

Citation: *Sutcliffe v. Ontario (Minister of the Environment)*
Date: 2003-06-17
Docket: 572-00;622/00
URL: <http://www.canlii.org/on/cas/onscdc/2003/2003onscdc10681.html>

DIVISIONAL COURT FILE NO.: 572/00

622/00

DATE: 20030617

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

CUNNINGHAM A.C.J., KURISKO J. AND LANG J.

B E T W E E N:

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)

Ben Sutcliffe and Helen Kimmerly)

Richard D. Lindgren,

)

for Sutcliffe and Kimmerly

Applicants)

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- and -

)

)

Minister of the Environment)

Sara Blake and E. Ria Tzimas,

(Ontario) and Canadian Waste)

for Attorney General for Ontario

Services Inc.)

)

David Crocker,

Respondents)

for Canadian Waste Services Inc.

)

)

AND BETWEEN:)

)

MOHAWKS OF THE BAY OF QUINTE) *Patrick Schindler,*

) for Mohawks of the Bay of Quinte

Applicant)

)

- and -)

)

MINISTER OF THE ENVIRONMENT)

(ONTARIO) and CANADIAN WASTE)

SERVICES INC.)

)

Respondents)

)

) **HEARD:** January 27 and 28, 2003

LANG J.:

[1] The applicants oppose the expansion of the Richmond Landfill Site near Napanee. The personal applicants live near the site, while the Mohawks of the Bay of Quinte (Mohawks) occupy a nearby reserve. The applicants seek judicial review of the Minister of the Environment's approval of Terms of Reference (TOR), which were granted preparatory to an Environmental Assessment (EA). The Minister and the private company proposing the expansion, Canada Waste Services Inc. (CWS), respond to the application.

[2] The key issue rests on the statutory interpretation of the *Environmental Assessment Act*, [R.S.O. 1990, c. E.18](#) (EAA).

The Facts

[3] The existing site, occupying a 16.3-hectare area within a larger 143.8-hectare property, is licensed to receive 125,000 tonnes of non-hazardous waste per year. Its first phase opened in 1954 and was designed on the then prevailing theory that the resulting pollution would be controlled by natural attenuation. That first phase, however, produced and continues to produce leachate, which the Ministry says is contained within the site's parameters. The applicants are concerned about the impact of that first-phase leachate on both ground and surface water.

[4] All subsequent phases of the site have been engineered and fully lined, although the applicants remain concerned about potential contamination. The site's neighbours allege that the landfill adversely impacts their agricultural operations and causes reproductive anomalies in their animals. CWS denies any environmental impact outside the site, and attributes any problems to the farmers' own agricultural practices, including the spreading of manure on their properties.

[5] In 1996, the site (and subsequently six other Ontario sites) was acquired by CWS, a subsidiary of Waste Management Inc., a U.S. corporation. In 1997, CWS decided to seek expansion of the Richmond Landfill Site to a capacity of 750,000 tonnes per year, up to a capacity of 23.5 million cubic metres of waste over 25 years.

The Legislation

[6] Such an expansion is subject to the requirements of the *EAA*, which was amended effective January 1, 1997. The most significant amendment adds an obligation on a proponent, such as CWS, to file TOR. This extra step of filing TOR gives the Minister, and others interested in the proposal, information about the scope of the proponent's proposed EA. If the Minister finds that the TOR for an EA are in the public interest and conform with the purpose of the legislation, the Minister will exercise his or her discretion to approve the TOR. The TOR thus informs, governs, and limits the scope of the EA. Upon receiving approval of the TOR, the proponent proceeds to the EA, which, in turn, is submitted for the Minister's consideration. A proponent may only proceed with an undertaking after the EA, completed in accordance with the TOR, has been approved. Another amendment requires the proponent to consult interested parties early in the process.

[7] The question in this case turns on the interpretation to be given to the 1997 legislative amendments, an interpretation that must be considered in the context of the *EAA*. Both the 1997 and pre-1997 legislative schemes require a proponent, whether a private corporation or a public body, to submit an EA to the Minister for approval. Under both the old and the new legislation, the Minister either approves or rejects the EA, or refers it to a Board for consideration. The Minister had, and continues to have, the authority to substitute his or her own decision if in disagreement with the Board's decision. At least pre-1997, the EA contained very specific information as to the purpose and rationale for an undertaking such as a landfill site, including consideration of alternative methods of carrying out the undertaking (alternative methods) and alternatives to the undertaking (alternatives to). In addition, again at least pre-1997, the EA was required to describe the environment that would be impacted, the potential impact, and the steps proposed to mitigate or remedy those impacts. The EA evaluated the advantages and disadvantages of the undertaking to the environment.

[8] Apart from the additional requirement for public consultation, the only difference between the pre-1997 and 1997 EA requirements rests with the addition of the emphasized words in the following provision:

s.6.1.(2) **Subject to subsection (3)**, the environmental assessment must consist of,

- (a) a description of the purpose of the undertaking;
- (b) a description of and a statement of the rationale for,
 - (i) the undertaking,
 - (ii) the alternative methods of carrying out the undertaking, and
 - (iii) the alternatives to the undertaking;

- (c) a description of,
- (i) the environment that will be affected or that might reasonably be expected to be affected, directly or indirectly,
 - (ii) the effects that will be caused or that might reasonably be expected to be caused to the environment, and
 - (iii) the actions necessary or that may reasonably be expected to be necessary to prevent, change, mitigate or remedy the effects upon or the effects that might reasonably be expected upon the environment,

by the undertaking, the alternative methods of carrying out the undertaking and the alternatives to the undertaking;

- (d) an evaluation of the advantages and disadvantages to the environment of the undertaking, the alternative methods of carrying out the undertaking and the alternatives to the undertaking; and
- (e) a description of any consultation about the undertaking by the proponent and the results of the consultation.

