

Ontario Municipal Board Hearing

March 2 to March 27, 2015

Introduction

Our fight against the industrialization, (permanent asphalt plant, ready mix concrete plant etc.), and huge expansion of the Miller Braeside Quarry culminated in this Ontario Municipal Board Hearing.

In June, 2013, McNab/Braeside Council voted against the permanent asphalt plant but gave Miller an enormous expansion, as much as 200 years' worth of aggregate at the expense of the residents of Golf Club Road, giving Miller 150 m of residents' property as a buffer for their Class III industry. FACT-MB Inc. took the municipality to the OMB to support John Kerr and David Simek, Golf Club Road property owners, in their appeal of Bill 2013-31. This bill had also left all the Miller property zoned as EMR or aggregate reserve which could be extracted later, thus destroying the globally rare alvar.

In January 2015, a new Council passed Bill 2015-03 which gave the Golf Club Road residents a 300 m buffer on Miller property but still left the zoning as aggregate reserve. So FACT-MB appealed both Bills to try to get protective zoning, such as 'Environmentally Protected' for the alvar and the 300 m buffer. All the appellants were on the same side as the Township in opposing the permanent asphalt plant and wanting a 300 m buffer between residents and the class III industry of the quarry. Miller appealed, wanting the permanent asphalt plant and the huge expansion.

Preparation

None of us had wanted to go to the OMB, but the Municipality didn't listen to residents' concerns, following planner Bruce Howarth's advice to give Miller what he wanted regarding the expansion. To have any chance at all at OMB, we needed experts and lawyers. We had already retained Wilf Ruland in 2008, a highly regarded, experienced hydrogeologist from Dundas, ON to advise us regarding concerns about the huge PTTW, (Permit To Take Water), that the MOE had given Miller unbeknownst to us in July 2005. Wilf met with us and MOE re. that PTTW in December 2008, and later addressed Council at the Public Meeting, May 6, 2013.

We had hired Dr. Henry S. Cole in 2012, an internationally known atmospheric scientist from Maryland, USA to evaluate the Miller Air Emission Study, write a report for us and speak at the Public Meeting of May 6, 2013 advising against the permanent asphalt plant.

In the summer of 2013, we also hired Michael Wright, a planner experienced in pits and quarries, from Gatineau QC, to advise us regarding the planning arguments of an appeal.

What we did not have and needed for a hearing was a lawyer. In the summer of 2013, we applied to the Canadian Environmental Law Association, (CELA), an organization doing *pro bono* work for worthy environmental causes for people without funds for legal representation. With only four lawyers for all of Ontario, our chances were pretty slim of getting their help. Linda McCaffrey of Ecojustice had succeeded in getting a nuisance decision against Miller in Small Claims Court for adverse effects a number of residents suffered from the Miller temporary asphalt plant in the Braeside Quarry. It operated from fall 2009 to fall 2011. In 2012 our nuisance judgment was upheld by the appeal court against Miller's appeal.

When CELA lawyer, Ramani Nadarajah, who had worked with Linda McCaffrey and Wilf Ruland in the past, saw that they had worked for us, she became interested in our case. And so we had the legal team of Counsel Ramani Nadarajah, Counsel Rick Lindgren and Erica Stahl, Associate, for the OMB hearing. Together they had more than 50 years of OMB experience. They were the best we could possibly have had!

So in the fall of 2013 we started to send documents to CELA in preparation. Two Pre-Hearing Conferences were held with all parties in January 2014 and 2015. A hearing date was set for March 2015, more than a year away. During all the intervening months we sought mediation before this could go to the hearing, but Miller was not interested. So we continued to work on research, issues and strategies. Kathy Cooper, CELA paralegal, spent days in June 2014 with lay witnesses and participants so that their statements could be included in the hearing process.

It was determined that we needed a structural engineer to argue the merits of a 300 m buffer. After months of search, we finally persuaded Dr. Sam Kiger, from Missouri, USA to work for us. An incredibly qualified and experienced expert, he was able to write a report for us as a blasting specialist. Previous blasting accidents by Miller had left us very concerned about lack of sufficient distance from the quarry to residents.

MNRF (The Aggregate Licencing Process)

In May of 2013, MNRF objected to the Miller application for their aggregate licence for the quarry expansion. MNRF sent a 25 page letter outlining all the reasons why the Miller studies had not done enough work and were inadequate for their licence. MOECC wrote a similar letter of objection.

