question of fairness,
15 getting apart from the legal question of fairness,
16 the question has been raised by the Town of Milton
17 and the residents and to some extent by NSP
18 that somehow not having a member of the OMB sit
19 on this Board is unfair to the clients. I am at
20 a loss again as to how there is unfairness there.
21 We can all agree that it would be better if we
22 had a third member and if that member was a member
23 of the Ontario Municipal Board. Unfortunately,
24 we are all in the position here of having to make
25 the best of an unfortunate situation. In my



1 submission the best thing is to continue. While
2 it may be true that a handful of decisions, and it
3 may be 6 out of 12 decisions that would normally
4 be made by the OMB and in view of the submissions
5 referred and in general, those decisions are not
6 the critical decisions that have to be made in this
7 hearing. The critical decisions are those to be
8 made under the Environmental Assessment Act and the
9 Environmental Protection Act. You two members
10 normally hear those kinds of matters.

11 If there is a critical third issue
12 I suppose it's the issue of expropriation which
13 will be heard by an Inquiry Officer anyway. A member
14 of the Ontario Municipal Board wouldn't necessarily
15 assist in any way the two members present here.

16 Under the Environmental Assessment
17 Act, it would be my submission that this is a
18 critical hearing for the -- in terms of the future
19 development of that Act. I don't think anyone
20 here can disagree that this hearing is absolutely
21 critical. I don't think I would be overstating
22 the case to say that there are municipalities
23 all around Ontario watching this hearing, watching
24 what comes out of this hearing, but I would say
25 that, so far, the history with the Environmental



1 Assessment Act and decisions made thereunder has
2 been -- (a) it has been limited; and (b) it has been
3 somewhat sketchy as to the interpretation of the
4 Act.

5 I couldn't tell you how many EA
6 hearings have been held. I suspect there are not
7 many more than perhaps 10. With the possible
8 exception of Mr. Jeffery's dissent in the Redhill
9 case, which I am sure Mr. Lederer will tell you all
10 about if you ask, there has not been a concerted
11 effort to interpret the Environmental Assessment Act.

12 In some respects, you are going to
13 be required for the first time, to really put your
14 mind to the interpretation of that Act as to what
15 it means. I am not sure, certainly the attendance
16 of an Ontario Municipal Board member will not assist
17 in that. Frankly, there are not many members of
18 the Environmental Assessment Board that have got
19 that much experience with Environmental Assessment
20 matters. So, in some respects that is ground-
21 breaking all the way around. I don't have any
22 problem at all with the two members sitting before
23 us, that they are relatively new to the Board.

24 All that means, in my submission,
25 is that the onus is going to be on counsel and there



1 are certainly enough of them, to assist this Board
2 in making submissions as to what counsel feels are
3 the appropriate tests that you should apply.
4 You are certainly able to seek the assistance of
5 Mr. Marshall's office dealing with the legal ques-
6 tions.

7 In my submission, you are simply
8 going to have to hear what counsel says. You are
9 in as good a position as anybody to deal with
10 Environmental Assessment matters.

11 When the idea was first raised
12 earlier in the week concerning reconstituting this
13 Board with a new member of the Ontario Municipal
14 Board, I did indicate that I would certainly consent
15 to that if everyone else did. Having heard
16 the submissions of Ms Vigod and Mr. McQuaid, I
17 would join in their great concern over that route.

18 It seems to me, that if the
19 concern here is trying to avoid a judicial review
20 application, the safer course of the two, let us say
21 the two are continuing as you are presently con-
22 stituted and trying to have an Ontario Municipal
23 Board member. I think certainly the safest
24 course is to continue. I don't have any doubt
25 about that at all. The import of the case is



1 you have been referred to -- as they were described,
2 it does seem that in fact anything you do from this
3 point on to where you were to add a third member
4 would be void and at issue.

5 I think those are the only sub-
6 missions I want to make. I simply want to
7 reiterate that our position is that this Board
8 should continue as constituted with two members.

9 Thank you.

10 DR. KINGHAM: Ms Mansfield.

11

12 ARGUMENT BY MS MANSFIELD:

13 Mr. Chairman, I will be very brief.
14 I would like to add the position of the Ministry
15 of Natural Resources to this discussion. The
16 Ministry of Natural Resources supports the con-
17 tinuation of the hearing with the Joint Board
18 consisting of the remaining two members and with
19 its appointment of experts to assist it on Planning
20 issues if the Board feels that that is needed, and
21 in accordance with Section 10.

22 Specifically, regarding the
23 composition of the Board being all Environmental
24 Assessment Board members and the legal authority
25 for that, we are satisfied that the Consolidated



1 Hearings Act authorizes a Joint Board to be
2 composed of members of only the Environmental
3 Assessment Board.

4 Regarding Ministry of Natural
5 Resources' particular concern with the utilization
6 of shale in one site, Site F, although this concern
7 could be considered more of an Ontario Municipal
8 Board-type matter than an Environmental Assessment
9 Board matter in the sense that it involves a
10 government policy statement issued under the
11 Planning Act on mineral aggregate resources policy,
12 we are quite satisfied that there is no special
13 expertise that an Ontario Municipal Board member
14 could bring to bear on this question that he would
15 be required to understand the nature of the concern
16 or to reach an appropriate decision.

17 Regarding the issue, which I found
18 very interesting, of whether the absence of an OMB
19 member in this particular case would deprive the
20 Board of jurisdiction which the Act clearly seems
21 to give it in the first instance, if that is a real
22 fear and there is the worry of restoring some kind
23 of balance, I would submit that that could certainly
24 be corrected by the appointment of assistants under
25 Section 10.



1 Regarding adding a new OMB member
2 who would receive the evidence by transcript, I
3 would also like to support those people here who
4 have said that this is a very dangerous practice
5 since the Consolidated Hearings Act, Section 12(3)
6 specifically says that no member of a Joint Board
7 shall participate in a decision of the Joint Board,
8 following upon a Joint Board hearing unless he was
9 present. There is physical presence that seems
10 to be required throughout the Joint Board hearing
11 and heard the evidence and argument of the parties.

12 There is, of course, a question of
13 whether or not the hearing would include just hearing
14 by virtue of reading a transcript but in light of
15 the physical presence that seems to be required with
16 that, I don't think that that could be an acceptable
17 interpretation.

18 If the new OMB member who might be
19 added to the Board, could not participate in the
20 decision, I fail to see the point of adding that
21 member and there are all the other dangers that
22 other people have pointed out.

23 So, in conclusion, I would just
24 like to repeat that the position of the Ministry
25 of Natural Resources is that it supports the



1 continuation of the hearing with the Joint Board
2 consisting of the remaining two members.

3 Thank you.

4 DR. KINGHAM: We have now
5 completed what I would call our normal order of
6 those who had been sort of present throughout.
7 I know that we have all counsel with us today,
8 some who had not been present more or less daily.