(3) The approved terms of reference may provide that the environmental assessment consist of information other than that required by subsection (2).

[9] These EA requirements, however interpreted, dictate the TOR that must be filed by the proponent as an initiating step. The applicable statutory wording with respect to TOR is contained as follows in the 1997 legislation:

s.5. (1) Every proponent who wishes to proceed with an undertaking shall apply to the Minister for approval to do so.

(2) The application consists of the proposed terms of reference submitted under subsection 6(1) and the environmental assessment subsequently submitted under subsection 6.2(1).

...

6. (1) The proponent shall give the Ministry proposed terms of reference governing the preparation of an environmental assessment for the undertaking.

(2) The proposed terms of reference must,

- (a) indicate that the environmental assessment will be prepared in accordance with the requirements set out in subsection 6.1 (2);
- (b) ...; or
- (c) set out in detail the requirements for the preparation of the environmental assessment.

(3) The proposed terms of reference must be accompanied by a description of the consultations by the proponent and the results of the consultations.

(4) The Minister shall approve the proposed terms of reference if the Minister is satisfied that an environmental assessment prepared in accordance with them will be consistent with the purpose of this Act and the public interest.

[10] Section 5.1 introduces additional public consultation by requiring the proponent, when preparing proposed TOR and an EA, to consult "with such persons as may be interested." Other provisions in the legislation, including s.6.1(3) above, support this new consultation requirement.

[11] Counsel disagree as to the meaning to be given to the added words "Subject to subsection (3)", which itself states: "The approved terms of reference may provide that the environmental assessment consist of information **other than** that required by subsection (2)". [Emphasis added]

The question is this: Does "other" mean "different from," or does it mean "in addition to"?

Standard of Review

[12] This question is one of statutory interpretation. The standard of review applicable to the Minister's decision on this issue must be based on a functional and pragmatic approach, with a consideration of four factors: any privative clause, the expertise of the decision maker, the purpose of the provision and the legislation, and the nature of the question: *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [\[1998\] 1 S.C.R. 982](#).

[13] In this case there is neither a privative clause nor a right of appeal. The Minister is considering his or her "home" statute. The purpose of the legislation is to protect Ontario's environment. The question is one of statutory interpretation: What are the statutory requirements for TOR/EAs? The answer to the question depends upon the correct interpretation of those requirements.

[14] The Minister, in interpreting the provision, must be taken to be familiar with the context and purpose of the provision. This preliminary question of the issues to be included in a TOR, however, is to be distinguished from the Minister's ultimate decision as to whether to approve TOR. The preliminary question requires interpretation of the parameters of mandated TOR requirements. The ultimate decision is one of informed discretion based on complex and political considerations, a decision that must be given significant deference.

[15] Counsel for the Ministry argues that the Minister's "interpretation" decision is inseparable from the discretionary political one and is, accordingly, entitled to similar deference. Even if this is correct, statutory discretion must still be exercised within the context of the legislation, including the legislative purpose, unless there is clear wording to the contrary. See *Multi-Malls Inc. v. Ontario (Ministry of Transportation and Communications)* (1976), 73 D.L.R. (3d) 18 at 29 and the cases cited therein.

[16] The question at issue, however, is not the ultimate discretionary decision of whether to approve the TOR. Rather, it is what information is to be put before the Minister when he or she makes that determination. It is purely a question of statutory interpretation. On this narrow point of law, I find that the Minister must be "correct".

The Ambiguity

[17] On the question of statutory interpretation, if "other" means "in addition to" then the proponent of an undertaking would be required to include in an EA all the components listed in s. 6.2(1). In that

case, when approving the TOR the Minister "may," in addition, seek "other" information. If, on the other hand, "other" means "different from" then a proponent, at its own option and discretion, may be relieved from fulfilling the historical requirements for an EA and simply "design its own." That custom design would still be subject to the Minister's approval, which the Minister must still exercise in accordance with the purpose of the legislation and the public interest.

[18] The pre-1997 *Act* clearly mandated a comprehensive EA. The 1997 *Act* is not as clear. Section 6(2)(a) permits a proponent to file TOR stating that an EA will be prepared in accordance with the detailed provisions of s. 6.1(2). If the proponent prefers, however, it may, under s. 6(2)(c), instead "set out in detail the requirements for the preparation of the environmental assessment." If the proponent chooses to use s. 6(2)(c) (to provide detailed requirements for the EA), should s. 6.1 be interpreted to mean that the proponent may "design its own" EA? And does it mean that the custom-made EA need not include the traditional comprehensive s. 6.1(2) components because they are exempted by operation of s. 6.1(3)? In the alternative, must a proponent who is providing detailed requirements for an EA include the s. 6.1(2) components and, at its option, include "other" information pursuant to s. 6.1(3)?

[19] *The Shorter Oxford Dictionary* has several definitions for "other" that refer to one of a group of two, followed by these definitions:

...4. Existing besides or distinct from that or those already specified or implied; further, additional...5. Different in kind or quality. (*The Shorter Oxford Dictionary*, Thumb Index Edition, 4th ed. s.v. "other.")

[20] In the section 6.1(3) context then, "other" information may mean "additional" information, or it may mean "different" information. Accordingly, the meaning of "other" is not clear on its face. There is ambiguity.

[21] Such ambiguity requires resort to rules of statutory interpretation and certain familiar rules apply. The act in question must be interpreted in a manner that promotes its legislative purpose, while at the same time complying with the legislative text, and producing a reasonable result.