But in the fall of 2014, Miller withdrew its application and reapplied with a number of new or 'rehashed' studies. Before the time period for public comment had even ended, MNRF did a complete about face and gave Miller an aggregate licence for their whole property. We were more than disappointed. But it was important to realize more than eight staff members were gone from the Pembroke Office, including the head guy. Transferred, retired, replaced - who knows exactly? So there was not much continuity.

Because there were so many residents who still had unresolved objections, MNRF, without even informing those people of their rights, simply dumped the whole mess onto the OMB Chairman, the day before the hearing saying, 'You deal with it!' They were all members of FACT so we had the job of contacting all 26, informing them of their rights and making their wishes known to the other lawyers and the Board Chair.

Hearing Preparation

For three to four months before the actual hearing, preparation was intense. Documents from the past nine years had to be evaluated for relevancy and usefulness. Expert witness statements had to be proofread and finalized before they were submitted to the other parties. Travel arrangements and scheduling had to be done. Experts in the different fields for all parties met to try to hammer out some agreements on common grounds before the hearing started, to try to shorten the hearing. Always mediation was sought.

The Hearing Itself

The Players: Our FACT-MB legal team was Rick Lindgren, Ramani Nadarajah, and Erica Stahl; Janet Bradley was lawyer for the Municipality and John Ewert was counsel for Miller. Our experts who gave testimony were Wilf Ruland, hydrogeologist, Sam Kiger, blasting expert and Hank Cole, environmental, atmospheric scientist – an emissions specialist. Miller experts included Gary Bell, planner, Anne Guiot, site plans, Rob Cyr, blasting, Hugh Williamson, acoustics, John Trought, air emissions, George and Jennifer Gorrell, hydrogeology, Jay Clark, hydrology, Dan Brunton and Kyle Flemming, natural environment.

It was rather interesting and telling that Miller called McNab/Braeside Township planner, Bruce Howarth as *their witness*.

The First Week (Miller Quarry Site Plans, Acoustics, (noise), and Blasting)

Miller put their case first and took two and a half weeks to do it! March 3rd, Gary Bell started with an overview of the application. Then Anne Guiot testified about the site plans. Ramani and Janet Bradley both had good questions on cross examination. What Anne Guiot had to admit to Janet Bradley was that it would only take a site plan amendment and any area zoned EMR (aggregate reserve) and licenced could be quarried; neighbours would not even be informed! That meant that the alvar would be gone.

As well, Hugh Williamson, the Acoustics expert for Miller testified. He was grilled with questions by Ramani, Janet and the Board as well! Williamson did not give strong testimony and he seemed even weaker and more uncomfortable under cross examination. It was clear that Williamson had taken three tries at running computer models in his study to try to get acceptable levels of noise. Finally, on the third try the levels just met the MOECC threshold at people's houses. But there was no margin of error, so the likelihood of there being exceedances was high.

Friday, March 6th was a very interesting and revealing day of testimony. The Miller witness was Robert Cyr of Explotech and this was the important Blasting Study. Our witness, Dr. Sam Kiger listened to the whole proceedings by telephone from Missouri.

Mr. Cyr stated with authority, under oath, that even though they have done no test blasts for this study nor will they do any before the OMB makes a ruling, there is no chance of any damage being done to any home by any quarry blast. He even went so far as to say that even at 200 m away there would be no problem, let alone 300 m.

He also commented on Dr. Kiger's witness statement, which he had read, of course, and he disagreed on just about everything Dr. Kiger said. We could hear rumblings and finally an outburst from Dr. Kiger on the speaker phone. He had to be reminded that he couldn't comment on what this witness said, but had to wait until he arrived the following week!

Then Ramani began cross examination. First she introduced a copy of the Explotech report to Tom Jones of Miller after the flyrock accident of August 2007, stating that even a very experienced blaster could still have an accident. Miller and the blasting company were charged by MOECC. The blasting company took the blame, was convicted and fined.

Next Ramani introduced a report after that same accident of August 2007 regarding damage sustained in a neighbour's basement. The report said that the blast did not cause the damage

and Miller was not responsible. So don't expect to get any compensation if you have damage. Even after this obvious accident Miller would not pay!

