

**SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT**

B E T W E E N:

NICHOLS GRAVEL LIMITED

Appellant

and

**HER MAJESTY THE QUEEN IN THE RIGHT OF THE PROVINCE OF
ONTARIO, THE MINISTRY OF NATURAL RESOURCES**

Respondents

NOTICE OF APPEAL

Take Notice that the Appellant, Nichols Gravel Limited, appeals to the Superior Court of Justice, Divisional Court from the final decision of M.C. Denhez, dated September 27, 2007, made at Cayuga, Ontario.

The Appellant asks that the decision be set aside and judgment be granted as follows:

1. FOR AN ORDER quashing the decision of Ontario Municipal Board member M.C. Denhez made September 27, 2006, as being made in error of law and contrary to the law.
2. IN THE ALTERNATIVE for an order quashing Ontario Municipal Board member M. C. Denhez's decision as being in excess of his jurisdiction and therefore void.
3. FOR AN ORDER directing the Minister of Natural Resources to rescind the revocation of the Appellant's licence #103717.

4. FOR AN ORDER declaring that prior suspensions of licence of the Appellant and Notice of Revocation of the Appellant's licence are devoid of authority and unlawful.
5. IN THE ALTERNATIVE, for an order that the penalty imposed by Ontario Municipal Board member M.C. Denhez is excessive and directing the Ontario Municipal Board to re-consider same or in the further alternative imposing such lesser penalty as this Court may deem just.
6. FOR AN ORDER that this Appeal be heard sequentially to a pending Application for Judicial Review being Court Action No. 30/2006 between the Appellant and the Ministry of Natural Resources.
7. FOR THE COSTS of this Appeal on a substantial indemnity basis.

THE GROUNDS FOR THIS APPEAL ARE:

1. Board Member M. C. Denhez committed serious errors of law in that:
 - a) He failed to rule on the legal issue raised by the applicant as to the legal validity of the Ministry of Natural Resources doing the following:
 - i) Imposing 23 specific pre-operating conditions on the license without any statutory or other authority;
 - ii) Prosecuting the appellant on the same 23 specific pre-operating conditions;
 - iii) Suspending the license of the appellant on the basis of the 23 specific pre-operating conditions;
 - iv) Issuing a Notice of Intent to revoke the license on the basis of some of the specific 23 pre-operating conditions;
 - v) Revoking the license on the basis of the remaining 23 specific pre-operating conditions;
 - vi) The Ministry of Natural Resources staff, keeping the existence of the 23 specific pre-operating conditions from the knowledge of the Minister of Natural Resources, when the Minister signed the Revocation Order under the misrepresentation that these remaining pre-operating conditions were in fact conditions of the licence, when in fact, they were not;

vii) Board Member Denhez consequently failed to rule on the issue as to whether the appellant company was in fact operating illegally or not;

viii) Board Member Denhez failed to consider the legality or otherwise of Nichols Gravel Limited applying for a site plan amendment while under suspension, the terms of which did not permit such an application;

ix) Board Member Denhez failed to give accord to the evidentiary principal that the onuses on the party alleging something to prove it. In this context Board Member Denhez sustained an argument from the Ministry of Natural Resources that the appellant corporation had entered ground water when there was no physical or scientific evidence that it had done so.

Board Member Denhez then based a substantial portion of his decision on the assumption that the appellant corporation had entered into ground water and had consequently failed to monitor ground water and/or provide for a water containment system for same;

x) Board Member Denhez further erred in assuming that there was a legal requirement on the quarry, imposed upon it by virtue of either its license or the site plan to develop the quarry to its fullest extent vertically before expanding laterally, and made illogical assumptions that it was improper for the appellant corporation to develop the quarry laterally so as to avoid entry into the ground water table, and thereby based his decision on an illegal assumption of fact;

xi) Board Member Denhez further failed to appreciate the significance of the decision of the Honourable Justice Reilly, made June 15, 2006, to the effect that the twenty-three specific pre-operating conditions imposed by Ministry of Natural Resources officials had no legal force and effect and termed such conditions as merely a covering letter, when in fact, Justice Reilly had specifically stated that the pre-operating conditions did not form part of the license.

Specifically Board Member Denhez failed to consider that Ministry of Natural Resources officials prosecuted Nichols Gravel Limited on its failure to comply with the twenty-three specific pre-operating conditions and in fact suspended the license on the failure of Nichols Gravel Limited to comply with those conditions within the thirteen (13) day period between April 1, 2003 and April 14, 2003.

