

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

BETWEEN:

NICHOLS GRAVEL LIMITED

Applicant

and

**HER MAJESTY THE QUEEN IN THE RIGHT OF THE PROVINCE OF
ONTARIO, DAVID RAMSAY, ALEC DENYS, PAUL CUTMORE, STUART
THATCHER, GARY ZACHER, EMMILIA KUISMA, ERIC D'HONDT
AND JOHN HAMILTON**

Respondents

AFFIDAVIT

I, Gary Nichols, of the Town of Delhi, Norfolk County, in the Province of Ontario,
MAKE OATH AND SAY as follows:

General Background

1. Nichols Gravel Limited is a company duly incorporated in accordance to the Law of the Province of Ontario and carries on business of extraction of Aggregate and sale of same.

2. On or about the month of March 1999, Nichols Gravel Limited applied for a Licence to operate a quarry in Walpole Township specifically part of Lot 10-12, Concession 12, now Haldimand County.
3. In order to have a quarry on that site a zoning amendment was required and initiatives were directed to the Regional Municipality of Haldimand-Norfolk to have the zoning amended. The Ministry of Natural Resources was copied on the Application and ultimately the District Manager, Alec Denys requested a joint hearing before the Ontario Municipal Board to deal with both the zoning amendments and the application for a Licence to operate a quarry. By correspondence dated January 7, 2000, such a request was made. The Ministry of Natural Resources chose not to take part in the Hearing.
4. On April 2001 the Ontario Municipal Board granted a preliminary ruling and ordered the Ministry of Natural Resources to issue a Licence to Nichols Gravel Limited. Now produced and shown to me and marked as Exhibit A to this my Affidavit is a true copy of the Order of the Ontario Municipal Board date April 3, 2001.
5. On July 25, 2001 the Ontario Municipal Board issued its final Order granting Nichols Gravel Limited its Licence. Now produced and shown to me and marked as Exhibit B to this my Affidavit is a true copy of that Order. The final Order of the Ontario Municipal Board required the Ministry of Natural Resources to issue a Licence subject to conditions as contained in the Order.
6. Despite numerous entreaties made by Nichols Gravel Limited the Ministry of Natural Resources withheld issuing this Licence until the 25th day of March 2003.
7. On or about the 27th day of March 2003, Senior Policy Manager of the Ministry of Natural Resources Aggregates, Stuart Thatcher, corresponded to Alec Denys,

local district manager of Ministry of Natural Resources concerning "the issuance of Aggregate Resources Licence to Nichols Gravel Limited and pending ARA charges." At this point no Licence had even been delivered to the Applicant. Now produced and shown to me and marked as Exhibit C to this my Affidavit is a true copy of said correspondence.

8. The Licence in question was finally delivered by the Ministry of Natural Resources inspector, Paul Cutmore, on the 1st day of April 2003. When the Licence was delivered it was also delivered with a letter dated March 31, 2003 which indicated that the Licence had been issued subject to a separate list of twenty-three (23) conditions entitled "Specific Pre-Operational Conditions" which were required to be satisfied prior to the operation of the quarry.

9. On the 14th day of April 2003 the Ministry of Natural Resources issued a Notice of Suspension to Nichols Gravel Limited suspending the Licence delivered thirteen (13) days earlier for failure to fulfil the twenty-three (23) Pre-operational Conditions. On the 1st of October, 2003 a Revised Notice of Suspension was issued

10. Now produced and shown to me and marked as Exhibit D, E and F, to this my Affidavit is a true copy of the following:

- i. Exhibit D—Licence dated March 25, 2003 with correspondence of March 31, 2003.
- ii. Exhibit E—Notice of Suspension dated April 14, 2003.
- iii. Exhibit F—Revised Notice of Suspension dated October 1, 2003.

11. On the 14th of April 2003 a series of charges were laid against Nichols Gravel Limited, Gary Nichols, Margaret Nichols and Dwayne Nichols for alleged infractions of the *Aggregate Resources Act* alleging illegal quarry operations

between the dates of March 31, 2002 to December 1, 2003 and with unlawfully obstructing an inspector. The initial return date on these charges was April 25, 2003.

Aggregate Resources Act Charges

12. The Charges referred to in the preceeding paragraph hereof were ultimately dealt with by Justice of the Peace Wendy Casey at Cayuga, Ontario by way of a decision rendered January 28, 2005 in which the said Justice of the Peace stayed the proceedings on the basis of Common Law Abuse of Process and Breach of the Charter of Rights. Now produced and shown to me and marked as Exhibit G to this my Affidavit is a true copy of decision of the Justice of the Peace Wendy Casey.