9 I would be interested in hearing
10 their views and I would ask at the same time that
11 you give us again, your name and the party you
12 represent.

13 DR. BOLDRINI: Mr. Chairman, are you
14 asking or inquiring from the public? If not, I
15 would appreciate your ruling.

16 DR. KINGHAM: We will deal with that
17 after we have heard from counsel.

18 MS GALEA: I am appearing on
19 behalf of Halton Region Conservation Authority, from
20 John Olah's office and my name is Maureen Galea, G-a-l-e-a.

21
22 ARGUMENT BY MS GALEA:

23 Our position is simply that we
24 are more than willing to have the Board continue
25 with the two-member panel. We want to avoid any



1 kind of delay and we wish to continue as is.

2 DR. KINGHAM: Thank you very much.
3 Other counsel?

4 MR. LEDERER: I don't think there
5 are other counsel.

6 DR. KINGHAM: Are you telling us
7 there aren't?

8 MR. LEDERER: There are no other
9 counsel.

10 DR. KINGHAM: Members of the public,
11 what we are trying to do at this stage is, we are
12 trying to come to grips with some very complex legal
13 matters here. We are seeking advice on these
14 matters so that we can consider them and consider
15 whatever other advice we may want to offer should
16 we choose to offer advice to the Chairmen of the two
17 Boards.

18 The question was put to us by one
19 member of the public as to whether we would be
20 considering views of the public on this matter and
21 I can only say that provided that those views have
22 to do with this particular legal difficulty we
23 are facing, we may consider such views. We
24 would appreciate that they be confined specifically
25 to that issue.



1 A SPEAKER: If you prefer, we can
2 do it in writing with the Chairman of the
3 Environmental Assessment Board, if you so prefer.

4 DR. KINGHAM: That would be fine.

5 Mr. Boldrini, do you have a point
6 to make on the legal proceedings issue?

7 DR. BOLDRINI: Yes.

8 DR. KINGHAM: Would you like
9 to state it now?

10 DR. BOLDRINI: I didn't want to
11 discuss it, but I wanted to put it on the record
12 if you would allow me to do so.

13 MR. LEDERER: Mr. Chairman, I am
14 sorry, I don't know whether you are going to hear
15 submissions with respect to this or not. I am
16 concerned about this and the precedent it sets.

17 We have had a specific ruling,
18 particularly about Dr. Boldrini, and I have sub-
19 missions to make. I am very concerned as to
20 what this might start. With the greatest of
21 respect, I don't want to sound crass, I don't want
22 to sound harsh, but we are not taking a vote here.
23 If Dr. Boldrini doesn't have an interest and there
24 is a ruling with respect to that, then with great
25 respect, he doesn't have anything to add to this.



1 It begins to colour the matter in a way which, in
2 my respectful submission, is not appropriate. If
3 he has no interest, he ought not to be permitted
4 to make submissions in any form, in writing, orally,
5 before you, in any way. We are not taking a vote,
6 sir. This is an important legal issue

7 DR. KINGHAM: I think that our view
8 on this matter would be that if any member of the
9 public wishes to make a statement on the views
10 of how this panel should continue, if it is to
11 continue, that we ought to allow them the opportu-
12 nity of making that observation, but that it should
13 be made here and orally if it is to be made, and
14 briefly.

15 Therefore, if anybody wishes to
16 make such a statement on the issue as we have
17 defined it, having to do with the options of
18 continuing with members of the Environmental
19 Assessment Board, or with a broader base, that is
20 to say restarting these hearings, we would be
21 interested in hearing those views on that issue
22 in the hopes that it may help to guide us.

23 DR. BOLDRINI: I have three
24 paragraphs, short paragraphs in the statement that
25 I am going to read you out.



1 MR. LEDERER: For the purposes of
2 the record, it would seem appropriate that anybody
3 that makes submissions identify themselves and
4 perhaps give us their address.

5 DR. BOLDRINI: Sorry, my name is
6 Boldrini, B-o-l-d-r-i-n-i, initial B, address,
7 91 Gibson, Hamilton, Postal Code L8L 6J9.

8 MR. LEDERER: Only for the purpose
9 of the record, and you have made your ruling. I
10 don't wish in any way to disturb it, but for the
11 purposes of the record, this is somebody who doesn't
12 live in Halton. What does the public mean?
13 Surely, it means people who are affected by this.

14 DR. BOLDRINI: I am affected by this
15 hearing because you have already questioned me
16 and there are several hundred pages in that respect
17 on the proceedings, so my residence here is only
18 in addition to the fact that I have been present
19 all days except one and you have already heard
20 parties contrary to many rulings of the Environ-
21 mental -- of the Consolidated Hearings Board, the
22 ruling being that the party has to be present to
23 the hearing. There are those who have never
24 been present to the hearing or the party will be
25 present only once or twice.



1 If you want my sentence, I can
2 omit the factual documentation for that consensus.

3
4 SUBMISSION BY DR. BOLDRINI:

5 Today, I am going to ask for a
6 judicial inquiry on your competence, Mr. Chairman, and honesty
7 to chair this hearing if you go to the Divisional
8 Court, I will bring the facts for that request.

9 I will repeat, in case, today I
10 am going to ask for a judicial inquiry which this
11 expression may be interpreted in several ways on
12 your competence and honesty to chair this hearing.

13 Thank you.

14 DR. KINGHAM: Thank you, Mr. Boldrini.
15 Mr. Marshall.

16 MR. MARSHALL: Thank you,
17 Mr. Chairman.

18 MS CRONK: Excuse me, Mr. Chairman,
19 again I am sorry to raise yet another procedural
20 issue but I know Mr. Lederer no doubt wishes to
21 respond to some of the submissions you have heard
22 and in light of the particular remarks you have
23 received from Mr. McQuaid, I seek that right from
24 you as well. The tradition usually is that
25 a Board, be it a disciplinary board, or a board of



1 this kind, has its own counsel that he has the
2 absolute reserved right to proceed last.

3 Mr. Marshall wishes to proceed now and I have no
4 objection. You might wish to have the benefit
5 of his remarks.

6 DR. KINGHAM: Were you planning to
7 make a response?

8 MS CRONK: If you would allow me
9 to do so.

10 MR. LEITCH: And I, too,
11 Mr. Chairman.

12 MR. LEDERER: Yes, the answer to
13 the question ...

14 MR. MARSHALL: It may be right
15 generally. It may be more useful if in some very
16 brief or general way, I indicate what my necessar-
17 ily tentative views would be concerning the issues
18 that have been raised so that indeed they will have
19 the opportunity to respond to what I say. It may
20 be important that they have that opportunity. So,
21 that if the Board is content, perhaps I can proceed,
22 as they say, reasonably briefly, not having had the
23 opportunity, because of press of other work, to
24 give the matter the kind of consideration that those
25 who have devoted solely and singly to this area



1 have given in the last few days.