Board Member Denhez acknowledged that while Ministry of Natural Resources might have been guilty of bad faith, as a consequence of this action, he failed to record any remedy for same;

xii) Board Member Denhez failed to consider the lawfulness or otherwise, of imposing twenty-three specific pre-operating conditions by Ministry of Natural Resources, imposed without any legislative authority and contrary to the direction of the Ontario Municipal Board which ordered the issuance of the license, Ministry of Natural Resources directed that some of the original fifty-six (56) conditions were required to be satisfied prior to operation of the quarry without considering the illegality of the imposition of those conditions selected by Ministry of Natural Resources officials, contrary to ARA Section 11 S.(15);

xiii) Board Member Denhez permitted evidence to be addressed that had already been addressed at the previous Ontario Municipal Board hearing that ordered the license to be issued thereby permitting a review of a prior order, contrary to ARA Section 11 Sub(15), no petition or review.

2. Board Member M. C. Denhez's order, created an apprehension of bias because of the following misfindings of fact and by virtue of his order confirming the Revocation in the light of the facts as found:

a) Board Member Denhez indicated that by the time the license 103717 was issued, two changes had occurred. In fact three changes had occurred, the third being the deliberate effort by Ministry of Natural Resources officials to alter the license ordered by the Ontario Municipal Board and as signed by the Minister of Natural Resources, to impose twenty-three (23) specific pre-conditions not so ordered by the Ontario Municipal Board or authorized by the Minister.

b) M. C. Denhez stated that 10,000 tonnes of aggregate was removed from the site to Brant County by a contractor prior to the issue of the licence. In fact the evidence was that 10,000 tonnes of material was crushed on site. However the compliance report filed indicated that 2,243 tonnes were in fact removed from the property to other pits owned by the same operator, Nichols Gravel Limited.

c) Ontario Municipal Board member Denhez further failed to indicate as intervening factors that Ministry of Natural Resources officials charged the appellant corporation with breach of the license based on twenty-three specific pre-operating conditions. Said charges having been laid on April 14, 2003, to both the company and its officers.

d) Board Member Denhez further failed to indicate the evidence that two notices of suspension issued by Ministry of Natural Resources were also based on twenty-three specific pre-operating conditions imposed by local officials of Ministry of Natural Resources.

e) Board Member Denhez further indicated in his reasons that the appellant company had failed to meet conditions required of it by Ministry of Natural Resources officials in a timely fashion and thereby ignored the evidence that the initial twenty-three specific pre-operating conditions demanded by Ministry of Natural Resources officials were in fact, for the most part, met and that by the time of the actual revocation of license, only ten of those conditions remained to be fulfilled in the submission of Ministry of Natural Resources, and only one or two remained to be fulfilled in the submission of Nichols Gravel Limited at the hearing.

f) Board Member Denhez considered the twenty-three specific pre-operating conditions in the "covering letter" irrelevant and the terminology used equally irrelevant. In coming to this conclusion Board Member Denhez ignored the conduct of the Ministry of Natural Resources in suspending the license based on those very conditions, and issuing a notice of revocation based on the same conditions and revoking the license on the same conditions. Board Member Denhez also ignored the Provincial prosecution of Nichols Gravel Limited on the same conditions, as well as Justice Reilly's decision regarding the March 31, 2003 letter and the 23 specific pre-operating conditions as not forming part of the licence.

g) Board Member Denhez accepted the contention of Ministry of Natural Resources officials that the ten conditions that had, originally, been labelled as specific pre-operating conditions on which formed the basis of the license revocation, should have already been fulfilled. Board Member Denhez indicated that had the appellant company drafted its site plan and conditions differently this might have led public authorities to respond with their own changes. Board Member Denhez failed to consider that the Ministry of Natural Resources chose not to appear at the original application of the Ontario Municipal Board at which the license was granted and was well aware of the conditions so ordered by the Board, to which it took no exception prior to issuance of the licence.

h) Board Member Denhez sanctioned the ten items which were the subject matter of the revocation by misapprehending the following data or in the alternative, by selectively ignoring the portions of the data without giving any reasons why:

Revocation reason one – No monitoring of well nests - Board Member Denhez indicated these should be installed before quarrying. There was no indication in this condition as submitted at the original Ontario Municipal Board hearing or in the condition itself that justified this construction, which was a creation of Mr. Denhez mind. The conditions of approval in Ontario

Municipal Board Dec. order 1194 did not state when or at what point these conditions would be implemented.

Revocation reason two – Inadequate internal water collection system - The purported Board Member Denhez's decision was, that the internal water collection system was inadequate. The requirement was not an adequate or inadequate water collection system, but an internal water collection system which in fact exists and serves the intended purpose.

Revocation reason three – Gaps in berming, allowing water to escape – There was no evidence that water escaped from any gap in berming and the one incidence of flooding of a neighbour's property had nothing to do with the gaps in berming. There was in fact no evidence before the Board on this point.

