

Ruling says MNR's conduct an abuse of process

OMB awards lawyer \$60,000 premium

BY HELEN BURNETT
Law Times

The Ontario Municipal Board has awarded a premium for what is reportedly the first time, because of the "unusual and rare circumstances" of a case between the Ministry of Natural Resources (MNR), the Regional Municipality of Halton, and a local sand and gravel pit company.

Those rare circumstances include withholding evidence, proceeding for frivolous and vexatious reasons and generally acting "egregiously in the conduct of these proceedings."

In addition to the \$60,000 premium awarded to lawyer Claudio Aiello, the Ontario Municipal Board also awarded costs to the licensee in the case, Campbellville Sand & Gravel Supply (CSGS), on a full indemnity basis, payable by both the region and the MNR.

The case involved a "notice of proposal to require an amendment to a site plan" issued in 2004 by the MNR, to amend a 1996 site plan document "by prohibiting any further extraction and prohibiting the filling of the site with any off-site material."

CSGS operated a pit, which, as it was excavated, was supposed to be filled back on a progressive basis.

The pit was operated by CSGS since 1972, it was run by another operator from 1992 to 1999, with no of progressive rehabilitation taking place.

According to the decision in *555816 Ont. Inc. v. Halton (Regional Municipality)* by S.D. Rogers: "It was when CSGS, a very small and relatively unsophisticated operator took over the operations around 2000 that the MNR took an interest."



Claudio Aiello recently awarded a rare \$60,000 premium for his work on a case at the Ontario Municipal Board.

The OMB originally ruled last year that the amendment of a site plan was a regulatory action rather than an enforcement action and that the MNR could "relate to the board any observations of adverse impacts on the environment resulting from activities on the site," but would not hear

evidence with respect to the alleged conduct of the licensee.

However, according to the decision, when the hearing reconvened in November, "it became clear to the board that the MNR did not apply itself to the intent of the decision of the board and reassess its case.

"Despite the MNR's claim that its main concern was the local ground aquifer, the MNR called no hydrogeologist or environmental expert to support this claim," said the decision.

Of the \$664,956.46 in costs awarded to the gravel company, the MNR is required to pay \$498,717.33, and the region \$166,239.11.

"The board has found that the conduct of both the MNR and the region should attract an award of costs. The conduct of the MNR constituted an abuse of the processes of this board from beginning to the end," according to the decision.

"It is the decision of this board that this litigation should never have taken place, or that if it did take place, it should have taken up no more than one or two days of the board's time. It is the decision of this board that both the MNR and the Region acted egregiously in the conduct of these proceedings, causing completely unnecessary expense to be incurred by the licensee in defending the case," ruled Rogers.

In the costs decision, Rogers noted that the MNR "initiated these proceedings for frivolous reasons, pursued the matter in a vexatious manner, and in every respect acted unreasonably in advancing the proceedings".

The ruling also said the region "in pursuing its case with respect to the hydrogeological risks of the activity at this pit, put forth witnesses who failed in their duty to provide objective unbiased

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Quote of the week

"Judges are forced to contend only with the evidence they receive and make the best decisions possible based on that evidence. 'Harmful' decisions often result from poorly presented cases."

- Ontario Court Justice Robert Spence See Speakers, page 7

MORE M.N.R. ABUSE OF PROCESS AND NEGLIGENT MISCONDUCT IN THE PUBLIC INTEREST?

Costs not routinely handed out by OMB

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professional opinions: failed to properly assess their case in a way that advanced the public interest, which the board finds it was their duty to do, which evidence was not brought before the board, and pursued the case in complete disregard of the cost consequences of so doing for both the licensee and the taxpayers of the region."

In terms of the premium, Rogers noted that "in general, the tests for the award of a premium on account of costs are that an outstanding result must be achieved, and that there has been a risk to the lawyer in the recovery of costs. It is the unusual and rare circumstances of this case which lead the board to the conclusion that a premium is appropriately claimed in this case."

Such circumstances included the fact that after the sole officer and director of the licensee became ill and died, there was no opportunity for counsel to seek instructions, but "because of the public interest at stake, and in the interests of the business and the property, and pursuant to the clear wishes of Mr. Guerrieri, expressed before his death, he sought an order to continue with the hearing," the decision noted.

Toronto lawyer Aiello, counsel for CSGS, told *Law Times* that, "even before the Supreme Court of Canada spoke last week on premiums (see article on page 2), premiums generally are very rare, and the fact that they have never ever been awarded at the [OMB] before is clearly a reflection of that. The fact that they were awarded in this case, quite apart from what *Walker and Ritchie* means today, speaks about the unusual nature of this proceeding, I think," said Aiello.

"Quite apart from the Supreme Court of Canada's ruling, I would not see that this particular case would be something that would allow premiums to be routinely awarded at the board. It just wouldn't happen, as I see it," he added.

Aiello added that costs are not routinely handed out by the board. "This costs decision, within the context of a board decision as opposed to a court decision, is fairly unusual, I would say.

"It was also a very significant case. It's the first case to ever deal full-on with s. 16 of the Aggregate Resources Act," he said, as well as being one of the leading cases in terms of source-water protection.

Attempts by *Law Times* to reach counsel for Halton Region and the Ministry of Natural Resources for comment were unsuccessful. ■