

ONTARIO

155/2003

SUPERIOR COURT OF JUSTICE

BETWEEN:

NICHOLS GRAVEL LIMITED

Plaintiff

and

HER MAJESDTY THE QUEEN in the RIGHT OF THE  
PROVINCE OF ONTARIO, its servants or agents including

ALEC DENYS and PAUL CUTMORE

Defendant((s))

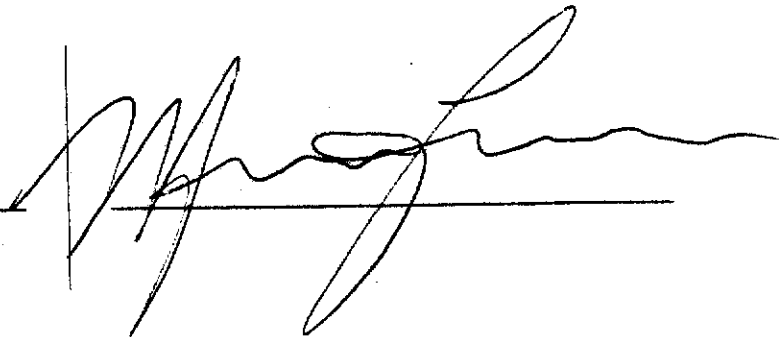
AFFIDAVIT  
OF SERVICE OF STATEMENT OF CLAIM

I, Marvin Feigenbaum, of the Town of Simcoe, Norfolk County in the Province of Ontario, ,  
MAKE OATH AND SAY (or AFFIRM):

1. I served on The Hon. David Ramsey Minister of Natural Resources for the Province of Ontario a Statement of Claim on December 11/2006 at 1:06 p.m. by leaving a copy of the Statement of Claim with Eric Bianchini (advisor & scheduler) for the Hon. David Ramsey Minister of Natural Resources for the Province of Ontario at 99 Wellesley Street West Room 6630 Whitney Block, Toronto Ontario Canada M7A 1W3. Eric Bianchini was identified to me by his own verbal admission of name & title

Sworn (or Affirmed) before me at the Town  
of Simcoe in the Province of Ontario, on  
*December 11/2006.*

*H. Susan Feigenbaum*  
\_\_\_\_\_  
Commissioner for Taking Affidavits  
(or as may be)



**Helen Susan Feigenbaum, a  
Commissioner, etc., Norfolk County, for  
Southern Counties Paralegal Services,  
and for Process Serving and Tenant  
Protection Act, 1997 matters only.  
Expires August 18, 2007.**

Court file no.  
155/2003

ONTARIO  
SUPERIOR COURT OF JUSTICE

13 January  
26.02(a)

BETWEEN:

AMENDED THIS 13 DAY OF January  
26.02(a) NICHOLS GRAVEL LIMITED

*H. Vanderkooy*

*H. Vanderkooy*  
REGISTRAR  
SUPERIOR COURT OF JUSTICE  
COUR DE JUSTICE DE L'ONTARIO

- and -

Plaintiff  
AMENDED THIS 8 DAY OF Dec  
PURSUANT TO RULE 26.02(a)  
MODIFIÉ DE 2006  
CONFORMÉMENT À LA RÈGLE

*H. Vanderkooy*  
REGISTRAR  
SUPERIOR COURT OF JUSTICE  
COUR DE JUSTICE DE L'ONTARIO

HER MAJESTY THE QUEEN, in the RIGHT OF THE  
PROVINCE OF ONTARIO, its servants or agents including  
ALEC DENYS and PAUL CUTMORE

Defendants

AMENDED AMENDED AMENDED STATEMENT OF CLAIM

TO THE DEFENDANTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this Court office, **WITHIN TWENTY DAYS** after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

**IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.** If you wish to defend this proceeding but are unable to pay legal fees, legal aid may be available to you by contacting a local Legal Aid office.