2 MS CRONK: I have absolutely no
3 objection, I am just alerting you both to the fact
4 there would be some requests for reply and you
5 might want to consider the order in which you hear
6 it.

7 MR. MARSHALL: I think if there
8 is anything that is raised in reply that requires
9 some specific response, then I can add that.

10 DR. KINGHAM: We have one other
11 logistical matter which I think is fairly important.
12 It is five to two. Our Court Reporter has been
13 bearing up here for two-and-a-half hours. I
14 wonder if we might take a 15-minute break, we will
15 hear Mr. Marshall's comments, we will offer the
16 opportunity to Mr. Lederer and others and then we
17 will return, if necessary, finally, to Mr. Marshall
18 before we adjourn.

19 So, we will take a 15-minute break,
20 reconvening at 10-past-2, so that everybody can
21 refresh themselves.

22
23 --- Recess

24

25



1 DR. KINGHAM: As I understand it,
2 what we would like to do is hear your initial
3 reactions, Mr. Marshall, and then, or there are
4 a number of people who may want to say something
5 more before Mr. Lederer wraps up, or is it just
6 Mr. Lederer?

7 MS CRONK: I would like to respond
8 to Mr. Mc Quaid.

9 MR. GARROD: I would also like one
10 minute or two, if I may.

11 DR. KINGHAM: And you as well,
12 Mr. Leitch. What I am hearing is a desire for
13 a few wrap-up comments, reserving the last position
14 for Mr. Lederer. Mr. Marshall?

15
16 SUBMISSION BY MR. MARSHALL:

17 Thank you, Mr. Chairman.

18 First of all, let me take the
19 opportunity to briefly and perhaps not exhaustively
20 outline the -- how I conceive my role as counsel
21 to the Board.

22 I think it probably necessary that
23 I do this in anticipation of perhaps becoming more
24 involved in these proceedings. I am not entirely
25 enthusiastic, but regardless of what course of



1 action is pursued by the Board in light of the
2 unfortunate circumstances that have given rise
3 to these submissions.

4 I do not see my role as being one
5 that involves any participation at all in any
6 analysis of the evidence that is led before this
7 Board. I see my role as a provider of the
8 kind, at least, of independent counsel dealing with
9 legal matters to the Board, independent in the sense
10 that I have no particular interest to advance,
11 I have no client that I represent. That legal
12 advice, advice on substantive matters as opposed
13 to non-substantive or merely assisting the Board in
14 relation to process and understanding how things
15 ordinarily develop and how they proceed.

16 In substantive legal matters, the
17 advice that I would render the Board, will be placed
18 before -- and should properly be placed before the
19 counsel for the parties that participate before this
20 panel so that the Board is not seen as receiving
21 legal advice to the exclusion of other opinions or
22 the exclusion of comment from counsel before this
23 panel. So, that I want the assurance to be
24 given that I in providing legal advice of that kind
25 to the Board, will undertake that advice of that



1 kind will be presented before the lawyers here and
2 they will have an opportunity to respond. That,
3 I think, is the only position that can be taken to
4 ensure the integrity of the process you two are
5 presiding over.

6 Having said that, and having listened
7 to the submissions made by counsel to the parties
8 here, I have no panacea that will resolve the
9 individual concerns of the parties.

10 Perhaps because I am somewhat
11 independent, I can observe that the issues that
12 concern the participants here are not entirely legal
13 but must proceed from their own individual percep-
14 tions based upon whatever stimuli there may be as
15 to whether one course of action as a practical
16 matter is in the best interests of their client or
17 not.

18 I will not comment on that kind of
19 practical concern because it is not a concern, I
20 think, of the Board.

21 In a tentative way, what I will do
22 and I will do it very briefly, is to indicate what
23 I think, I say it is a tentative view only, is
24 the state of the law as it applies to this
25 particular situation. There are only two



1 alternatives that are available without the
2 unanimous concurrence probably being required of
3 the parties or participants, those who have been
4 recognized as having standing before this panel.
5 They will be, one certainly is that a new panel
6 could be constituted, that is a new order made
7 under the Consolidated Hearings Act constituting
8 a fresh panel with three members. That may or
9 may not require the dissolution of this panel.
10 So that the first issue and perhaps the only issue
11 is whether or not this panel can, as a matter of
12 law, continue with these proceedings constituting
13 a quorum and making the necessary decision because
14 it is quite clear that if this panel does not
15 have that standing, then these proceedings are
16 aborted. So that certainly the prime issue,
17 as I say, it may be the only issue, where there
18 is a matter of law, the remaining two, assuming
19 that the vacancy is confirmed, and you have heard
20 some submissions this morning about the need to
21 obtain further medical information and so on.

22 If you can't continue then the only
23 alternative is to start over again, which perhaps
24 puts in perspective and causes some need to clarify
25 the positions taken by some of the parties before



1 you.

2 It is my opinion, however tentative
3 that opinion is, that as a matter of law you can
4 continue to carry out the duties of the Joint Board
5 as constituted for the reasons and because of the
6 statutory provisions that you have heard referred
7 to today.

8 Thereafter, the issue is, it seems
9 to me, whether for practical reasons, which may
10 involve the desirability or questions of desirability
11 of having additional expertise there might be some
12 method or some way of increasing that expertise or
13 adding a "balance" that is said to have been lost
14 if Mr. Lancaster is unable to proceed. That
15 also has legal consequences, but isn't a necessary
16 question, in my opinion, that has to be addressed.

17 I think in any case, it cannot be
18 done without the consent of all of the participants
19 before this panel.

20 The matter of balance as was dis-
21 cussed, here I express no opinion except to make
22 observations, involves consideration at least of
23 these two matters.

24 To talk about balance in any
25 effective way would require analysis of the



1 governing legislation to determine whether that
2 balance somehow or other is a legal precondition
3 to the establishment of, validly, a Joint Board.

4 It is my opinion that that is not
5 a legal precondition, that it is balanced in the
6 sense that has been discussed here.

7 Within the use of the term "balance,"
8 as I understand it, however, there are two con-
9 siderations. One must surely have to do with
10 questions of competence. That is that a panel
11 that isn't constituted by persons with the back-
12 ground of the OMB and the EAB cannot properly
13 adjudicate on matters such as these. That again
14 raises the question as to whether or not the
15 Statute requires that; in my opinion, it does not.

16 But in any case, it raises the issue
17 as to what happens if an Ontario Municipal Board
18 member who was nominated doesn't have any great
19 experience. Will the argument be that not only
20 is an OMB member required, but it has got to be
21 an OMB member with a particular track record of
22 experience. I say that is not an issue either.
23 Inherent in this discussion of balance, the need
24 for an OMB member to sit has been expressed as
25 requiring that sort measure of experience is the



1 submission that not any ordinary OMB member would
2 be an appropriate addition to this panel, but only
3 an Ontario Municipal Board member with experience
4 of a particular kind. I know of no basis in
5 law for insisting on that kind of composition.
6 In my opinion, and I so submit the submission is
7 correct, that the Board members that sit here are
8 sitting as members of a Joint Board. While they
9 may be constituted from members of the EAB Board
10 and the OMB.