Then Ramani brought up the Sept. 2005 megablast when many neighbours had damage. So here we had a Miller expert saying there will never be any damage from quarry blasting as long as you forget about what has happened in the past!

The Second Week (Air Emissions, Natural Environment, Hydrogeology and Hydrology)

The Miller Air Emissions witness, John Trought, gave his witness statement in chief. (This study is very important because Miller wants a permanent asphalt and concrete plant, both highly polluting industries. Just to fill you in, if you didn't read his study on the Township website, it is just the worst study our expert, Dr. Henry Cole had ever seen!) It is full of omissions; it is confusing, misleading, inadequate and downright wrong!

Then Rick Lindgren, our Counsel stood up to begin his cross examination. He peppered Trought with questions; the Board member sat up and listened carefully. Rick's questions circled and veered off then suddenly pounced. Trought was left stammering and saying over and over, 'He didn't know; he couldn't remember; that wasn't his expertise; he had no idea; he didn't take that into account; he couldn't comment; he wasn't qualified to give an opinion on that.....' Do you get the picture? This was supposedly an expert! Yet all he could repeat over and over was that he follows Ministry standards and they protect human health.

Rick's often seemingly simple questions were fired at him always with a plan, a plan to show up some big flaw or shortcoming. He was relentless. And Trought continued to stammer and tried to fabricate some informative answers. He just couldn't succeed. For example:

Are these carcinogenic chemicals which are emitted? Yes.

Did you do a human health risk assessment? No.

If you smell an odour are you breathing in these carcinogens? Yesssss.

Did you do an odour study? No.

Did you do an odour management plan? No.

Did you have a protocol for odour complaints? No.

Did you canvass the neighbourhood for age, sensitivities and health problems of individuals? No.

In your computer modelling for emissions, did you know the type, age or model of the permanent asphalt plant? No.

Did you build in a margin of error? No.

Did you model the crusher? No.

Did you model fumes from the diesel trucks in the quarry? No.

It went on and on. Not a good day for John Trought.

On Tuesday, March 10th Dan Brunton and Kyle Flemming gave testimony about the natural environment of the Miller land. Dan Brunton is Miller's alvar expert, knowledgeable and glib and absolutely sure of himself. So sure of himself that he was able to assure the Chair that the asphalt plant emissions or possible chemical spill or water contamination would have no negative effect on the alvar, even though he hadn't even read the Air Emissions Study by his colleague! He didn't know how asphalt was made, what an asphalt plant looked like or even what emissions were produced. He had not bothered to find out.

So when Rick Lindgren asked him the loaded question of whether he thought the alvar might be better protected by Environmentally Protected or EP zoning, he said no, his instructions on the quarry site plans would be enough to protect it forever. What Dan didn't know was that Anne Guiot had already told the hearing that the zoning EMR, (the alvar), could be quarried after just a site plan amendment. So Dan Brunton, the alvar protector lost all credibility.

The water panel was next. Part of the OMB process puts the experts of the different fields together to resolve differences **before** the hearing. Wilf Ruland had done a good job at those meetings, and apart from the asphalt plant concerns, many issues were resolved. But Miller overrode his experts and the issues became unresolved again. So the Chair had to listen to an incredibly boring morning of the Miller water guys going over these issues yet again.

The Board member was furious!!! What a waste of his time! He left, saying it had to be resolved! We had to break into sides and try to resolve the issues with the wording that would protect our water in the future. That took until late evening.

Cross examination of the water panel next day left us with the feeling these were not strong witnesses and indeed set the stage neatly for our hydrogeologist, Wilf Ruland, testifying the following week.

Week Three (Township Planner, Miller Planner)

(Our case: Hydrogeologist, Blasting Expert, Lay Witnesses)

Bruce Howarth, Township Planner when the township passed By-law 2013-31 testified as a witness ***for Miller!***

Some really important facts came out with skillful cross examination:

- The Environmental Commissioner of Ontario's Report, April 2007, *Doing Less is less*, highlighted the fact that MOE has downloaded noise, dust and odour controls to the municipalities who have **no budget or staff to prosecute companies;**

- *MOE has also given aggregate industries the task of reporting on their own site. Each of MNRF inspectors has been given 600 sites to audit. So on average, only about 10%, are ever audited;*
- The zoning EMR (aggregate reserve), **has one purpose and one purpose only, to be extracted as mineral aggregate at some point, no matter what is said about protecting the alvar and wildlife;**
- And the McNab Braeside Official Plan states clearly that there should be a distance of 300 m from a Class III industry to a **residential property line, not residence.**

The Bombshell

It was just impossible to predict what would happen from one day to the next! Gary Bell dropped the bombshell that as of Miller's directive the previous night, they were going to turn the asphalt plant and staging area on its side so that the Golf Club Road and Osborne St. residents would all have a 300 m buffer, instead of the reduced one of 180 m!