Date: *October 2, 2003* Issued by: *[Signature]*

Address of  
Court Office: 55 Munsee St.  
Cayuga, Ontario  
N0A 1E0

Her Majesty the Queen  
In the Right of the Province of Ontario  
Crown Law Office  
Civil Law  
720 Bay Street, 8<sup>th</sup> Floor  
Toronto, Ontario  
M5G 2K1

Alec Denys, Manager  
Ministry of Natural Resources  
353 Talbot Street West  
Alymer, Ontario  
N5H 2S8

Paul Cutmore, Inspector  
Ministry of Natural Resources  
300 Water Street  
Peterborough, Ontario  
K9J 8M5

## CLAIM

1. The Plaintiff claims:

- (a) A Declaration that the defendants have not complied with the order of The Ontario Municipal Board dated April 3, 2001 relating to parts of lots 10, 11, -12, Concession 12, Haldimand County (formerly Walpole Township);
- (b) An Declaration that the licence as issued by the Defendants to the Plaintiff is not in accordance with the orders of The Ontario Municipal Board dated April 3, 2001 and July 25, 2001 (Order 1194);
- (c) A Declaration that the water taking permit issued by the Ministry of the Environment is Ultra Vires and not in accordance with the orders of the Ontario Municipal Board dated April 3, 2001 and July 25, 2001 (Order 1194);
- (d)(e) For general damages against the defendant in the amount of ~~\$800,000.00~~ ~~\$1,800,000.00~~ \$2,800,000.00 as a consequence of the failure of the defendant to issue the licence as ordered by The Ontario Municipal Board on July 25, 2001; and the continued failure by the M.N.R. to enforce only the conditions of the licence as issued March 25, 2003 up to the present time.
- (e) (d) For punitive damages in the amount of ~~\$250,000.00~~ \$500,000.00 for the wilful misfeasance and misconduct of the defendant, the Queen

in the right of the Province of Ontario, its agents and servants in refusing to issue the licence as required, in time, or at all; as directed by the O.M.B. without pre-operating conditions and the extended harassment to enforcement to compliance to these conditions up to and including the Court Injunction granted November 7, 2006.

- (f) ~~(e)~~ For special damages for costs sustained by the plaintiff as a consequence of the defendants' actions;
  - (g) ~~(f)~~ For pre-judgment and post-judgment interest in accordance with the provisions of the Courts of Justice Act, 1984, c. 11 and amendments thereto;
  - (h) ~~(g)~~ Costs of this action on a solicitor and client basis;
  - (i) ~~(h)~~ Such further and other relief as This Honourable Court may deem just.
2. The plaintiff is incorporated in accordance with the laws of the Province of Ontario and carries on business amongst other places in Haldimand County in the Province of Ontario.
  3. The defendant, the Queen in the right of the Province of Ontario, has dealt with the plaintiff through its Ministries, The Ministry of Natural Resources and The Ministry of the Environment.
  4. The plaintiff states that on or about the 3<sup>rd</sup> day of March 1999 the plaintiff applied for a licence to operate a quarry pursuant to the provisions of The Aggregate Resources Act.

5. The plaintiff further states that on or about the 7<sup>th</sup> day of January 2000 the Ministry of Natural Resources (hereinafter referred to as the M.N.R.) referred the application to the Ontario Municipal Board (hereinafter referred to as the O.M.B.) for a hearing both as to the issuing of licence and as to a zoning amendment on the property.
6. The plaintiff further states that on September 22, 2000 the O.M.B. issued a preliminary order permitting the re-zoning of the subject lands.
7. The plaintiff further states that after a full hearing a preliminary ruling granting the licence was ordered on April 3, 2003 on or about the 25<sup>th</sup> day of July 2001 the O.M.B. ordered that M.N.R. to issue the licence sought by the plaintiff and subject to terms as set forth in the order.
8. The plaintiff further states that despite numerous requests to the defendants the M.N.R. declined or refused to issue the licence until April 1, 2003.
9. The plaintiff further states that the licence issued was not the licence as ordered by the O.M.B. on July 25, 2001 but instead contained a covering letter dated March 31, 2003 imposing approximately twenty-three specific pre-operating conditions not approved or ordered by the O.M.B.; ~~and~~ as identified as Schedules A and B on the licence, signed by the Minister, March 25, 2003.
10. The plaintiff further states that there is no appeal or review from the O.M.B. decision and pleads and relies on The Aggregate Resources Act,

Secton 11, sub. 15, "no petition or review". The Ontario Municipal Board Act s. 43 and The Statutory Powers Procedures Act, s. 21.

