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September 9, 2005

SENT BY FAX: (416) 314-2030

Demetrius Kappos
Ministry of Natural Resources
Legal Services Branch
3rd Floor, Room 3420
99 Wellesley Street West
Toronto, Ontario
M7A 1W3

Dear Sir:

RE: Nichols Gravel Limited - Appeal to Ontario Court of Justice

Enclosed herewith please find out Amended Argument served upon you pursuant to the Rules.

Yours very truly,

ARRELL, BROWN, OSIER, MURRAY & ROSEWELL LLP



PAUL J. OSIER

PJO/ah

Encl.

c.c. Gary Nichols 1-519-582-2143

Information No.

ONTARIO COURT OF JUSTICE

**CANADA
Province of Ontario
Central South Region**

BETWEEN:

HER MAJESTY THE QUEEN

Applicant

and

**NICHOLS GRAVEL LIMITED, GARY I. NICHOLS, MARGARET D.
NICHOLS and DWAYNE E. NICHOLS**

Respondents

AMENDED ARGUMENT

Part I - Statement of the Case:

1. The court in which this proceeding arose is the Ontario Court of Justice, at Cayuga, Ontario.
2. The respondents are charged with unlawfully operating a quarry between the 31st day of March, 2002 and the 1st day of December, 2002, and May 31, 2003 to August 3, 2003 with unlawfully operating a quarry without a licence contrary to s.7(1) of the Aggregate Resources

Act and with unlawfully obstructing an inspector by refusing to furnish information contrary to s.57(4) of the Aggregate Resources Act.

Part II A- Summary of the Facts:

- A) Nichols Gravel Limited applied for a licence to operate a quarry in Walpole Township in March, 1999.
- B) The Ministry of Natural Resources (M.N.R.) referred the application to the Ontario Municipal Board (O.M.B.) which heard evidence in July, 2000 to November 1, 2000.
- C) In April 2001, the O.M.B. granted a preliminary ruling ordering the M.N.R. to issue a licence to Nichols Gravel Limited to operate a quarry.
- D) On July 25, 2001, the O.M.B. issued its final order, which required the Ministry of Natural Resources to issue a licence to Nichols Gravel Limited.
- E) After numerous requests to both the M.N.R. and to local officials, the M.N.R. finally issued the licence ordered by the O.M.B. on March 31, 2003 and hand-delivered it to Nichols Gravel Limited on April 1, 2003 by Inspector Paul Cutmore.
- F) (i) On April 14, 2003, the M.N.R. issued a notice of suspension to Nichols Gravel Limited alleging that it failed to complete 23 specific operating pre-conditions and requiring that that be done by September 30, 2003, and alleging that the quarry was being operated in spite of the conditions not being fulfilled.
(ii) On April 25, 2003, the charges before the Court were laid. James Greenwood, a Conservation Officer, was the informant.
- G) (i) When the licence was hand-delivered to Nichols Gravel Limited on the 1st of April, 2003 by Inspector Paul Cutmore, also contained

with it was a letter dated March 31, 2003, which was signed by Alec Denys, District Manager, and which was prepared by aggregate inspector Paul Cutmore. The letter indicated that the licence was issued subject to 56 conditions on Schedules A and B. However the letter also indicated that there was a separate list of 14, then changed to 23, of the original 56 conditions under Schedules A and B, which were relabelled as "specific preoperational conditions".

(ii) In the testimony of Paul Cutmore, it became apparent that Inspector Cutmore took it upon himself to create 23 pre-operational conditions without any legislative authority to do so and to present the licence as issued by the Ministry with a letter indicating that the 23 pre-operational conditions were part of the licence. In doing this, the Inspector was without legislative, or any authority to do so. In this regard, please see the testimony of Paul Cutmore, page 145, lines 15 through to 24, and page 172, lines 5 through to 15.

(iii) It is submitted that the licence as signed and approved by the Minister on March 25, 2003 and the licence as hand-delivered to the offices of Nichols Gravel Limited on April 1, 2003 is not one and the same and that certain conditions have been changed and restructured and altered to "specific pre-operating conditions". The change from the original licence which was also prepared and submitted to the Minister by Paul Cutmore indicates that Schedule A conditions numbered 5, 7, 8, 9, 10

4

and 12 were changed to specific pre-operating conditions after the original licence was signed by the Minister, and, in addition, under Schedule B of the original licence conditions 14, 15 17, 20, 25, 27, 29, 37, 38, 45, 49, 50, 51, 52, 53 and 55 were all similarly changed. Alec Denys signed the letter that authorized these changes. The insistence of the local officials of M.N.R. that these pre-operating conditions be completed prior to operation of the quarry effected a significant change in the licence and made it impossible in many if not all instances to commence a quarry operation. It is evident from Exhibit "B" appended to the Affidavit of Allison Sladin that Alec Denys was aware that the conditions attached to the licence were 56 in all and that there were no pre-conditions.