11 The reference is to the source of
12 personnel, so to speak, and not to any particular
13 burden of experience that the members of the
14 individual boards may have accumulated or not
15 accumulated as the case may be.

16 With respect to the addition of an
17 OMB member, I would only say that there are
18 problems with that. I am not convinced, at least
19 as I stand here, that consent cannot deal with the
20 issue of the admissibility of transcripts. In
21 an appropriate context, that, in my view, does not
22 necessarily involve a serious jurisdictional issue,
23 but it may do. I think it is questionable and
24 I am not prepared to be categorical about that.
25 But I am confident that absent at this stage, absent



1 the consent of the parties, it is not achievable.

2 Lastly, again these are by way of
3 observation more than anything else for those
4 others who wish to comment so that what I say is
5 absolutely clear. I have this to say about the
6 stated case proposition.

7 Based on my experience with advising
8 other boards and tribunals and discharging the
9 responsibility of having carriage of the stated
10 cases in Divisional Court, and I have done so on a
11 number of occasions. It may not be appropriate,
12 perhaps I should be stronger than that, in my
13 opinion it is not appropriate for an administrative
14 tribunal which is presumed to know its jurisdiction
15 to state a case at least in circumstances where
16 it entertains no doubt itself as to what its juris-
17 diction is. So that absent a genuine concern
18 as to whether or not it can proceed, perhaps there
19 is no absence but certainly in that context absent
20 a real substantial concern about its own juris-
21 diction, it ought to be very hesitant in running off
22 to the Divisional Court asking the court to provide
23 it with directions as to how it ought to proceed.

24 So that if the panel is satisfied
25 on the basis of the submissions that it hears and



1 its own deliberations that it has jurisdiction to
2 proceed as constituted and that there are no other
3 alternatives that may allow it to meet all of the
4 concerns of the parties that have expressed con-
5 cerns here, it should proceed as it is best advised,
6 in my opinion.

7 If, on the other hand, there are
8 other alternatives, recognizing the particular
9 jurisdiction, that is, can the proceedings be
10 fashioned in some way or in such a way as to
11 minimize the concerns that the parties have as to
12 this supposed lack of balance as has been described
13 to you then those would be matters of a largely
14 procedural kind that the Board can contemplate and
15 attempt to fashion the process or procedure that
16 would allow it, if it sees it necessary to receive
17 the kind of expert assistance that may or may not
18 become demonstrably necessary. I am not sure
19 how helpful the retaining of experts to assist
20 the Board would be.

21 Ms Cronk and others can comment on
22 this, but my experience is that, as is the case
23 with counsel retained under the same section, the
24 advice that would be given, perhaps the interpre-
25 tations that would be given by say, a Planning



1 expert to the Board, would be available in some
2 suitable fashion, or forum for review by counsel
3 and an opportunity provided for them to comment
4 on the substance, I suppose, of those views.

5 So that what you may think you are
6 doing is receiving advice, interpretive help,
7 indeed there may be a virtue in the sense that it
8 will be independent but you are adding another
9 witness to the proceedings. Albeit somebody
10 who stands off at some distance from the individual
11 participants. Those are considerations or is a
12 consideration that you may have to bear in mind at
13 some point.

14 I suppose by way of summary, I can
15 only observe that, subject to repeat quickly what
16 I said, either this panel has jurisdiction to
17 continue as it is constituted, or it does not. If
18 it does not, then there is no alternative but to
19 constitute an entirely new Board. Whether that
20 can be done with the two present members forming
21 part of that panel, if it is a panel of three, there
22 may be some difficulties that counsel may want to
23 address.

24 If the panel has jurisdiction to
25 continue, then the issue is surely do we continue



1 simply as we are, reduced in numbers, or do we do
2 that and try to fashion the process with the assis-
3 tance and advice of all the participants to most
4 closely meet the concerns whether they are
5 articulated or otherwise, by the parties that are
6 here.

7 Thank you, Mr. Chairman, that is
8 about as much help as I can be here.

9 DR. KINGHAM: For the purposes of
10 hearing responses to that, which we heard this
11 morning, I think we will reverse the order from
12 that in which we heard that earlier information.
13 I have already on the list, Mr. Garrod, Ms Cronk,
14 Mr. Leitch, are there others? If not, Mr. Garrod.

15 MR. LEDERER: Mr. Hodgson
16 points out you didn't mention my name. I am so
17 extricably bound to this.

18 DR. KINGHAM: You have the cleanup
19 role this time.

20
21 REPLY BY MR. GARROD :

22 Mr. Chairman, I will be very brief.
23 I think I have two different areas I would like to
24 address.

25 Firstly, I would like to reply



1 briefly to some remarks that Mr. Tidball made about
2 the central issue, or the driving force in this
3 hearing being the decision under the Environmental
4 Assessment Act and I can well appreciate it from the
5 point of view of his client and the point of view
6 of that perspective that this is an extremely imp-
7 ortant Environmental Assessment Act case. There
8 is no doubt about that.

9 This is, in fact, the first landfill
10 case in Ontario that is being decided under that Act.

11 Having said that however, it is
12 my position that that, the other approvals do not
13 flow from whatever result comes out of that. In
14 fact, the Region's undertaking is to landfill at
15 either D or F and it is conceivable, in my submis-
16 sion that the decision of this Board if it approves
17 the undertaking, would be to approve landfilling at
18 D or F and the matter would then be determined on
19 an analysis of the technical issues under the
20 Environmental Protection Act and the planning and
21 expropriation issues so that the decision as to
22 which site actually would be used for landfilling
23 will not automatically flow out of the resolution
24 of the Environmental Assessment Act issues as to
25 whether or not to approve the undertaking or accept



1 the Environmental Assessment Document.

2 It is for those reasons that
3 I made the submissions earlier to you of the crucial
4 importance that there be a balanced consideration
5 of not only those technical issues under the
6 Environmental Protection Act which I have no doubt
7 of the capability of this Board but also a balanced
8 consideration of the planning and expropriation
9 considerations which are the other side of that
10 equation in my submission without intending any
11 disrespect. It is for those reasons that the
12 concerns of my clients arise.

13 The other point I would like to
14 turn to is just very simply the question of whether
15 or not there would be a jurisdictional error in
16 attempting to proceed with simply the two remaining,
17 the two present members of the Board. That, I
18 think it has been clear now, everybody has agreed
19 that the Statute itself in technical terms, gives
20 you that legal authority. The concern for lack
21 of jurisdiction or loss of jurisdiction arises as
22 a result of what might be termed the law or the
23 doctrine of fairness. That is a doctrine that
24 is rapidly emerging, a new area of law evolving
25 and it has origins in applications of this sort.