[22] The legislature provides assistance with the following provision in the [Interpretation Act, R.S.O. 1990, c.I.11, s. 10](#):

Every Act shall be deemed to be remedial, ... and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

[23] The Ontario Court of Appeal commented on statutory interpretation in *Bapoo v. Co-Operators General Insurance Co.* (1998), 36 O.R. (3d) 616 at 620-621:

The modern approach to statutory interpretation calls on courts to interpret a legislative provision in its total context. The court's interpretation should comply with the legislative text, promote the legislative purpose and produce a reasonable and just meaning. Professor Sullivan described the modern approach in the following passage in *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994) at p. 131, which was cited by Kiteley J.:

There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of

proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just.

[24] In *Will-Kare Paving & Contracting Ltd. v. Canada*, [\[2000\] 1 S.C.R. 915](#) at 940-941 Binnie J., in dissent but not on this point, gave the following review of the modern approach to statutory interpretation:

This is not to say that the "plain meaning" is to be applied by a court oblivious to the context. In *Stuart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, at p. 578, Estey J. emphasized that "[c]ourts today apply to this statute [the *Income Tax Act*] the plain meaning rule, but in a substantive sense", which he elaborated by reference to the oft-quoted passage from E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87 (which Driedger styled "the modern rule"):

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

"[W]ords, like people, take their colour from their surroundings", observed Professor J. Willis at p. 6 in "Statute Interpretation in a Nutshell" (1938), 16 *Can. Bar Rev.* 1, the classic article cited by Estey J. at p. 577 of *Stuart Investments*, *supra*. More recently, Professor J. M. Kernochan has made a similar point: "The precise words which are in issue in relation to the facts must be weighed in the light of successive circles of context" ("Statutory Interpretation: An Outline of Method" (1976), 3 *Dalhousie L.J.* 333, at pp. 348-49). The *Stuart Investments* principles were further addressed by Cory J. in *Alberta (Treasury Branches) v. M.N.R.*, *supra*, at para. 15:

Even if the ambiguity were not apparent, it is significant that in order to determine the clear and plain meaning of the statute it is always appropriate to consider the "scheme of the Act, the object of the Act, and the intention of Parliament."

[25] In considering the meaning of s. 6.2(3), it is appropriate to look at the purpose of the legislation, its context, and its legislative history. Section 2 of the *EAA* states that the legislative purpose "is the betterment of the people of the whole or any part of Ontario by providing for the protection, conservation and wise management in Ontario of the environment. "Environment" is very broadly defined to include not only air, land, water, plant, animal and human life, structures made by humans, liquids, gases, odours, heat, sound and vibration from human activities, but also "the social, economic and cultural conditions that influence the life of humans or a community." (s.1(1)) Accordingly, the "purpose" of the legislation emphasizes that it is intended to protect, conserve, and wisely manage Ontario land for the people of Ontario.

[26] The Minister may only decide to approve the TOR if he or she is satisfied that those terms will produce an EA "consistent with the purpose of this Act and with the public interest." (s. 6(4)) Counsel for the Ministry argued that the 1997 legislative amendments were enacted to make it easier for private companies to obtain approval for proposed private undertakings. She argued that, pre-1997, the *EAA* applied only to public endeavours and was not used by private undertakings. Private undertakings, she said, proceeded under the narrower [Environmental Protection Act, R.S.O. 1990, c. E.19](#) (*EPA*), which focussed on pollution control, rather than on the broader environmental repercussions of a proposed undertaking. There was, however, no evidence to support this argument. Indeed counsel conceded that the *EPA* and the *EAA* were equally applicable to private and public

undertakings, both before and after the amendments. If designated by the Regulation, the *EAA* applied to a private undertaking. At the request of CWS, the Richmond Landfill Site was so designated.

[27] As part of its argument, the Ministry espoused an interpretation that would provide less restrictive requirements on private undertakings. It was pointed out that while public bodies had powers of expropriation to remedy acquisition hurdles, such powers were not available to and, hence restricted, private enterprises. With expropriation powers, it was said, public bodies are better able to present "alternatives to" a particular site or undertaking because they could simply expropriate any property deemed necessary. Such an option is not available to private enterprises. Apart from the absence of evidence on this point, it is worth noting that CWS, the private company at issue, has acquired seven landfill sites since it began business in Canada in 1996. This argument by the Ministry to interpret the legislation more strictly for public entities and less strictly for private enterprises is not borne out either by the evidence or by legislative wording.

[28] Other arguments indicated the Ministry's support of an interpretation that would curtail the expense of lengthy environmental hearings and streamline the process. This argument is consistent with an analysis of the change in Ministry direction referenced by Alan D. Levy in his extensive article: *A Review of Environmental Assessment in Ontario* (2002) 11 J. Env'tl. L. & Prac., 173 (Vol. II, No. 2), which the Ministry cautions was written by Mr. Levy on behalf of the Canadian Environmental Law Association. Although the article supports the Ministry's argument, that the government's "overhaul" of the environmental system was intended to bring a much narrower approach to environmental issues, there is no evidentiary basis or statutory wording to support such a change in legislative intent. Indeed, to the contrary, the 1997 amendments added the extra TOR step to the process and added consultation requirements.

[29] Another tool to assist with the interpretation of the legislation is provided by the decisions of its statutory Board. It is reasonable to assume that the Minister would have considered the Board's interpretations of its own legislation at the time of the 1997 amendments and that those amendments would have reflected any change in approach that the government intended to achieve.