Revocation reason four – Rock check dams - Board Member Denhez suggested that a site plan amendment should have been applied for by the appellant corporation if the creation of rock check dams was physically impossible as contended by the company. Board Member Denhez failed to consider the restrictions imposed upon the company by the suspension order which in effect prohibited the company doing anything other than specified in the suspension order.

Revocation reason five – No storm water holding plan – Whether the company should have such a plan and started implementation already, bearing in mind the illegal imposition of other conditions, many of which the company had fulfilled in any events, was in fact the question of opinion, which was expressed by the Board Member without any supporting evidence.

Revocation reason six – No County quarry approval under the drainage act – This was a point conceded by the appellant company and agreed to obtain.

Revocation reasons seven & nine – Inadequate grading and seeding of berms – This was only partially done by the corporation. Berms in ongoing construction process for the life of the quarry.

Revocation reason eight – Inadequate fencing – The evidence by the corporation was that the fencing was in fact completed before the time of revocation. Board Member Denhez gave no credit to the company for this point.

Revocation reason ten – Road and scale in wrong location - Again, Board Member Denhez expected a site plan amendment for this, which site plan amendment was impossible for the company to apply for while under suspension and which previously had been discussed prior to release of site

plans to Inspector Cutmore, February 14/03, who stated no exception to the location.

i) The appellant corporation appeals the decision with respect to the ground water monitoring, on the basis that there was no ground water to monitor and that in fact as there was no scientific evidence either way as to whether ground water had been entered, the whole issue is premature. The right of the Ministry of Natural Resources to attend on site and to secure testing, or refer to the appropriate ministry, the Ministry of the Environment, a right which was not exercised, but totally ignored by Member Denhez.

j) The corporation also appeals the decision on the basis of apprehension of bias for the following reasons:

i) Board Member Denhez asserted that the corporation chose the wrong method in which to respond to Ministry of Natural Resources concerns and complaints.

ii) Board Member Denhez acknowledged the likelihood that there was bad faith on the part of Ministry of Natural Resources (see page 16 of Decision) but refused to sanction Ministry of Natural Resources for same.

k) Board Member Denhez is also guilty of apprehension of bias in his failure to consider a conditional order, which order is sanctioned by Ontario Municipal Board legislation and Case Law, in order to allow the company to complete conditions and continue to operate.

l) Board Member Denhez refused a conditional order on terms based upon the following:

a) Its finding that the company was operating under a revocation order Board Member Denhez failed to appreciate the legal issue that the license, that the Minister ordered revoked, was not the license that was in fact being enforced, as signed by the previous Minister in 2003, as there was no evidence that the Minister was ever aware of twenty-three specific pre-operating conditions, illegally imposed upon the licence, which gave rise to the revocation order.

b) Board Member Denhez asserted that there was no reason to expect the appellant company to comply with the terms of a conditional order. This order was made in spite of the clear evidence that, however illegal Nichols Gravel Limited had in fact complied with thirteen plus (13+) of the twenty-three specific pre-operating conditions unlawfully imposed upon it prior to issuance of the revoke order.

c) Board Member Denhez took it upon himself to assert a requirement that Nichols Gravel Limited quarry below the ground water table before quarrying

laterally, a requirement that does not appear in the license, the site plan or the regulations of A.R.A. The site plan indicates extraction by two (2) lifts or benches of seven (7) metres.

d) There was no valid evidence provided at the hearing, either by Ministry of Natural Resources or the residents, that confirmed since issuance of the license April 1, 2003 to date, that this quarry operation had provoked any adverse impact to ground or surface water, ground vibrations, noise or dust.

The only point made by the Ministry of Natural Resources and the residents was that since October 7, 2004, this quarry had operated under a Revoke of License Order, which Nichols Gravel Ltd. considered to be unlawful and illegally imposed.

Three different courts have now confirmed that twenty-three (23) specific pre-operating conditions do not form part of the licence and therefore are not enforceable in law upon the licence.

- m) The penalty sustained by Board Member Denhez is excessive in contrast to the alleged infractions that remain at the cost of development of the quarry thus far since 1999.
- n) The decision of Mr. Justice Reilly, dated June 15, 2006, and the failure of Ontario Municipal Board member M.C. Denhez to give legal weight to it.

3. Such further and other grounds as this Court may deem just and counsel may advise.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

- a) The Order of Justice T. D. Marshall, dated March 12, 2007 made pursuant to Rule 62.02 granting Leave to Appeal.
- b) The decision of Ontario Municipal Board member M. C. Denhez is final.

Delivered at Caledonia, Ontario this day of March, 2007.

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[2] Mr. Osier, who represents Nichols Gravel Limited relies on a number of points, which I have considered, but his main contention is a narrow one, which I will refer to momentarily.