11. The plaintiff further states that on or about the 13<sup>th</sup> day of March 2002 it applied for a permit to take water in connection with the licence referred to. The application was made to The Ministry of the Environment (hereinafter referred to as the M.O.E.). That permit was granted but was subject to twenty-four pre-dewatering conditions ~~pre-conditions~~. This permit is appealed ~~under appeal~~. The O.M.B. made no reference to conditions other than the 55 conditions contained in its order. The M.O.E. has imposed 24 pre-watering conditions contrary to the order of the O.M.B. This permit was only granted on June 20, 2003, one year and three months after being applied for. The Plaintiff states that the ~~O.M.B.~~ M.O.E. has refused to provide any documentary or other rationale as to why it has unilaterally imposed such conditions. Not so imposed on other quarry permits to take water.
12. The plaintiff further states that ~~at~~ on the ~~7<sup>th</sup>~~ 14<sup>th</sup> day of April 2003 the M.N.R. suspended the licence it granted on April 1, 2003 alleging violations of The Aggregate resources Act having taken place between March 2002 and December 2002.
13. The plaintiff further states that the M.N.R. also charged ~~at~~ the company and its officers with these violations in ~~an~~ Informations dated April 14, 2003.

14. The plaintiff further states that the defendant through the M.N.R. has interpreted the conditions on the licence as ordered by the O.M.B. as being pre-conditions to the granting of an operational licence and has imposed further conditions of its own thereby emasculating the licence originally directed to be granted and making it impossible for the plaintiff to comply with the terms of the licence as issued.
15. The Plaintiff states that there is no legislative authority entitling the Defendants to impose pre-operating conditions on a licence specifically ordered by the O.M.B. both as to whom it was to be granted and as to its conditions.
16. The plaintiff therefore states that it has lost revenue and business as a result of both the excessive and unjustifiable delay in issuing the licence and in the non-response of the defendant to comply with the terms as set by the O.M.B. and has incurred unnecessary costs thereby. Due to the enforcement of twenty-three (23) specific pre-operating conditions over a period of almost four (4) years.

RE: Defendants Alec Denys and Paul Cutmore:

17. The plaintiff states that Alec Denys is the manager of the M.N.R. for the Alymer District of that Ministry and which district included Haldimand County and that the defendant Paul Cutmore is or was an Inspector within that district having responsibility for the licence referred to herein and issued to the plaintiff.

18. The plaintiff further states that the defendant, Paul Cutmore, failed to exercise his statutory duties in a responsible manner and wilfully misconducted himself and was negligent in acting upon the order of the O.M.B. and in the issuance of the licence referred to herein to the plaintiff. Particulars of which negligence are as follows:

- (a) He misrepresented conditions listed on the site plan required in connection with the licence to representatives of the plaintiff thereby causing the plaintiff to expend monies on features on the site plan; which features were later complained of by Paul Cutmore as being infractions of the site plan;
- (b) He unlawfully added twenty-three pre-operational conditions to those conditions ordered by the O.M.B. as a requisite to the licence;
- (c) He termed the conditions that he added as well as certain of those ordered by the O.M.B. to be specific pre-operational conditions to be complied with prior to extraction when he knew or ought to have known that the O.M.B. directive contained no such requirement and that to impose such requirements made the fulfilment of the conditions an impossibility for the plaintiff;
- (d) Without lawful justification or excuse he was primarily responsible for a delay of almost two years before issuing the licence from the date of the order of the O.M.B.;