[30] The only two cases brought to our attention that touch on the scope of an EA were *Re Steetley Quarry Products Inc.* (1995), 16 C.E.L.R. (NS) 161 (Jt. Board) and *Re West Northumberland Landfill Site* (1996), 19 C.E.L.R. (NS) 181 (Jt. Board). *Steetley Quarry* proposed to establish a solid waste disposal site within a quarry that it owned and operated. In proposing a rationale for the disposal site, the proponent had reasoned that it had an obligation to rehabilitate the quarry and, in doing so, had an opportunity to provide waste management services. This rationale was internal to the proponent and based on its own needs; it did not address the "need" for a waste disposal site as opposed to other alternatives such as waste export, waste reduction, and waste diversion. The Joint Board did not accept the EA and did not approve the undertaking. It noted that while "need" for the undertaking was not a word specifically used in the EA requirements, it was included in the requirement for a "rationale" for the undertaking, particularly when interpreted in light of the legislative purpose to better the people of Ontario. In so holding, it said at 188:

Justification for an undertaking on the basis of need does not form an explicit requirement of the EA Act. It can, however, be successfully argued that implicit in the requirement for a rationale for the undertaking is an expectation that the proposed undertaking is needed. Also, since approval of an undertaking must rest comfortably on the purpose of providing for the betterment of the people of Ontario, one may conclude that if it does not enhance the community interest, it is not needed. Further, although an undertaking under the EA Act may provide substantial private benefit to the proponent, it must also result in demonstrable social benefit. In any event, by convention, demonstration of need is accepted as an intrinsic part of an environmental assessment.

[31] In other words, while the proponent's corporate need is one reasonable perspective, by the end of the EA that private need must be in accord with the legislative purpose, which is to provide for the betterment of the people of Ontario by providing for "wise management" of the Ontario environment. The Minister was entitled by statute to review the *Steetley Quarry* decision and to vary it or substitute his own opinion. He did not. It must then be presumed that the Minister was not in disagreement with this interpretation.

[32] A year later, in *Northumberland*, another Joint Board again considered the relevance of "need" as an appropriate consideration. In this decision the Board cited Prof. Emond's *Environmental Assessment Law in Canada* (Toronto: Emond-Montgomery, 1978). Emond in turn had referenced a Ministry form entitled "Justification for the Need for the Undertaking" and noted that it was a novel position for the Ministry to argue that "need" was irrelevant. Such a position was, the Board said at 208, inconsistent with the "traditional principle that the undertaking should be necessary in order to be approved."

[33] Thus, an EA, at least pre-1997, included the "need" for the undertaking from a public interest perspective apart from any corporate perspective. At some point, the Ministry began to take the position that "need" was not a relevant consideration mandated by "rationale" in the legislation. In keeping with this position, the Ministry passed a regulation removing the "Justification" form. The removal of the form alone, however, cannot be interpreted as a Ministry decision to delete "need" as a relevant statutory consideration encompassed in the word "rationale." The *Steetley Quarry* and *Northumberland* decisions interpreted "need" to be an important component of "rationale." This then was the state of the law at the time the 1997 amendments were introduced into the House. There is no guidance from any Board decisions made subsequent to the new legislation. We are told this may be because, since the amendments, only two matters have been referred to the Board for hearing.

[34] A similar state of law apparently existed with the interpretation of "alternatives to" and "alternative methods," which had historically been an important component of an EA. In contrast to the traditional approach, CWS specifically states that it will not address "alternatives to" the proposed expansion. This is consistent with the Ministry position that a proponent is now free to construct its own EA and need not comply with the items listed in s. 6.1(2).

[35] As mentioned earlier, the Ministry position favours an approach that provides a proponent with a streamlined mechanism for obtaining government approval. In interpreting legislative intent, parliamentary debates are admissible to provide some insight on legislative intention: *Will-Kare Paving & Contracting Ltd. v. Canada, supra*.

[36] On June 13, 1996, in answer to a question regarding the proposed legislation, including s. 6.1(3), the then Minister of the Environment, although referring to concerns about "open-ended procedural wrangling," was quoted in the Official Report of Debates (Hansard) (Ontario, Legislative Assembly, *Official Report of Debates (Hansard)* [Hansard] as saying:

All proponents will be subject to full environmental assessments. Of that my colleague opposite can be absolutely assured. *Hansard*, 88 (13 June 1996) at 3538 (Hon. Brenda Elliot)

[37] The Minister also said:

Environmental protection remains the overriding objective of the act ... A full environmental assessment will still be required and the key elements of the environmental assessment are maintained, including the broad definition of the environment, the examination of alternatives, the role of the Environmental Assessment Board as an independent decision maker. *Hansard*, 88 (13 June 1996) at 3529 (Hon. Brenda Elliot)

[38] On June 24, 1996, the Minister, after referring to the "unworkability" of the present system and the need to "focus" the issues, stated that:

Alternatives will be addressed under the new process. Let me assure my colleagues that these reforms commit to a full environmental assessment. The requirement to consider project rationale and alternatives remains. *Hansard*, 88 (24 June 1996) at 3849 (Hon. Brenda Elliot)

[39] Read together, these statements convey an intention by the Minister to continue with a broad based EA, one that would specifically include "rationale" and "alternatives." Nothing in the legislative debates demonstrates an intention to streamline the process for private or public proponents by reducing the legislative requirements for an EA. To the contrary, the Minister gave specific assurances that a "full environmental assessment" will "still be maintained." Concerns raised were apparently addressed by focussing issues early in the process with the requirement that a proponent now consult with interested parties and file TOR outlining its proposed environmental assessment.

[40] The Minister's statement, that "rationale" would remain a criterion, is particularly significant as that word is only contained in s. 6.1 (2), which supports the view that the section speaks to the core of an EA.

[41] There was no indication that a proponent, either public or private, would henceforth be able to "design its own" EA and exclude consideration of the previous requirements for "rationale" and "alternatives." If, as the Minister said, "rationale" and "alternatives" are required in an EA, then it follows that they must be included in the detailed requirements of the TOR under s. 6(2)(c), a document designed to inform the EA.