- H) Monitoring of blasting operations – how can one monitor blasting operations if one is not operating a quarry? It is evident that these conditions were not required or directed by the original licence. In this regard, see the evidence of Paul Cutmore, page 102, lines 5 through to 25. Similarly other conditions re-labelled as pre-operating were impossible to complete prior to operating.

Provincial Standards:

- I) There was evidence given at the hearing that certain conditions of a licence attached to every licence and are prescribed by Provincial standards. A copy of the provincial standards was filed as an exhibit. Prescribed conditions that fall in this category cannot be varied or rescinded by either the Minister or the O.M.B. **Reference:** Provincial Standard v.10. It is submitted that Inspector Cutmore changed these prescribed conditions as approved by the O.M.B. to specific pre-operational conditions on the Class A licence without legislative authority.
- J) Site Plan – The Aggregate Resources Act, s.16 (5), provides that if the Minister proposes to require the amendment of a site plan or proposes to approve the amendment of a site plan that notice of that would be given to the licensee. Conditions of approval numbered 27, 29, 45, 50, 51, 52 and 53 were not described in the O.M.B. decision or on the site plan as “specific pre-operating conditions”. However, these conditions were changed and imposed upon the licence without amendment of the site plan. This was a contravention of the existing legislation, s.16(8) of the *Aggregate Resources Act*, which gives the licensee who is served with a notice of amendment an opportunity for a hearing. Nichols Gravel Limited was not notified that the conditions of the site plan would be changed to “specific pre-

operational condition". An example of this is the location of the berm, access road and scale. It is identified on the site plan but subsequently directed by Paul Cutmore to be relocated.

SEE: Aggregate Resources Act, Exhibit Book Tab 23, p.18.

- K) The Aggregate Resources Act, as amended, made compliance to the Aggregate Act operator self-regulatory. It is submitted that the charges under s.7(1), 57(1) and 57(4) are invalid in this instance as there was no operating quarry, any activity that was done was done in furtherance of development of the operating conditions as approved by the O.M.B. One wonders if there was in fact an operating quarry why charges were not filed September, 2002 rather than after the licence was issued on April 1, 2003 and after the licence was suspended April 14, 2003 and after the local inspector had conferred with the head of the local oppositional group to the quarry. In addition the self-reporting scheme didn't oblige the operator to report until September 2003. The charge was laid April 2003.
- L) The licence as issued was designed to set up the licensee to fail. The licence provided no authority to operate until 23 specific pre-operating conditions had been completed. The Aggregate Resources Act provides only for licence suspension under s.15(1)

7

compliance report s.15(6)(a) and (b). As Nichols Gravel Limited was not permitted to operate and as a result was not able to provide an annual self-reporting compliance report and as there was no operating quarry, the efforts of the local M.N.R. officials simply are further evidence of a total abuse of process, both in terms of the manipulation of the licence as issued by the Ministry, (all of which was without authority) and of the efforts of local officials to frustrate, delay and close down the gravel operation as ordered by the O.M.B.

M) It is further submitted that local M.N.R. officials were and are in contempt of the O.M.B.'s orders to issue the licence by deliberately delaying the issuance of the licence until the spring of 2003 and then by almost immediately issuing a notice of suspension of the licence. It is submitted that in fact the licence as issued by Inspector Cutmore with its 23 unauthorized pre-operating conditions in fact is not reflective of the licence as ordered by the O.M.B. and is not reflective of the licence as in fact signed by Minister Ouellette and therefore the following flows:

- (i) there are no contraventions of the licence as issued by Minister Ouellette, and
- (ii) this Court should exercise its authority to prevent an abuse of process and order a stay of these and all proceedings to this

8

date as the charges are premised on a licence as issued and delivered by Inspector Cutmore which by its terms is invalid as not having been ordered by the O.M.B. and as not having been presented as signed by Minister Ouellette.

- (iii) The decision of J.P. W. Casey is therefore correct and should be maintained.

Part II B—Evidentiary References re: Summary of the Facts

1) The conditions attached to a Licence to quarry in this case are those imposed by the Ontario Municipal Board together with the statutory conditions required by regulation and attached to all licences to quarry.