1 Very recently, in the last five or
2 ten years, the decision of the Supreme Court of
3 Canada in the Nicholson which all of us are familiar
4 with, and has been extended and applied beyond that
5 in the last five or ten years.

6 Frankly, I believe it is an area
7 of law that is evolving and has not yet completed
8 its evolution. I do not believe there is anyone
9 in this room can tell you how far the courts are
10 prepared to extend that doctrine. It has not
11 yet been decided and it is my submission to you that
12 in this case the requirement for fairness is a
13 very high one, given the potentially grave
14 consequences for my clients as well as others in
15 the room.

16 For that reason, I believe that there
17 is a risk that proceeding with just the two members
18 here opens the door to a challenge on the grounds
19 of fairness. I believe that, and I don't mean,
20 Mr. Chairman, I want to make this perfectly clear,
21 I don't mean in terms of your -- either of your
22 personal intentions or good faith or anything like
23 that in the nature of fairness. I am talking
24 simply about procedural fairness along the lines
25 that I have indicated earlier.



1 So, I don't think you can look at
2 this and say we have one route that is crystal clear
3 and we will have no problems and another route
4 that is perhaps fraught with difficulties. I
5 think you have two alternative routes that may be
6 fraught with difficulties. The only clear one
7 perhaps is to start over again, although for all
8 the reasons everybody has expressed, that is
9 perhaps undesirable. I wouldn't want it to be
10 left that you have one easy route and no difficult
11 ones. I don't think that is the case, given the
12 emerging nature of the law.

13 Thank you, sir.

14 DR. KINGHAM: Ms Cronk.

15
16 REPLY BY MS CRONK:

17 Yes, Dr. Kingham, Ms Tanner, there
18 were a few points that in my submission require
19 some response given what you have heard from
20 Mr. McQuaid and other counsel, after my submissions
21 that you heard from me.

22 I go immediately to what I conceive
23 to be the heart of it and that is the issue of
24 whether there is, in the circumstances, any merit
25 in seeking directions from the court and if so,



1 whether that is practical or as my friend,
2 Mr. McQuaid said, that is a futile exercise and
3 that is the use of transcripts and whether that
4 procedure would offend natural justice. With
5 very genuine great respect for my friend,
6 Mr. McQuaid, obviously I have parted company with him
7 on a number of his submissions to you or I wouldn't have
8 made the submissions I made.

 Let me come back to the suggestion
9 of seeking directions. A number of counsel
10 have suggested to you today that there is not the
11 complexity of legal issue in this case that requires
12 the kind of additional expertise I am urging upon
13 you and it seems after four hours of submission today
14 on a matter confined to the procedural issues it
15 is greater from time to time in a case of this
16 length there are going to be issues arise that
17 have very complex implications and they may very
18 well arise in the planning context.

 Leaving that for the moment aside,
19 the procedure that could be followed or has been
20 followed in the past, is to seek direction from the
21 court. It is simply this: Questions are posed
22 for the response of the court. In this case,
23 as Mr. Marshall has suggested, that is a route
24 that no board or tribunal would wisely follow
25



1 where there is no real issue over its jurisdiction.

2 I have tried, in my submissions,
3 to make it clear that I do not take the position,
4 nor have I understood anyone before you today, to
5 take the position that the panel of two is without
6 jurisdiction to continue. That is not the issue.
7 The issue is whether there is jurisdiction to meet
8 the concerns that have been expressed with respect
9 to additional expertise such that the questions
10 could be posed. I am not suggesting express
11 language, but in a way that was not an academic
12 exercise, to inquire of the court whether this
13 Board has jurisdiction to form a new panel comprised
14 in part of a member of the Ontario Municipal Board,
15 given the circumstances of this case and if so,
16 if the answer to that is yes, whether that panel,
17 as constituted, has the jurisdiction to receive
18 evidence in transcript form with respect to the
19 evidence heard to date.

20 There is no issue over your juris-
21 diction to continue as a panel of two in my sub-
22 mission. The issue is whether you have jurisdic-
23 tion to answer the concerns that have been put before
24 you.

25 Mr. McQuaid suggested, as I



1 understood, in his submission that that would be
2 a sideshow and in his words, it was unnecessary,
3 that you can't state questions in the abstract. There
4 must be a decision of the Board first.

5 Now, he and I and several others
6 in the room have experience with this kind of
7 procedure. Clearly, you can't do it in the
8 abstract. Clearly, it was not put forward to you
9 as a sideshow, but as a possible solution to what
10 is a procedural problem in my submission, a matter
11 which may determine, the questions were framed in
12 that way, you would have direction from
13 the court as to whether your jurisdiction
14 permitted you to frame a response to a concern you
15 have heard.

16 Mr. Marshall has told you you
17 shouldn't do that unless there is a concern, a
18 genuine serious concern about your jurisdiction.
19 You have heard from Mr. McQuaid and Ms. Vigod. They
20 have articulated a concern as to whether you have
21 jurisdiction to introduce an Ontario Municipal Board
22 member in one procedural fashion or another. That
23 is the issue on which the direction of the court is
24 needed. That is not a clear issue. There is
25 no case law under the Act that exists, let alone any



1 in existence.

2 In my submission, the case law
3 that has been put forward to you today is not of
4 assistance either along that line.

5 Let me put this to you. That is
6 the use of transcripts. It has been suggested
7 to you, as I understood their arguments, that
8 reading transcripts would somehow insult the
9 natural justice which somehow in itself, constitute
10 a breach. I just say simply three things.

11 Clearly, first, the Courts of Justice
12 Act in the context of court proceedings contem-
13 plates that very procedure. It does not require
14 consent. That in itself is a recognition,
15 statutory recognition, that that procedure is
16 acceptable and will not in an appropriate case,
17 constitute a breach of natural justice. Otherwise the
18 provision would not be in the Statute.

19 Secondly, under the Statutory
20 Powers and Procedures Act which governs the procedures
21 of this Board, Section 15 provides a very broad
22 jurisdiction to the Board as to the manner in which
23 it will receive evidence. It provides that you
24 may admit as the evidence at a hearing whether or
25 not, given or proven under oath, you can receive
evidence that isn't under oath or affirmation, any



1 oral testimony, any document or other thing
2 relative to the subject matter and you may act on
3 such evidence and you may exclude anything that
4 is unduly repetitious. There is an enormously
5 broad discretion under the Statutory Powers
6 Procedures Act to receive evidence in whatever form
7 -- relevancy is always the test. The issue
8 as to what weight you attach to it is another
9 matter. Its admissibility is in the hands of the
10 Board based on its relevancy.