[42] At the same time as the legislature introduced the "extra" step of TOR, it also introduced an obligation on proponents to consult with interested parties. This amendment can only be taken as one intended to broaden the scope of EAs. Any interpretation of s. 6.1(2) to narrow the scope of TOR and EAs would be inconsistent with the apparent legislative intent to broaden environmental reviews by early consultation with those affected.

[43] The purpose of the legislation, which assists with the interpretation of the ambiguous provision, includes the betterment of Ontarians by wise management of the environment. This purpose seems to focus on the betterment of the individual and not the betterment of a corporate proponent. In addition to purpose, the Minister is obliged to consider the public interest. The specific requirement to consider public interest suggests an interpretation that favours public over private interests. The concept of "wise management" and the broad definition of "environment" both lend support to the concept that a project would not be approved that did not address a public, as opposed to a private, need or rationale. This is consistent with the most current tribunal interpretation of the legislation.

[44] Accordingly, based on a reading of the legislation, its stated purpose, its context, its historical interpretation, and in light of the legislative intent, which is reflected in the *Hansard* debates, it follows that an EA, and hence TOR, must satisfy the listed requirements of s. 6.1(2). "Other than" means "in addition to" and does not mean "different from." This interpretation is plausible in the legislative context, promotes the legislative purpose and results in a rational outcome.

Mohawks of the Bay of Quinte - Fiduciary Duty

[45] While I find that this judicial review can be resolved based on the statutory interpretation issue, I will briefly turn to the Mohawks' fiduciary obligation argument in case I wrongly interpreted the statute.

[46] The Mohawks are a First Nation and a "band" within the meaning of the *Indian Act*, [R.S.C. 1985, c. I-5](#). They occupy the Tyendinaga Mohawk Territory, also known as the Tyendinaga Indian Reserve No. 38. The Mohawks received that reserve under Treaty 3 1/2 as a tract of land:

under our protection for a safe and comfortable retreat for them ... to be held and enjoyed by them in the most free and ample manner and according to the several Customs and usages by them ... and of securing to them the free and undisturbed possession and enjoyment of the same.

(*Treaty No. 3 1/2*, 1 April 1793, *Indian Treaties & Surrenders From 1680 to 1890*, vol. I, (Ottawa: Brown Chamberlin, 1891) at 7.

[47] The CWS landfill site is located some 8 kilometres distant from the reserve adjacent to the headwaters of Marysville Creek. The creek flows through the reserve. The Mohawks say that groundwater from the site drains through the reserve. The Mohawks also state that they have a possible claim for more land that includes the land on which both the landfill and proposed landfill are situate. The Mohawks argue that the present reserve and their potential land claims create a fiduciary obligation on the Minister to refrain from action that would interfere with their aboriginal rights.

[48] Given the Minister's obligation arising from the present reserve, it is unnecessary to consider the effect of the potential additional land claim. Those potential claims are, at the moment and at best, speculative. The Mohawks were unable to provide any details except to say that there is uncertainty about where Bowen's Creek, one of the reserve's boundaries, was located when the Treaty was signed. That is being researched. The Mohawks also suggest that a large tract of land was alienated without surrender. They are unable to provide any particulars. As the Minister argues in response, apart from the vague nature of a land claim not yet made, the lands at issue, to the extent they can be identified, have been privately owned for 160 years. The case law suggests that any remedy accorded to the Mohawks in the event of a successful land claim would likely result in an award of damages rather than an award of land. The Minister points out that was the case in the *Chippewas of Sarnia Band v. Canada (Attorney General)* (2001), 51 O.R. (3d) 641 (C.A.) leave to appeal to S.C.C. refused, [2001] S.C.C.A. No. 63. At this stage, the potential aboriginal claim to an unidentified body of land does not affect or expand the duty owed by the Minister to the Mohawks.

[49] The Mohawks, on many occasions, expressed reserve-related concerns to CWS. These concerns were also conveyed to the Minister in two letters dated February 18 and July 23, 1999. The issues addressed included the following:

- (a) the effect of pollution from the existing and proposed landsite;
- (b) the reliability of the pollution monitoring data; and
- (c) the lack of reference to aboriginal claims and archeological aboriginal findings in the TOR.

The Minister referred these concerns to CWS for response and also wrote to the Mohawks directly on August 12, 1999.

[50] On the pollution control issues, all parties to the proceeding agreed during argument that the court should not enter into the scientific fray created by differences of opinion between the parties' respective scientists. I agree and do not do so. Those matters are better left to the discretion of the Minister with the benefit of available advice during and after the EA. The issue before us is not whose expert is correct, or even what the experts should consider, but whether the TOR met the applicable statutory requirements.

[51] The Crown acknowledged that the provincial government has a fiduciary duty not to approve an undertaking that would infringe on aboriginal or treaty rights. In the circumstances of this case, it is unnecessary to examine the extent of the Minister's fiduciary relationship and responsibility to the Mohawks because the reserve-related concerns have now been addressed in the TOR. The broad questions of the extent and scope of the fiduciary obligation would be better determined in a case that presented an appropriate factual foundation.

[52] While these concerns are no longer at issue, what remains at issue is the Minister's refusal to include in the assessment the "need" for the expansion and "alternatives to" the expansion, including alternative sites and alternative methods of garbage disposal. It is these omissions that shape the Mohawks' remaining concerns and leave them fundamentally opposed to the expansion. The Mohawks argue that the government should find alternatives to garbage dumps rather than expand existing facilities. The Minister's refusal to consider these issues has led the Mohawks to withdraw from any further consultation. In essence, their concerns are the same as those raised by the "neighbour" applicants: the refusal to consider the two issues that had been historically taken into consideration by EAs before the 1997 amendments.