13. Justice of the Peace Wendy Casey's decision was appealed to the Ontario Court of Justice and ultimately Madame Justice Zivolak overturned the decision of Justice Casey and remitted the matter back to Ontario Court, Provincial Division for a re-hearing. The decision of Madame Justice Zivolak was rendered on the 24th day of November 2005. Now produced and shown to me and marked as Exhibit H to this my Affidavit is a true copy of her said decision.

14. On the 6th day of January 2006 the Ministry of Natural Resources elected to withdraw all of the said charges.

15. The decision of the Ministry of Natural Resources to withdraw all charges included a second set of charges, which had been laid in the year 2004 alleging failure to operate a quarry without the authority of a Licence. The allegation of these various charges are March 31, December 1, 2002 and July 19 and July 27, 2004. The particulars of the infractions also involved allegations that the twenty-three (23) pre-operating conditions had not been met. Now produced and shown to me and marked as Exhibit I and J to this my Affidavit is a true copy of both sets of charges.

Application for Judicial Review

16. On the 25th of November 2004, Nichols Gravel Limited made an Application for Judicial Review concerning the issue as to what the proper terms and conditions of the Licence were as ordered by the Ontario Municipal Board and whether or not the Licence as issued by the Ministry of Natural Resources was in fact in conformity with the Licence ordered by the Ontario Municipal Board. That Application has yet to be heard and by consent was held in abeyance pending the outcome of the charges herein referred to.

17. I am advised by my counsel, Paul J. Osier, that on an emergency basis that the initial Application for Judicial Review may be heard during the week of March 13, 2006.

Revocation of Licence

18. On the 7th of April 2004 The Ministry of Natural Resources issued a Notice of Intention to Revoke the Applicant's Licence listing a number of alleged infractions Now produced and shown to me and marked as Exhibit K to this my Affidavit is a true copy of said Notice of Intention to Revoke.

19. On the 30th day of September 2004, the Honourable David Ramsay, Minister of Natural Resources signed a Notice of Revocation of the Licence purported as issued to Nichols Gravel Limited. The Notice of Revocation was based upon a purported failure of Nichols Gravel Limited to meet and comply with ten (10) of the twenty-three pre-operational conditions. Now produced and shown to me and marked as Exhibit L to this my Affidavit is a true copy of the said Notice of Revocation.

20. The Notice of Revocation of Licence was signed by David Ramsay and was made despite correspondence dated July 14, 2004 directed to the Honourable David Ramsay indicating that the Licence as issued by the Ministry of Natural Resources was in fact not in conformity with the direct Order of the Ontario Municipal Board. No response was made to the information provided to Mr. Ramsay in this regard. Now produced and shown to me and marked as Exhibit M to this my Affidavit is a true copy of said correspondence.

21. On or about the 7th of October 2004 a Notice of Revocation of Licence was hand delivered by the Ministry of Natural Resources to the Applicant. Now produced and shown to me and marked as Exhibit N to this my Affidavit is a true copy of said Notice of Revocation signed September 30, 2004.

22. Then Nichols Gravel Limited appealed the Revocation of Licence to the Ontario Municipal Board. Ontario Municipal Board has not yet dealt with the issue as a preliminary decision was made by Ontario Municipal Board member Smout that the issue as to what constitutes the Licence must be dealt with first by the Court.

Abuse of Process

23. The Applicant throughout the process of obtaining its Licence has been thwarted, delayed and harassed both individually with respect to its shareholders, agents and employees and economically in the following ways:

- i. The purported Licence was not issued as directed by the Ontario Municipal Board until 20 twenty months after the decision order was released July 25, 2001.
- ii. It was to have been granted a Licence in specific terms as Ordered by the Ontario Municipal Board however; the Ministry of Natural Resources saw fit to deliver a Licence containing additionally twenty-

three (23) pre-operational conditions. None of these have the legislated authority of law and which twenty-three (23) pre-operational conditions have been used, at various times, in an effort to suspend and revoke the Licence and hence hamper the operations of Nichols Gravel Limited at the Hagersville Quarry.

- iii. To charge Nichols Gravel Limited and its corporate officers with alleged offences under the *Aggregate Resources Act*.
- iv. By applying for and receiving a revocation of the Licence for non-compliance with the twenty-three (23) pre-operational conditions.
- v. To indicate to certain members of the general public and to independent contractors working for Nichols Gravel Limited that this was an illegal quarry operation.
- vi. To indicate to Municipal Officials and to other Aggregate operators that persons ought not to deal with Nichols Gravel limited as it was in violation of the law and operating without a Licence.