11 It has been suggested to you that
12 Section 12(3) of your Act would prevent the kind
13 of procedure I am suggesting to you. That
14 subsection contemplated, in my submission, what is
15 to occur under the hearing. It was precisely
16 because of Subsection 3 that I suggested to you the
17 procedure that I have. If a new Board were to
18 be constituted, comprised of Dr. Kingham and
19 Ms Tanner and an Ontario Municipal Board member,
20 all Subsection 3 requires is that on the commence-
21 ment of that new hearing, all three members be
22 present throughout and hear the evidence and
23 argument of the parties. That is a condition
24 precedent to them participating in the ultimate
25 decision. The issue is how they hear the



1 evidence. That is a procedural matter. It
2 is by no means in my submission a description of
3 the state of the law to suggest that in the context
4 of a newly constituted Board that fresh commencement
5 of the hearing, that evidence could not be received
6 in transcript form pursuant to the very broad
7 latitude that you have in both your own Statute
8 and the Statutory Powers Procedures Act.

9 I suppose it comes to this; This
10 decision can't be made today. It's an issue as
11 to how that section is to be properly interpreted.
12 It's a legal issue. It's an issue that would in
13 part be encompassed by the kind of question that
14 I propose you put to the Divisional Court.

15 I should back up and say one other
16 thing in response to the submissions you have heard.
17 In time, if this solution is not practical, if there
18 is insufficient time to do it, in my submission, that
19 is a complete answer to the suggestion, but I urge
20 it upon you, that as at least one route that has
21 the potential of addressing the concerns expressed
22 by Mr. McQuaid and Ms Vigod and Mr. Tidball and the
23 concerns expressed on the other hand, not I might
24 add, just by Mr. Leitch on behalf of Milton, but
25 by Mr. Lederer on behalf of the Region, and myself



1 on behalf of National Sewer Pipe Limited and by
2 Mr. Garrod. You have two divergent sources of
3 concern here.

4 In those circumstances, if you
5 could obtain direction from the court which spoke
6 to your jurisdiction to cure some of those concerns,
7 it seems to me the matters would move forward in a
8 substantive way.

9 Now, very briefly, of the cases
10 that have been put before you, there is no doubt
11 that any counsel experienced in the administrative
12 law, there is a principle in administrative law
13 long recognized that he who decides must hear.
14 That constitutes generally, that no decision-maker
15 will participate in the making of a decision unless
16 he or she is conversant with and has heard the
17 other parts of the issue.

18 How do you hear it? Again, you
19 come to the forum in which a tribunal may or may
20 not receive evidence. In the two cases particularly
21 that have been put before you in the Rosenfeld case
22 which involved a disciplinary committee of the
23 College of Physicians and Surgeons, about which I
24 have some experience, involved a situation in which
25 new members were involved on a decision on penalty



1 after finding misconduct by a physician without ever
2 having heard the evidence and they didn't read the
3 transcripts. There was no suggestion that the
4 evidence was either before them in transcript form
5 and they had to pass on an appropriate penalty for
6 misconduct. A very difficult decision.

7 In the Doyle case, if you look at
8 the reasons and the exact passages that were drawn
9 to your attention, you have there a Board comprised
10 of several -- and with all due respect to the
11 individuals who were involved, he was a revolving
12 door. Two or three of them kept coming out, not
13 one or two days, but several days, so they came
14 partially seized of the hearing at the beginning,
15 left for a number of hours, came back to pick up
16 on it, left for a couple of days, came back and
17 picked up on it again. That is not the situation
18 before you.

19 In the end, my submission to you
20 quite simply is that if you seek the direction of
21 the court as to whether you have jurisdiction to
22 constitute a fresh panel, commence a new hearing
23 with an additional member assigned to assist you
24 and seek direction as to whether you have jurisdic-
25 tion to receive evidence in transcript form, then



1 if the answers to those questions are yes, you have
2 found a procedural route that addresses the
3 concerns expressed to you and he who hears the
4 case will then still be in a position to decide
5 it.

6 I think then in the end, Dr. Kingham
7 and Ms Tanner, with respect to Mr. Tidball's
8 comments he has indicated to you that he can't
9 understand how any unfairness would arise, that he
10 can't understand how any breach of natural justice
11 might arise and let me, in respect of those submis-
12 sions, simply say two things.

13 There are cases, in my submission,
14 where a particular form of expertise is indispensable
15 to a tribunal's decision-making. That is in
16 essence what you have had submitted to you today.
17 This is one of those cases where that expertise or
18 planning input is missing. It is clearly arguable,
19 not up to counsel in this room to decide the issue,
20 it may be decided ultimately in another forum. It is
21 clearly arguable that where that is missing and the concerns
22 of natural justice and fairness have been raised
23 before you, it is clearly possible that that
24 fairness could, in fact, be worked if in the decision-
25 making process is necessary to assess, to analyse



1 or to reject or accept matters relating to land use
2 issues and finance issues matters of that kind.
3 That is how the allegation of unfairness or the
4 perception of unfairness can arise and that's how
5 the perception of a lack of natural justice can
6 arise.

7 Finally, with respect to the import
8 of Section 10 of the Act, with relation to experts.
9 My submission is that the Board clearly has an un-
10 ambiguous jurisdiction to appoint an expert to assist
11 it.

12 If you look at the language of that
13 the difficulty I have with it as a solution to
14 the concerns before you is that
15 because traditionally where boards, other boards
16 have jurisdiction of that kind an expert is appointed
17 to provide opinion evidence on a matter at issue
18 in the hearing. That is what the expertise is
19 all about. It's a planner or it's a hydrogeologist
20 or it's an engineer. In that respect the evidence
21 of the Board's witness, because that's what it is,
22 it's an adviser, is always subject to testing under
23 cross-examination. That is a procedure we are
24 accustomed to in this province. Certainly every
25 party has a right to know what that expert is



1 advising the Board and to respond to it. So,
2 what you are really doing is, yes, you are seeking
3 additional expertise, but it has to be weighed in the
4 balance against the other experts in this same
5 area. The section does not contemplate, in my
6 submission, an expert generally on land use matters that might
7 sit with you advises you as the evidence comes in as to how you are
8 to weigh it and assist you in reaching your deter-
9 mination, that is not the concept that has evolved
10 in this province to permit tribunals and courts
11 to call upon expert witnesses, expert advisers
12 in technical cases. It is, in effect, another
13 expert opinion that is received as opinion evidence
14 to assist the Board in matters of controversy.
15 It is not to assist you in your decision-making as
16 direct input and cannot be seen as a substitute in
17 my submission, for the kind of expertise Ontario
18 Municipal Board members might be able to offer you.

19 Finally, lest there has been any
20 confusion or misinterpretation, there have been a
21 number of words in this room this afternoon, which I
22 regret and were no doubt unintentional, but unfortunate,
23 We have tried to be of assistance to you this
24 afternoon. There is a procedural and substantive
25 jurisdictional problem and in my submission, the



1 manner in which you choose. I urge you not to
2 abandon prematurely the concept of obtaining some
3 assistance. If it can be done expeditiously,
4 and we don't know that it can't, I believe that
5 solution would be of assistance to you.