[53] The Mohawks point out that the Minister, quite apart from any fiduciary duty owed to aboriginal people, has a statutory duty to ensure that there is consultation with the interested public, which includes aboriginal people. The Minister also has a statutory duty to act only in the public interest, including the interest of those immediately impacted by a landfill expansion. It is on this basis that the Mohawks join with the "neighbours" in arguing for a statutory interpretation that would require the Minister to include "needs" and "alternatives" in the proposed EA.

Public Consultation

[54] Section 5.1 requires the proponent to "consult with such persons as may be interested" and to report on those consultations in the TOR. Both the individual applicants and the Mohawks raise concerns about the adequacy of public notice and the limits placed on consultation. Putting aside for the moment the Mohawks' unilateral withdrawal from the consultation process, it seems that, in substance, and on the specific facts of this case, the affected parties were given the opportunity to provide input on the scoped TOR. These are not the facts on which to decide the parameters or procedure for adequate public consultation or whether the Crown has a duty, by reason of any special relationship, to consult directly with aboriginals. Those issues should be left to be determined on another occasion on appropriate facts.

Disposition

[55] In the result, the decision of September 16, 1999 approving the TOR is quashed. Counsel may address costs by written submissions. The applicants will have 7 days to submit a bill of costs of the judicial review and to provide written submissions. The respondents will have 7 days to respond. The submissions are to be filed with the Registrar of Divisional Court.

LANG J.

I agree: _____

KURISKO J.

DATE: June 17, 2003

CUNNINGHAM A.C.J. (dissenting):

I have had the benefit of reading and carefully considering the reasons of my learned colleague. Respectfully, in two important areas, I disagree for the following reasons.

The Legislation

(i) The proposed expansion of a landfill site is governed by the requirements of the *Environmental Assessment Act* (EAA), R.S.O. 1990, c.E, 18.

(ii) The purpose of this Act, as set out in s. 2 thereof is stated,

The purpose of this Act is the betterment of the people of the whole or any part of Ontario by providing for the protection, conservation and wise management in Ontario of the environment.

(iii) Within s. 1 of the Act, "environment" is defined to mean (a) air, land or water; (b) plant and animal life, including human life, (c) the social, economic and cultural conditions that influence the life of humans or a community; (d) any building, structure, machine or other device or thing made by humans, (e) any solid, liquid, gas, odour, heat, sound, vibration or radiation resulting directly or indirectly from human activities, or (f) any part or combination of the foregoing and the interrelationships between any two or more of them.

(iv) Pursuant to s. 5, a proponent must apply to the Minister for approval to expand. Once again, "proponent" is defined in s. 1 to mean a person who (a) carries out or proposed to carry out an undertaking, or (b) is the owner or person having charge, management or control of an undertaking. "Undertaking" means (a) an enterprise or activity or a proposal, plan or programme in respect of an enterprise or activity by or on behalf of Her Majesty in Right of Ontario, by a public body or public bodies or by a municipality or municipalities or (b) a major commercial or business enterprise or activity or a proposal, plan or programme in respect of a major commercial or business enterprise or activity of a person or persons other than a person or persons referred to in clause (a) that is designated by the regulations.

(v) In the present case, Canadian Waste Services Inc. ("CWS") requested that it be designated by the regulations in order to bring it within the ambit of the *EAA*. Accordingly, the landfill site in question (along with another) was designated to be subject to the provisions of the *EAA* pursuant to O.Reg. 369/99, May-June 16, 1999. Simply put, this was done because the *EAA* does not apply to private undertakings unless so designated.

(vi) In 1996, the *EAA* was amended to include, as an interim step in the environmental assessment process, the preparation by a proponent and the approval by the Minister of terms of reference ("TOR"). The 1996 amendment also provided that the proposed TOR had to be accompanied by a description of the consultations by the proponent and the results of those consultations.

(vii) As a proponent, pursuant to s. 6(2), CWS had an option. It could either have proceeded pursuant to s. 6(2)(a) and indicate that the environmental assessment would be prepared in accordance with the requirements set out in subs. 6.1(2), the "generic" approach, or it could proceed pursuant to s. 6(2)(c) which mandated that it set out in detail the requirements for the preparation of the environmental assessment.

(viii) Had CWS chosen to proceed under subs. (6)(2)(a), that is to say in accordance with the requirements set out in subs. 6.1(2), it would have had to provide, amongst other things, (a) a description of the purpose of the undertaking; (b) a description of and a statement of the rationale for

(i) the undertaking,

(ii) the alternative methods of carrying out the undertaking, and

(iii) the alternative to the undertaking.

As stated, CWS chose to proceed pursuant to s. 6(2)(c), which it was perfectly entitled to do. By taking that approach, CWS was obliged to set out in detail the requirements for the preparation of the environmental assessment. Once the proposed TOR is complete, pursuant to s. 6(4), the Minister "shall" approve the TOR if he is satisfied an environmental assessment prepared in accordance with them will be consistent with the purpose of the Act and with the public interest.

(ix) It is important to look as well at s. 6.1(3). Clearly, s. 6.1(2) defines what an environmental assessment must consist of. However, s. 6.1(3) states, "the approved terms of reference may provide that the environmental assessment consists of information other than that required by subs. (2).