SEE: Evidence at Trial- Exhibit 1 and 2, paragraph 36, vol.1 of Exhibit 12, vol. 2 page 126

Evidence of Joe Strachan, vol. 1; page 26; line 20-24

2) The hierarchy of job function under The Aggregate Resources Act is constituted by the Inspector at the field level; over him is a Supervisor and over him is the District Manager.

SEE: Evidence of Joe Strachan; vol.1; page 10; line 16-26

3) The source of the Inspector's authority is The Aggregate Resources Act

SEE: Evidence of Joe Strachan; vol. 1; page 14; line 116-118

4) The licence comes with existing conditions, operating conditions and remedial conditions either on the site plan or on the licence.

SEE: Evidence of Joe Strachan; vol. 1; page 16; line 25-33

5) In this case the Ministry of Natural Resources referred the Application by Nichols Gravel Limited to an O.M.B. hearing to determine the issue of zoning and licence but chose not to participate in the hearing.

SEE: Evidence of Joe Strachan; vol. 1; page 22; line 12-26

6) The licence was what the O.M.B. ruled and what was on the site plan.

SEE: Evidence of Joe Strachan; vol. 1; page 23; line 22-26 and page 25; line 12-17.

7) The fifty-five (55) condition imposed by the O.M.B. were operating conditions not pre-operating conditions.

SEE: Evidence of Joe Strachan; vol. 1; page 27; line 9-13 and page 29; line 21-28 and page 31; line 9-37 and page 33; line 18-21 and page 50;

line 9-13

Evidence of Paul Cutmore; vol. 1; page 104; line 20-23

8) There are no licences issued since 1997 in the district in which Nichols Gravel Limited operates in which pre-conditions were imposed

SEE: Evidence of Joe Strachan; vol. 1; page 42; line 1-6 and Exhibit 3

9) In order to change conditions after the licence is issued notice must be given to that effect.

SEE: Evidence of Joe Strachan; vol. 1; page 25; line 17-19

10) It was impossible to complete the fifty-five conditions unless the company was operating.

SEE: Evidence of Joe Strachan; vol. 1; page 69; line 13-22

11) The O.M.B. order did not make fulfilment of the conditions of the licence a pre-condition before issuance of the licence.

SEE: Evidence of Paul Cutmore; vol.1; page 85; line 10-14

12) Paul Cutmore chose to accept the point of view of a caseworker with the O.M.B. that all conditions would have to be fulfilled before the licence

could be issued.

SEE: Evidence of Paul Cutmore; vol. 1; page 86; line 21-32

13) Inspector Cutmore chose conditions he extracted from the O.M.B. decision and made them pre-conditions

SEE: Evidence of Paul Cutmore; vol. 1; page 90; line 11-15

14) Inspector Cutmore had a legal opinion prior to issuance of the licence that the water-taking permit need not be secured prior to the issuance of the licence.

SEE: Evidence of Paul Cutmore; vol. 1; page 95; line 15-20 and page 96; line 1-12.

15) It was Paul Cutmore who created the licence to be signed by the Minister.

SEE: Evidence of Paul Cutmore; vol. 1; page 97; line 23-26

16) Paul Cutmore presented the issued licence with twenty-three pre-operating conditions which he drafted, had his Supervising Officer, Alec Denys, sign; then changed the number of conditions from fourteen to twenty-three.

SEE: Evidence of Paul Cutmore; vol. 1; page 101; line 23-26

Exhibit 15

Evidence of Paul Cutmore; vol 1; page 144; line 7-10

12

17) Inspector Cutmore testified that he sent the documents to the Minister for signature including the twenty-three pre-operating conditions.

SEE: Evidence of Paul Cutmore; vol. 1; page 102; lien 1-30

However the last exhibit is of a number licences that came directly from the District Office of the Ministry of Natural Resources. Included in these is the licence of Nichols Gravel Limited and it has no pre-conditions on it. Nor do any of the other licences.

18) The Inspector did not have authority to change the site plan conditions some of which were included in the pre-operating conditions he imposed.

SEE: Evidence of Paul Cutmore; vol. 1; page 105; line 6-28

Page 108; line 25-33

Page 112; line 24-30

Page 113; line 1-15

Page 143, line 7-12

Page 145; line 13-24

Additionally the 'pre-conditions' were only imposed after expiry of the Site Plan Appeal period and were therefore illegal.

SEE: Evidence of Paul Cutmore; vol. 1; page 141; line 31-33 and page 142; lien 15-25.

19) Inspector Cutmore was aware when he issued the licence that he would be issuing a suspension order.

SEE: Evidence of Paul Cutmore; vol. 1; page 137; line 26-30

20) Despite requiring Nichols Gravel Limited to fulfil pre-operating conditions, Inspector Cutmore suspended his company for doing them.