6 Thank you.

7 MR. LEITCH: Mr. Garrod, and Ms
8 Cronk have covered my ground.

9 DR. KINGHAM: Mr. Lederer?

10
11 REPLY BY MR. LEDERER:

12 Thank you, Mr. Chairman.

13 You have heard a lot in the last
14 three or four hours and I am afraid to say that
15 you are now going to get from me almost a stream
16 of consciousness response. It's a little
17 difficult to follow it all.

18 First of all, may I begin with the
19 submission made to you by Ms Cronk towards the end
20 of her submissions in which she responded to a point
21 made by Mr. Tidball with respect to the notion of
22 fairness. It may well be, as Ms Cronk submits
23 to you, that it is not up to counsel to make those
24 decisions and it is not inappropriate for counsel
25 to comment.



As I understood Ms Cronk's submissions at the outset, her first set of submissions, she said it is clear you have the jurisdiction now, however, you may lose it. You may lose it if I understand what she has now said, because of some lack of expertise. In respectful submission, if you have something and lose it, you only lose it by actions that you take.

In my respectful submission, if this hearing is continued, we are all, I am sure, happy to presume that this Board will do everything necessary to proceed in a way which is fair in accordance with that principle of law that has been established.

In any event, the legislation makes it clear that you have jurisdiction and prima facie the legislation must be accepted in my respectful submission or we will be second-guessing the legislation in these kinds of circumstances.

Some of my friends have put to you, the issue of deferral which, in my submission, was not clear. A pure deferral to another Board is meaningless in this case, because what it means is that we will have two decisions, two hearings and a potential for conflicting decisions. A deferral



1 on its own will not help us out of this dilemma.

2 In my submission, it must be
3 accompanied by the understanding that the evidence
4 which you have heard by transcript will become
5 incorporated into any proceeding which may follow.

6 In my submission, again, that can
7 only be on consent. There has been some reliance
8 placed before you on Section 5(4)(a) which talks
9 about the Joint Board imposing such terms and
10 conditions, or give direction both in respect of
11 proceedings which it defers.

12 In my respectful submission, that
13 cannot be extended to mean that you can direct the
14 Board, a future Board as to how it is to receive
15 evidence. The issues which are placed before it
16 perhaps, but how it is to receive evidence, no.

17 In my respectful submission, the
18 Act is clear. This is Section 7(3). Subject
19 to this Act and the regulations, a Joint Board may
20 determine its own practice and procedure. It is
21 first in the hands of the Board conducting the
22 hearing to determine what is the appropriate evidence
23 and the manner of receiving it.

24 Section 12(3) which you have heard
25 so much about, similarly flies in the



1 face of the notion that you can simply direct the
2 Board in the manner in which it is to receive
3 evidence.

4 Some reference was made by Ms Cronk
5 to the Courts of Justice Act. May I indicate
6 to you that that section, even if it had application
7 here is not a complete answer because there is a
8 discretion left to the court in those circumstances,
9 the discretion of the court at the rehearing to
10 recall a witness or require such further evidence
11 as may be necessary.

12 In my respectful submission, what
13 we will be confronted with is a request to rehear
14 evidence by all counsel who believe there is some
15 witness they could do better with. At best,
16 we will have a serious fragmentation of the evidence
17 and quite possibly, no substantial gaining in time
18 as a result of the incorporation of the transcripts
19 into the record.

20 You need, in my respectful submis-
21 sion, consent.

22 If I may turn now to the submis-
23 sions made to you by Mr. McQuaid and Ms Vigod.
24 In my respectful submission, there will not be a
25 nullity in this situation as they propose. I rely



1 in large part upon submissions which have been
2 made to you by Ms Cronk in distinguishing the cases
3 on which they rely.

4 In my respectful submission, there
5 is no individual here who is personally at risk
6 in that fraud has been alleged against them as in
7 the Doyle case or a disciplinary proceeding
8 commenced against them as in the Rosenfeld case.
9 In this situation, everybody has notice, everybody
10 has been here. Somebody reappearing down the
11 road, or somebody appearing and saying "Oh, now I
12 want to take part" and saying therefore "You should
13 strike this down on the basis that I did not have
14 a chance to be heard."

15 In my respectful submission, in this
16 kind of inquiry, which is an inquiry and not an
17 adversarial proceeding, such an argument will not
18 hold. The substance, the logical extension of
19 such an argument is that every time a jurisdictional
20 issue is raised a proposition might be made that
21 somebody may appear later to argue that juris-
22 dictional decision. It is not, in my respectful
23 submission, the case.

24 Secondly, Mr. McQuaid says to you
25 there is not a matter of importance here.



1 Mr. Tidball said, Mr. McQuaid is
2 in the back saying he didn't say that. As I
3 understand it, I can be corrected, his position was
4 that there are no particular issues which anybody
5 ought to be concerned about with respect to how
6 they can be interpreted and what impact this case
7 may have on future applications.

8 Mr. Tidball has a disagreement and
9 says he is content to proceed. My submission is,
10 as I said at the outset, that there are matters of
11 first impression here and if I may try to augment
12 this by giving you, the Board, a very particular
13 example.

14 One of the absolute fundamental
15 concepts in the Environmental Assessment Act is
16 the distinction between alternatives to an under-
17 taking and alternative methods of an undertaking.
18 This Act has been around for 12 years. That issue
19 was argued for three or four days. It was
20 restricted to two days before the recent Joint
21 Board which conducted a hearing into the hydro lines
22 in southwestern Ontario. It was the first time,
23 so far as I know, it had been argued. Unhappily,
24 in my view, the Board's decision was that since in
25 the end that debate didn't impact upon the decision



1 which they had to make, they chose not to assist
2 us with any interpretation. So here we are, we
3 are 12 years out, we don't have any direction from
4 the Board as to some of the fundamental concepts
5 wrapped up in this legislation. I am not
6 suggesting that that one, the distinction between
7 alternatives and alternative methods will be an issue
8 here. I rather suspect it will not, but there
9 are any number of like issues.

10 With respect, no matter how this
11 matter is conducted, great care will have to be
12 taken because of the impact these decisions will
13 have on future inquiries dealing with similar
14 matters.

15 Mr. Tidball has mentioned that I will
16 at the drop of a hat talk about the Redhill Creek
17 decision. I am not really prepared to do that
18 but since he has raised that by way of a counterpoint
19 because as I am sure the Board will be aware, it
20 will be in any way familiar with the petition made
21 to Cabinet in response to that issue on behalf of
22 the Region of Hamilton-Wentworth, with great respect
23 to Mr. Jeffery, I have great difficulty with some
24 of his interpretations.

25 These matters have to be clarified



1 and they are going to start with this hearing.
2 These are matters of importance and they reach
3 beyond this particular inquiry.