[3] The facts can be stated briefly. In March, 1999, Nichols Gravel Limited (hereafter Nichols) applied for a licence to quarry. On April 3, and July 25, 2001, The Ontario Municipal Board (hereafter OMB) ordered the Ministry of Natural Resources (hereafter MNR) to issue a licence to Nichols. This was done March 25, 2003.

[4] In April, the MNR delivered a licence to Nichols. The licence came with a letter as I understand it super-imposing 23 “specific pre-operating conditions”, emphasis my own, which the letter said were to be completed before the operation of this quarry could begin.

[5] Subsequently, the MNR took the following actions premised on the failure of Nichols to meet the 23 pre-operating conditions in the letter. It should be said that these were also conditions of the licence but the licence did not – as the letter did – specify that they were “pre-operating conditions”.

[6] So on April 14, 2003, there was a Notice of Suspension, October 1, 2003 revised Notice of Suspension, April 7, 2004 Notice of Intention to Revoke and September 30, 2004, final Notice of Revocation.

[7] Next on June 15, 2006, Mr. Justice Reilly of the Superior Court in a Judicial Review of the licence ruled that the 23 specific pre-operating conditions were not a part of the licence.

[8] Next on September 27, 2006, the OMB in its ruling on the appeal of the revocation denied the Nichols appeal. The OMB, specifically member Denhez decided the appeal on the

basis that in fact Nichols had failed to meet the conditions substantially the 23 specific pre-operating conditions contained in the covering letter. It was his view - these though called pre-operating conditions in the covering letter – other than being set out – were still the conditions in the licence and hence that Nichols had failed to meet the conditions in a timely fashion and hence Mr. Denhez upheld the revocation of Nichols licence.

[9] It is accepted by all parties here that leave to appeal from a decision of the OMB is to be granted only where (1) the court is satisfied that there is a point of law of sufficient importance to merit the attention of the Divisional Court, (2) there is some reason to doubt the correctness of the OMB's decision and the issue of law.

[10] Further, the issue must be a question of law and be of public importance, though it may be of importance to the litigants alone. See Toronto (City) v. Torgan Developments, [1990] O.J. No. 55; 47 M.P.L.R. 7.

[11] The OMB's duties in hearing the appeal from the revocation are directed by the language of the Aggregate Resources Act, R.S.O. 1990, c. A.8. Section 20(1) which states "*The Minister may revoke a licence for any contravention of this Act, the regulations, the site plan or the conditions of the licence.*"

[12] The essence of Mr. Osier's argument is that the four steps leading to Revocation that is the Notice of Suspension, Revised Notice of Suspension, Notice of Revocation and, finally, the Revocation itself were all based not on the condition of the licence being contravened – but rather the pre-conditions in the letter that the MNR included with the licence. Indeed Mr. Osier has prepared a chart and traced the pre-conditions through all the steps to the final revocation and

purports to show that the documents themselves – served – as well as the contraventions – were in fact contraventions of the pre-conditions set out in the letter and held by this court not to be part of the licence and that these were the foundation of not only the revocation – but also the Board’s decision.

[13] I will refer to the notice of suspension only which is the plinth of the further steps the MNR took. It refers to specifically the 23 pre-conditions as its basis and refers to them as the pre-conditions set out “in the covering letter.”

[14] The OMB, in its decision took the view the letter had no importance but that the revocation was proper because of non-compliance with the actual Condition of the Licence.

[15] I have considered Mr. Osier’s argument and, though it is in a sense technical, it seems to me clear on the materials that the revocation was founded in fact and from its inception not on a condition in the licence but on pre-conditions in a letter which carried no authority. The conditions in the licence were conditions not pre-conditions. The chairman reasoned that in common sense, some of these at best were as well pre-conditions.

CONCLUSION

[16] It would seem to me that a statute such as the Act we are here concerned with should be meticulously followed by the Ministry: much was at stake. Here the applicant has in my view, shown – on balance – that Section 20(1) of the Act has not been complied with.

[17] I am satisfied that in the light of this conclusion, the member of the OMB may well have exceeded his jurisdiction in making the order that he did.

[18] In my respectful view, this may well amount to an error in law. As well, since considerable property of the applicant is at stake, the matter should merit the attention of our courts. As well, as I have indicated, I have reason to doubt that there was the careful compliance there should be in the application of the strong hand of the state. There is then, a question of law of importance to the litigants and, indeed, the public.

[19] In my respectful view having made this finding in regards to this issue the motion is effectively disposed of. I would extend the time to appeal. This matter has been going on for a very long time and as I have said is a matter of great moment to the applicant. It follows since the licence was granted and these findings that I have made that there should be a stay of the OMB decision pending the hearing of the appeal.

[20] Counsel may speak to me in regard to costs.

MARSHALL, J.

Released: March 12, 2007