(x) Section 5 of the *EAA* requires the proponent to obtain the Minister's approval before proceeding with a proposed undertaking. The Minister approves, first, the TOR and, subsequently, the environmental assessment. Section 6 concerns the approval by the Minister of the proposed TOR. Subs. 6(2) allows the proponent flexibility as to what will be contained in the proposed TOR. Subs. 6(2)(c), together with s. 6.1(3), permit the proponent to design a TOR that addresses the public interests in the specific context of the proposed undertaking. CWS chose this option. They could have chosen to design its TOR in accordance with the terms prescribed by subs. 6(2)(a). One of the major complaints of the applicant is that CWS did not consider alternative sites or the need for the proposed undertaking. Even if CWS had chosen to proceed in accordance with the "generic" terms prescribed by subs. 6(2)(a), there still would have been no requirement to consider alternative sites or the need for the proposed undertaking. The "generic" TOR are set out in subs. 6(2)(a) and are listed in s. 6.1(2). As I have stated, CWS has chosen not to proceed that way, but rather to proceed pursuant to s. 6.1(3) which states that the approved TOR may provide that the environmental assessment consist of information other than that required by subs. (2). In other words, it permits a proponent to design a TOR that addresses the public interest in the specific context of its proposed undertaking. It is a choice granted to proponents and CWS has chosen it.

(xi) The old Act did not contain a requirement for terms of reference. Rather, it prescribed one generic environmental assessment for all undertakings. It is submitted by the respondent, Minister of the Environment ("MOE"), that the Act was amended because one size did not fit all and because the generic environmental assessment was designed for public projects. Because they had no power to expropriate, private proponents had real difficulty. Accordingly, the Act was amended to permit proponents to choose to conduct environmental assessments differently from the generic environmental assessment. Thus, to ensure that every environmental assessment would be consistent with the purposes of the Act and the public interests, the additional requirement for terms of reference was added.

(xii) The issue therefore is whether subs. 6.1(3) means what it says, which is, that a proponent in designing its own environmental assessment is entitled to use information "other than" that required by subs. (2) or whether s. 6.1(3) means that in designing its own environmental assessment, a proponent may provide that the environmental assessment consist of information in addition to that required by subs. (2). In my view, if the legislators had meant the latter, they would have said so. To

conclude otherwise would be to render s. 6.1(3) meaningless. Surely a proponent can always submit additional material even if it chooses to proceed by way of the "generic" s. 6(2)(a) and 6.1(2). There is no ambiguity in this wording and clearly s. 6.1(3) must be read in conjunction with ss. 6.1(2) and 6(2)(c). Because there is no genuine ambiguity here, it is wholly unnecessary to review the legislative history. In *Bell ExpressVu Limited Partnership v. Rex*, 212 D.L.R. (4th) 1, the Supreme Court of Canada had occasion to revisit the principles of statutory interpretation. At p. 21, Iacobucci J. had this to say,

What, then, in law, is an ambiguity? To answer, an ambiguity must be "real" (*Marcotte, supra* at p. 115). The words of the provision must be "reasonably capable of more than one meaning" (*Westminster Bank Ltd. v. Zang* [1966] A.C. 182 (H.L.) at p. 222, *per* Lord Reid). By necessity, however, one must consider the "entire context" of a provision before one can determine if it is reasonably capable of multiple interpretations. In this regard, Major J.'s statement in *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [\[1999\] 1 S.C.R. 743](#) is apposite: "It is only when genuine ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute, that the courts need to resort to external interpretive aids" to which I would add, "including other principles of interpretation".

For this reason, ambiguity cannot reside in the mere fact that several courts... or, for that matter, several doctrinal writers... have come to different conclusions on the interpretation of a given provision. Just as it would be improper for one to engage in a preliminary tallying of a number of decisions supporting competing interpretations and then imply that which receives the "higher score", it is not appropriate to take as one's starting point the premise that differing interpretations reveal ambiguity. It is necessary, in every case, for the court charged with interpreting a provision to undertake the conceptual and purposive approach set out by Driegder and, thereafter to determine if "the words are ambiguous enough to induce two people to spend good money in backing two opposing views as to their meaning" (*Willis, supra* at pp. 4-5).

(xiii) We must read s. 6.1(3) in the context of the other sections, including the purpose of the Act. If CWS had chosen to proceed pursuant to s. 6(2)(a), it could simply have filed a single document stating that it would be proceeding in accordance with the "generic" requirements outlined in s. 6.1(2). They chose not to do that. Rather, they chose to design their own environmental assessment pursuant to the provisions of s 6.1(3). It must not be forgotten that what we are considering here is something at the very beginning of a long process. What is being considered here is simply the terms of reference. After the environmental assessment has been submitted, there will be an extensive review process with further and more expansive opportunities for public comment. The approval of terms of reference is no guarantee that the proposed expansion of this landfill site will be approved by the Minister. Indeed, CWS has not even presented its environmental assessment to the Minister for approval. The proposed TOR require CWS to consult with the public and with the Mohawks of the Bay of Quinte ("MBQ") as part of the environmental assessment, and this gives all of the applicants additional opportunities to consult and to make their views known to CWS and the Ministry.

(xiv) In the present case, before the final TOR were submitted by CWS for ministerial approval, several drafts were approved and commented upon by Ministry staff and other government agencies which have knowledge and expertise in the area. This review process was extensive and the decision by the Minister to approve the TOR was made after considering, not only the submissions of CWS, but the recommendations of the government review team, as well as comments received from interested parties during the public comment period. The Minister is required, pursuant to s. 6(4), to approve the TOR if he is satisfied that an environmental assessment in accordance with them would be consistent with the purpose of the Act and with the public interest. That was the basis on which the Minister approved the subject TOR. The TOR proposed by CWS and approved by the Minister do provide for a detailed and full environmental assessment. It would appear that the primary concern of

the applicants is that the TOR do not require CWS to consider further, in the next stage of its studies, alternative landfill sites for expansion or the need to expand this landfilled site. In my view, there is no such requirement in the legislation. The detailed and full environmental assessment proposed by CWS and approved by the Minister, however, will include the following:

- (1) a description of the purpose of the undertaking;
- (2) a definition and description of the undertaking (to be further defined and described through the preparation of the environmental assessment);
- (3) an assessment of alternative methods of carrying out the undertaking;
- (4) a description of the environment potentially affected by the undertaking and alternatives;
- (5) a description of the effects that will be caused or that might reasonably be expected to be caused to the environment by the undertaking and the alternative;
- (6) a description of mitigation measures that are necessary to prevent, or reduce significant adverse environmental affects upon the environment;
- (7) an evaluation of advantages and disadvantages to the environment as a result of the undertaking and the alternatives;
- (8) a report on the consultation undertaken by CWS in carrying out and preparing the environmental assessment.