4 All of that takes me to the one
5 substantive proposal that has been made to you,
6 which I have never dealt with in these submissions
7 today, and that is the matter of the stated case.

8 First of all, may I say to you
9 I did not hear anything about that proposition until
10 this morning, which has placed me in the somewhat
11 difficult position. I have no specific instruc-
12 tions. I do, however, wish to raise with you some
13 concerns. With great respect, there is no way
14 of knowing how long such a procedure would take.
15 Even if it were possible, and it cannot be known now,
16 or known if it is possible to have such a matter
17 taken before the courts within two weeks, there is
18 every prospect that it will be appealed, nobody can
19 say that it won't. If it proceeds before a single
20 judge, may I indicate to you that I have had at
21 least one experience in my career in which I went
22 before a single judge with five or six other
23 parties, interestingly enough, dealing with a
24 landfill case in which every counsel present on
25 all sides of the issue said it was a matter of



1 urgency but the judge believed the issues raised
2 were of enough significance that the matter had to
3 be handled by a full Bench of the Divisional Court
4 and that meant a six-month delay.

5 If this matter goes to the courts
6 by way of a stated case, there is only one thing of
7 which we can be certain. This Board will lose
8 control of the timing.

9 With respect, if some other party
10 is left to make the decision as to whether this
11 is to go to the courts, it will still be open to
12 you to consider whether or not the hearing should
13 proceed on the basis of that court application.

14 In my respectful submission, there-
15 fore, without knowing, and we do not now know what
16 the timing will be and I am not certain we could
17 ever know to my satisfaction and the Region. I
18 find that a difficult proposition to accept.

19 With respect to the matter of expert
20 witnesses and what if they were here to advise
21 you and what would happen? In my respectful
22 submission, if any expert is going to have a part
23 in the hearing, he must be subject to cross-examin-
24 ation. Every expert is subject to his own
25 experience and his own particular view of his



1 discipline and we must, as counsel, have an
2 opportunity to examine him or else get a Board
3 member appointed without knowing what side their
4 position is, knowing they will have a great impact
5 on their expertise.

6 Now, all of this takes me back to
7 where I started. That is, that it would be
8 better, we would prefer it if another OMB member
9 could be appointed to this Board and if we could
10 continue with that assistance.

11 Without consent, in my submission,
12 it is not possible. I take now some added
13 strength in that submission that has been put
14 forward to you by your counsel, Mr. Marshall.

15 Unhappily, that situation
16 seems to me leaves us with no option but to proceed.
17 Let me say I do not lack confidence in the ability
18 of this Board to complete this matter in a
19 satisfactory way. I simply feel it would have
20 been helpful to all parties if we could have had
21 the assistance of an experienced OMB member. It
22 is unfortunate that people cannot see their way to
23 consent and it seems that they cannot. We have
24 to accept matters as we find it and there is a time
25 in all these debates where you have to come to grips



1 with the decision and deal with it and unhappily in
2 this case, I am afraid it means we should proceed.

3 Of course, I am in the Board's hands
4 as to what you may choose to do or how to deal with
5 this matter, but if we are to proceed, I am concerned
6 now with how we are going to inform the parties,
7 I don't wish to lose any more time than necessary.

8 As it now stands, we are scheduled
9 to be back here on July 13th. My proposition is
10 that we be back here ready to go and if the Board
11 makes some other order, then we will disband, but
12 I do not want to lose any more time.

13 DR. KINGHAM: Thank you,
14 Mr. Lederer.

15 I would like to say, on behalf of the
16 Board, thanks to all of you for having provided a
17 great deal of information which I think has been
18 very helpful to us in understanding your views on
19 the complexities in these issues.

20 We have several things to consider.

21 First and foremost, our hope for the
22 good health of Mr. Lancaster, in which case we may
23 find the route ahead much easier than it otherwise
24 would be. We will keep checking on Mr. Lancaster's
25 progress daily in the hope that in fact his recovery



1 may obviate the need for these other considerations.

2 That being said, we have other
3 matters to consider. We have understood our
4 jurisdiction in this matter from the outset,
5 otherwise we would not have been here Monday
6 morning even for the brief discussion that we had
7 then, nor would we have reconvened to hear views.
8 We have therefore some decisions to consider our-
9 selves in terms of whether or not we constitute
10 a quorum. Those decisions would not be taken
11 lightly and they must be taken in the context of
12 the broader issues which you have all brought to
13 our attention today.

14 The next logical step to consider
15 would be, of course, whether or not such a decision
16 should be overtly, obviously confirmed by the
17 Chairmen of the two Boards for which we are acting.
18 That would be a different step and one which, if
19 it were taken, would have to be taken in light
20 of the information that you have brought forward.

21 You have made it clear to us that
22 in this consideration there are two steps which
23 are arguably -- relatively uncontested. That
24 is to say that we continue as a Board of two or
25 we start from scratch. I think what we were



1 reaching for on Monday morning was some sense from
2 all of you as to whether there might be a reasonable
3 and unanimously supported mid-position which would
4 be in the best interests of everybody. I am not
5 sure that we have found such a unanimously supported
6 position. I think to the contrary, we have found
7 that there is not unanimity. We will therefore
8 have to consider in a phased way, these options
9 that are available to us.

10 I think in order to proceed in the
11 most optimistic sense we should at least be prepared
12 to convene on the 13th of July at ten o'clock here.
13 If for no other purpose than to convey that
14 procedural decision. But in the event that
15 procedural decision might be that we would proceed
16 with a Board of two, we should be prepared to hear
17 evidence at that time.

18 With that, I will adjourn this
19 gatherin until ten o'clock on July 13th, which is
20 our next regular sitting day. Thank you.

21 MR. GARROD: Mr. Chairman, I wonder
22 just before we break, if there is some possibility
23 of getting an indication before that, I would very
24 much appreciate it. The Board may remember that
25 last week, I think it was, when you had the



1 discussion about the order of cross-examination,
2 I indicated that I had some difficulties in the week
3 of the 13th and I would therefore want to do my
4 cross-examination that week and obviously events
5 have conspired against me.

6 If it becomes necessary for me to
7 make attempts to rearrange my schedule to the
8 extent that I can, I would appreciate, if it is
9 possible, knowing that earlier than the 13th. If
10 we are not going to sit the 13th, it would make
11 things considerably easier for me to not have to
12 make attempts to reschedule. So, I just mention
13 that only in the hope that if there is some
14 resolution of the matter prior to the 13th that it
15 could be conveyed to us.

16 DR.KINGHAM: As I stated to you,
17 my most optimistic scenario is that we would
18 continue on the 13th. If it becomes clear much
19 sooner than that, as it may become clear on
20 Monday of next week that that would be not a
21 useful expenditure of time for all parties con-
22 cerned, we would endeavour to contact all counsel
23 early next week to let them know that we would
24 or would not be continuing.

25 You mentioned the 13th, so that