But that area in the quarry had already been excavated so they are going to have to fill it up to some extent to put the paved base and runoff containment area, originally planned, around the plant. Everyone had tough questions for him. But when he answered, instead of simply saying yes or no, he had to take five minutes quibbling, prevaricating and trying to obscure every answer in a volume of words. I doubt that the Chair was impressed. But it certainly took up our time.

As well, one of the Miller witnesses had previously talked about a 'state of the art' asphalt plant that they planned to install, so they submitted a simple sheet of asphalt plant **components** and pretended this list described 'state of the art'. It was not believable.

Finally, Wilf Ruland was on the stand, talking in his quiet, unhurried manner about the truth. He was impressive! One of the most shocking examples of Miller fiction he exposed very calmly. Miller witnesses claimed the temporary asphalt plant which 'had been in the quarry since 2009', (not true of course; it was only there three years), had caused no effects on surrounding water. They claimed their results showed all levels of chemicals were below the provincial thresholds.

Wilf told the Chair the water was only tested for one year and the lab test detection levels were as much as 10,000 times *above* the provincial threshold! So how could this testing have possibly revealed anything? Shocking!!!

Wilf revealed the new Miller proposal to shift the asphalt plant envelop on its side and continue as if everything was exactly the same, would simply not work. None of the studies had been done at this elevation, location or base. All of the studies related to the asphalt plant, including the air emissions, acoustic, natural environment, and water studies should now all be redone, because the data would no longer fit with this location. It had changed everything.

Under cross examination Wilf Ruland was calm and unruffled under pressure. Wilf knew his subject, knew this quarry and stuck to his guns, a man of integrity. Wilf was very clear to the Chair. Do not approve the permanent asphalt plant. It is a bad idea; Miller has not done the work to prove that it will not contaminate the water.

Then our blasting expert, Dr. Sam Kiger presented his case. With his white hair and southern US accent, he really made a presence in the room. His absolute knowledge of a very technical subject convinced us that continued blasting and blasting closer to residents would cause damage. Under cross, he stood up for his principles and left the Chair with a clear understanding of how blasting would damage structures.

Finally, Mike Battiston took the stand, the first of our lay witnesses. The negative effects he had felt from the temporary asphalt plant, the blasting, and the dust made him a very believable witness. He was excellent, unruffled under cross fire, clearly convincing, unshakeable.

Friday, March 20th we presented four lay witnesses. I started and had my testimony done in an hour but it took Mr. Ewert, Miller's lawyer another hour in cross. That's his job of course, because he has Miller breathing down his neck to be hard on us. But as Ramani said, it was like quicksand for him. Whenever he asked a question he just allowed me to say more and more. More trouble for him and for Miller. The more he asked, the more I talked, not good for them.

Cherilyn Turner did a brilliant job, dealing with the issue of buying their house and not knowing about the planned asphalt plant in their back yard. She talked of their two very young children and how she did not want the chemicals from the plant affecting them.

Alex Simek was a very strong, convincing witness, talking about the effects from the temporary asphalt plant, the damage from flooding on his property because Miller had dug a ditch, draining water onto his property. Cross examination was offensive against him because he was a damaging witness against Miller. But he didn't budge.

Our wonderful CELA articling student, Erica Stahl had her first experience leading her witness's testimony in chief, Chris Sherrer, calm and unruffled, solid. New to the neighbourhood; once again buying a property without being told of the quarry plans. Both he and Cherilyn shared taking the realtors through the 'complaint to their professional association process.'

Week Four (Our Emissions Expert, Lay Witnesses, Dave Simek and John Kerr's Planner, Janet Bradley's Planner, Miller's VP Bill Kasper and Summations)

Our emissions expert, Dr. Henry Cole, an environmental atmospheric scientist gave his evidence, and what expert testimony it was! He is amazingly knowledgeable in his field; I just sat and listened; I did not take notes because I didn't want to miss a thing. His sense of humour bounced off the Chair's and we had a few good laughs. But basically everyone learned just how flawed, incomplete, confusing and inadequate the CTI air emissions studies were.