Moreover, within the TOR there is a whole section on alternatives to be evaluated, all of which will be considered and assessed during the environmental assessment. Although an assessment of alternatives to the expansion of this particular landfill will not be considered during the environmental assessment, alternative methods for carrying out the undertaking, according to the TOR, will be considered and assessed during the environmental assessment. These are extensive. As well, the TOR and the background documents thereto describe the approach to be taken by CWS in the environmental assessment. This will, I accept, ensure that the additional landfill capacity being applied for will be provided while protecting the environment and thereby the purpose of the *EAA*.

(xv) The simple reality based on the record is that the applicants do not want this landfill at all and surely do not want to see it expanded. In my view, CWS has complied not only with the spirit of the legislation, not only with the purpose of the Act, but with the letter of the legislation in choosing to design its own environmental assessment, an assessment which fully complies with the Act and which will be complete, comprehensive and balanced.

Standard of Review

(xvi) As to the standard of review, I am persuaded that this Court ought to show a high level of deference to a Minister's discretionary decision to approve terms of reference. In my view, the Supreme Court of Canada in *Suresh v. Canada (Minister of Citizenship and Immigration)* (2002), 208 D.L.R. (4th) 1 at 20, completely answered this question when it stated,

Decisions of Ministers of the Crown in the exercise of discretionary powers in the administrative context should generally receive the highest standard of deference, namely patent unreasonableness. This case shows why. The broad regulatory purpose of the Ministerial permit is to regulate the provision of health services "in the public interest". This favours a high degree of deference, as does

the expertise of the Minister and his advisers, not to mention the position of the Minister in the upper echelon of decision-makers under statutory and prerogative powers. The exercise of the power turns on the Minister's appreciation of the public interest, which is a function of public policy in its fullest sense.

(xvii) In the present case, the respondent urged that a Minister's decision ought to be in the "hard to review" category. It is a political decision based on a multitude of policy considerations and the weighing of competing interests. It argues that most human activity is harmful to the environment and that in the present case the Minister had to recognize and balance the public interest of environmental protection and the right of the landowner to conduct and expand its lawful business on its own private property. I completely agree with the respondent's submission in that regard.

(xviii) In the present case, the expertise of the Minister is demonstrated in a number of ways. The greater the level of expert consultation, the higher the level of deference ought to be. For example,

(1) S. 6(4) of the Act requires the Minister to approve the proposed TOR if the Minister is satisfied that an environmental assessment prepared in accordance with them will be consistent with the purpose of the Act and with the public interest.

(2) S. 2 states that the purpose of the Act is the betterment of the people of the whole or any part of Ontario by providing for the protection, conservation and wise management of the environment.

(3) S. 31(3) recognizes the important political nature of the decision by requiring the Minister himself to make the decision whether to approve the TOR. This cannot be delegated. S. 31(1) permits the Minister to conduct research with respect to the environment or environmental assessments, to conduct studies of the quality of the environment, to conduct studies or environmental planning or environmental assessments designed to lead to the wise use of the environment by humans, and to make such investigations, surveys, examinations, tests and other arrangements as he considers necessary. Here, Ministry staff conducted numerous reviews, examinations and tests and reported their findings and recommendations to him.

(4) When the environmental assessment is submitted for approval, and further consultation has been reviewed by the Ministry and been subject to public comment, the Minister may approve or refuse to approve the undertaking and the Minister must give written reasons for his decision. All of this is subject to the approval of the Lieutenant Governor in Council or such ministers as the Lieutenant Governor in Council designates, and such involvement by the Lieutenant Governor in Council at this stage highlights the political nature of the decision.

(xix) There is criticism that the Minister's reasons were brief and belated. While there is no statutory requirement that the Minister give reasons at this stage, he did so. No appeal lies from his decision, nor is there any privative clause protecting it from judicial review. Although reasons are not normally given for a political decision, the Minister's brief reasons adequately dealt with the important issues and did not extend into irrelevant areas.

(xx) As a Minister, on the basis of the advice received, he might well have made a different decision. He did not, and it is not for us to review other reports to question the wisdom of the Minister's decision. Without question, the reports of the experts are in conflict, but the Minister was fully entitled to prefer the evidence and the opinions of some experts over others. In any event, the environmental issues raised by the various experts remain open to be addressed more fully in the future environmental assessments. Having said all of that, I would dismiss the appeal with costs to the respondents.

Cunningham A.C.J.

Released: June 17, 2003

DIVISIONAL COURT FILE NO.: 572-2000

and 662-2000

DATE: 20030617

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

CUNNINGHAM A.C.J., KURISKO and

LANG JJ.

B E T W E E N:

BEN SUTCLIFFE and HELEN KIMMERLY

Applicants

- **and** -

MINISTER OF THE ENVIRONMENT
(ONTARIO) and CANADIAN WASTE
SERVICES INC.

Respondents

AND BETWEEN:

MOHAWKS OF THE BAY OF QUINTE

Applicant

- **and** -

MINISTER OF THE ENVIRONMENT
(ONTARIO) and CANADIAN WASTE
SERVICES INC.

Respondents

REASONS FOR JUDGMENT

Released: June 17, 2003

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