SEE: Evidence of Paul Cutmore; vol. 1; page 149; line 5-12.

PART III—The Law

1. It is submitted that Abuse of Process is readily available for a Court in order to control its own process and that of a prosecution. The tests for Abuse of Process is set out in the case of Regina v. Keyowski [1988] 1 S.C.R. 657 [1988] S.C.J. NO. 28.

A Stay of proceedings for abuse of process should be granted where compelling an accused to stand Trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency or where the proceedings are 'oppressive or vexatious" The Court in Jewitt also adopted the caveat of the Court in Young that this is a power which can be exercised only in the "clearest of cases". (Paragraph 2)

The Court also stated that to define "oppressive" as requiring misconduct or an improper motive would be unduly restrictive, and misconduct is only one factor to consider (paragraph 3).

This case re-affirms the Supreme Court's adoption of the test in Regina v. Jewitt [1985] 2S.C.R.128, and the Supreme Court adopted this test from the Ontario Court of Appeal case in Regina v. Young, 46. OR (2nd) 520 (1984)

2. In O'Conner v. The Queen [1995] (SCC) The Supreme Court states that the tests for stay of Proceedings under Abuse of Process are the same at common law as under the Charter and that the only time there would be a need to maintain a distinction is when the Charter does not apply and yet there has been an Abuse of Process (paragraph 70) (See Appellant book of Authorities.)

Thus Common Law Abuse of Process is not extinguished. The *Courts of Justice Act* also provides authority for a stay of Proceedings and a Court controlling its own processes.

However, in Regina v. Regan (see Appellant's Book of Authorities) the Court qualified the test for a stay of Proceedings by adding the following:

- i) There must be prejudice caused by the abuse and the prejudice must be manifested, perpetuated or aggravated through the conduct of the Trial or by its outcome
 - ii) No other remedy is reasonably capable of removing that prejudice
- and

iii) Criteria of balancing the interests to be served by the granting a stay of proceedings against the interests that society has or having a decision on the merits may be necessary were uncertainty persists as to whether a stay of proceedings is necessary. (Regina v. Regan paragraph 54).

4) Regina v. Abitibi Paper Company Limited, 47 C.C.C. (2d) 487- provides authority for the Provincial Court to apply stay of Proceedings and also gives an example of when a stay is necessary i.e. when Crown breaks its agreement.

5) Regina v. Brown Shoe Co. of Canada Ltd. [1983] 6 C.C.C. (2d) 487:

This is an example where the Crown continued to try to get an indictment again and again after being turned, and constitutes an Abuse of Process stay issue.

The last two cases provide an exemplification of cases where the Court imposed a stay.

It is submitted here that the Trial Judge made certain findings of fact and of credibility particularly with respect to Inspector Cutmore. Those findings of fact and creditability are difficult to assail on appeal. The imposition of the stay in these unusual and extreme circumstances were well justified by the Trial Judge and ought not to be disturbed on appeal.

Part IV—Charter of Rights and Freedom Section 7

- 1) The Respondent acknowledges that the general principal of law in respect of the Charter of Rights is that the Charter does not protect economic rights and that Corporations have limited rights of protection under the Charter. Corporations however, are well protected under the Abuse of Process principle.
- 2) Under Section 7 of The Canadian Charter Rights and Freedoms infringement of liberty occurred when the Ministry of Natural Resources invoked prosecution in respect of its own non-compliance to a direct order by the Ontario Municipal Board to issue a licence to Nichols Gravel Limited and by its own wilful distortion of that order and subsequent suspension Order based on the distorted order and ultimately charges based on the order. All of this was done in addition to the inordinate delay in issuing the licence pursuant to a direct order of the Ontario Municipal Board dated July 25, 2001.
- 3) The loss of security to the persons involved i.e. the Respondents occurred due to the difficulty thusly created to the corporation and its shareholders and its inability to carry on business. Similarly, under Section 15 of the *Canadian Charter of Rights and Freedoms Act* discrimination was imposed on the individuals and

17

corporation by the imposition of twenty-three pre-operating conditions unauthorized by legislation or by the O.M.B. and was clearly unusual when one considers the last Exhibit filed in the proceedings i.e. the licences issued by the District Office none of which contained any pre-operating conditions including the licence purportedly issued to Nichols Gravel Limited

Order Sought

It is submitted that the appropriate order here is a dismissal of the appeal with costs to be fixed by the appellate Justice

All of which is respectfully submitted.

Dated at Caledonia, this 7th day of September, 2005.

Paul J. Osier
Counsel for the Applicants