During cross, John Ewert scored no points, made no headway, in fact lost ground as Hank made point after point. Take this little visual. Imagine salt on a fry pan. Blow on it; it scatters. Again imagine salt in the bottom of a pot. Blow on it. Will it get out of the pot? No, of course not. But this is exactly the deception that Miller is trying to use. The quarry is the fry pan, comparatively shallow. But they are modelling as if it were the pot, holding emissions in. But emissions will leave the Braeside quarry, affecting us all because it is comparatively shallow.

There were excellent presentations from David Simek and John Kerr. But their planner, Bob Clark, whose witness statement said he thought the permanent asphalt plant was poor planning in a residential area, *on the stand, said it would be OK if mitigation measures were shared with the Township!* A total reversal!

The township had hired a young planner, Stuart David who took the stand as the last witness. He was excellent, clear, forceful, and convincing that a permanent asphalt plant would be unacceptable in this location! Would it ever be nice if he worked for the Township full time!

Then we heard another Miller witness, Mr. Bill Kasper, a Vice-President of the company. This was Miller splitting their case, using both the beginning and the end of the hearing, (not allowed), but the Chair allowed it anyway. Kasper talked honestly about the difference between temporary and permanent asphalt plants; they are the same equipment, use the same ingredients and, most importantly, produce the same emissions and are not 'apples and oranges' as John Ewert had insisted when we talked about the adverse effects from the temporary asphalt plant. They are trying to control these emissions but they still exist. Mr. Kasper helped our case enormously.

The Last Day (Final Summations)

John Ewert, as the applicant's lawyer, had the first and last words. As expected, he focussed on the By-law 2010 reinforcing the 1999 By-law giving Miller the right to use the property of Golf Club Road residents. (For those of you who have forgotten, this By-law says that a **quarry cannot be closer than 300 m to a residence, not 300 m to a property line.**) So the township

planner would have written these By-laws. The Chair, when he makes his decision, must decide by the law, not necessarily what is right.

Then Rick Lindgren took the stage and made point after point after point against the permanent asphalt plant, emphasizing Hank and Wilf's testimony that Miller just hadn't done the work to prove that it will not cause adverse effects. Again the Chair peppered Rick with difficult questions but he stood his ground and answered with absolute conviction!

FACT-MB is in agreement with the extraction area being licenced for aggregate extraction, *but not the whole Miller property*, or eventually it **will** all be extracted and it will be goodbye to the alvar and the buffer for people's homes.

Both John Kerr and David Simek spoke really well to the land use issue and of course the unfairness to the property owners along Golf Club Road.

Janet Bradley spoke for a long time, fighting hard on the issues of whether the asphalt plant is good land use planning and emphasizing that the letter and spirit of the McNab/Braeside Official Plan must be followed. It recognizes the requirement of 300 m from a heavy industry to a neighbouring property line. She inferred that the planning decision made in the past obviously benefited only Miller, not the residents of the Township of McNab/Braeside.

Then John Ewert had a chance to rebut those arguments. He pointed the Chair again and again to By-law 2010 which gives the quarry the right to use the neighbouring property as a buffer, noting that it was passed without comment from those very residents and was not appealed. But Ewert did not attack Rick's arguments, simply because they were too strong. Our experts have given the Chair ample facts and reasons why this asphalt plant should not go ahead.

But once more, it all comes back to the fact that Miller put a temporary asphalt plant in this quarry with adverse effects on neighbours. And John Ewert's continual argument that temporary and permanent asphalt plants are as different as apples and oranges was dispelled. And, as the Chair has stated, everyone hates quarries and asphalt plants. He has seen many of our type of appeal to OMB; but *what is different is the fact that some neighbours took Miller to Small Claims Court and won a decision of nuisance, a decision which stood up on appeal. This is something this Chair cannot ignore.*

So once again, thanks to Linda McCaffrey for all those hours, weeks and months of *pro bono* work she did for us to get that win!

Thanks to all those FACT-MB Inc. members who raised money for this OMB Appeal, who donated money or their time, who gave support with their presence at the Hearing, or Participant Evenings, donated food or opened their homes. This was a strong community effort, a community of which we can be proud.