24. All of these actions of the Officials of the Ministry of Natural Resources and in two instances Officials of Norfolk County, have been deliberate and intended to harm Nichols Gravel Limited economically and by reputation and have cost in both delay of production and loss of profits.

25. Particulars of the interference of the named individuals are as follows:

- a) **Alec Denys, Gary Zacher, Emilia Kuisma, Paul Cutmore:** These named individuals created, and/ or enforced either individually or collectively twenty-three (23) specific pre-operating conditions in violation of *The Aggregate Resources Act* and regulations appended thereto and without justification or authority appended those as conditions as the Aggregate Resources Licence of

Nichols Gravel Limited and attempted to enforce compliance to the twenty-three (23) specific pre-operating conditions through the Licence Suspension, charges under *The Aggregate Resources Act* and through purported revocation of the Licence of Nichols Gravel Limited being Licence Number 103717. Paul Cutmore purported to require pre-operating conditions on November 13, 2002 prior to the execution of the Licence. This was done despite a legal opinion rendering such questions questionable. Now produced and shown to me and marked as Exhibit O to this my Affidavit is a true copy of such legal opinion dated December 18, 2002 from Mark Michaels, counsel. Gary Zacher, Emilia Kuisma further acted outside of the scope of their authority when on June 2, 2005 they attended at the County Public Works office of Norfolk County and made inquiries concerning possible contracts the Applicant had or may have to complete with Norfolk County and informed County staff that the Licence of the Applicant had been revoked on September 30, 2004 and that Norfolk County should not purchase Aggregate from the Applicant.

b) **David Ramsay:** Executed an authorization to revoke Licence 103717 of Nichols Gravel Limited despite being advised by written communication from Nichols Gravel Limited of the illegality of the imposition of twenty-three (23) specific pre-operating conditions appended to said Licence. And Despite the fact that of the impossibility of completion of those ten specific pre-operating conditions without operating a quarry.

c) **Stuart Thatcher:** Policy Manager and a Ministry of Natural Resources official provided advice and authority to Alec Denys and Paul Cutmore amongst others knowing when he knew or ought to have known that the advice so provided with respect to the twenty-three (23) specific pre-operating conditions was contrary to the provisions of *The Aggregate Resources Act* and regulations appended thereto.

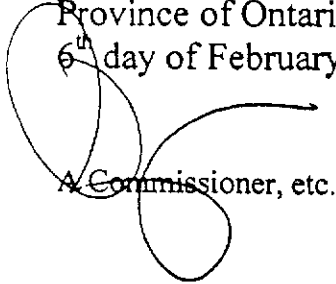
Stuart Thatcher was instrumental in instigating charges prior to the delivery of a licence to the Applicant and based on illegal conditions not authorized by the Ontario Municipal Board or legislation (See Exhibit "C" and "O" herein)

d) **John Hamilton and Eric D'Hondt:** These Officials employed by Norfolk County decided on Ministry of Natural Resources representation that Norfolk County would refuse to accept Aggregate from Nichols Gravel Limited at a developer's subdivision and as a consequence Nichols Gravel Limited lost amongst other contracts a contract with Haggerty Brothers Construction of Brantford in the Spring of 2005. Now produced and shown to me and marked as Exhibit P to this my Affidavit is a true copy of a contract with Haggerty Brothers Construction Inc., correspondence of John Vallee and Gary Zacher; and myself.

24. In April 2004, pursuant to a Freedom of Information request I sought a copy of all Aggregate Resources Licences issued after a particular date. Amongst those was the Licence purportedly issued to Nichols Gravel Limited. When I received it from the Ministry of Natural Resources on June 30, 2004 I noted that it did not contain any reference to twenty-three (23) pre-operational conditions, which startled me. At no point has the Ministry of Natural Resources delivered to me the Licence without twenty-three (23) pre-operational conditions or in terms similar to those which I obtained photocopies of through the Freedom of Information process from the Ministry of Natural Resources computer files. I therefore seek an Order requiring the Ministry of Natural Resources to deliver to me only the Aggregate Resources Licence as ordered by the Ontario Municipal Board in 2001. Now produced and shown to me and marked as Exhibit Q to this my Affidavit is a true copy of the licence and the envelope in which they were received from the Ministry of Natural Resources pursuant to the Freedom of Information Request.

SWORN BEFORE ME at)
Haldimand County, in the)
Province of Ontario, this)
6th day of February 2006)

Gary Nichols


A Commissioner, etc.