- (e) He caused a Notice of Suspension dated April 14, 2003 to be issued one week after the licence in question had been issued to the plaintiff alleging that site plan contraventions, some of which he had previously approved of and for failing to complete twenty-three ~~licence~~ specific pre-operating conditions to the licence which he had imposed knowing that the licence itself had only been issued one week previously;
- (f) He knew or ought to have known that the excessive and unjustifiable delay and the imposition of unreasonable and impossible conditions would have the effect of creating massive financial loss and hardship for the plaintiff;
- (g) He totally exceeded the bounds of his authority in the purported exercise of his Inspector functions as authorized under the Aggregate Resources Act and the O.M.B. order.

RE: Alec Denys:

19. The Plaintiff alleges that Alec Denys, as the supervisor for the defendant, Paul Cutmore, acted in concert with and failed to adequately supervise or supervise at all the conduct of Paul Cutmore and failed to determine the misfeasance and wilful neglect of Paul Cutmore in the exercise of his responsibilities as an Inspector under the regulations appended to the Aggregate Resources Act and in particular failed to ensure that the licence, as ordered by the O.M.B., be issued in a timely

fashion and thereby knew or ought to have known that the impediments imposed by the M.N.R. contrary to the O.M.B. order would cause severe financial hardship to the plaintiff. In addition he knew or ought to have known that his agents and officials contacted private contractors working for the plaintiff and ~~encouraged~~ directed them not to work for the plaintiff under threat of prosecution thereby causing further loss of income to the plaintiff by preventing the operation of the quarry.

20. The defendant, Her Majesty the Queen, in the Right of the Province of Ontario, is also responsible for the actions of the defendants Alec Denys and Paul Cutmore as their employers. As well as for the actions of the Honourable David Ramsay, who at the relevant time was the Minister of Natural Resources. Particulars of the negligence of the Honourable David Ramsay are as follows:

- a) The Honourable David Ramsay was the Minister responsible for the Ministry of Natural Resources in the year 2004 when the plaintiff advised him that the aggregate license in question, as issued by the Ministry, had had superimposed onto it specific pre-operating conditions that had been added by a local Ministry of Natural Resources officials.
- b) Despite being so advised by letter of July 14, 2004 of the said additionally imposed specific pre-operating

conditions, the Honourable David Ramsay  
proceeded nevertheless to execute an order  
revoking the said license dated September 30, 2004.

c) In addition to the foregoing, the Honourable David  
Ramsay sanctioned the laying of charges against the  
plaintiff thereafter alleging the operation of a quarry  
without a license.

d) The Honourable David Ramsay took the  
forementioned action despite being provided with  
M.N.R. F.O.I. photocopies of information taken  
directly from the Ministry of Natural Resources  
computer files, which indicated that there were in  
fact no specific pre-operating conditions attached to  
the said license or any other licence.

21. The plaintiff estimates that the following are its losses to date and which losses are ongoing:

- (a) Loss of profit ~~July 25, 2001 down to and including December 31,~~  
~~2001~~ to ~~September 20, 2003~~ (26 months):  
~~\$800,000.00; \$1,800,000.00;~~ estimated at \$2,800,000.00
- (b) Loss of additional revenue due to loss of opportunity to expand:  
 \$50,000.00;
- (c) Additional operating costs: \$10,000.00

22. The plaintiff states that the trial of this action be at Haldimand County  
(Cayuga), Ontario.

**Arrell, Brown, Osier & Murray**  
Barristers & Solicitors  
41 Caithness Street West  
Caledonia, Ontario  
N3W 2J2 (905) 765-5414  
Fax: (905) 765-5144  
**Paul Osier**, LSUC # 116531  
Solicitor for the Plaintiff

**NICHOLS GRAVEL LIMITED**

and

**HER MAJESTY THE QUEEN et al**

**Court File No. 155/03**

**ONTARIO COURT OF JUSTICE**

**PROCEEDING COMMENCED AT Cayuga**

**AMENDED AMENDED**

**STATEMENT OF CLAIM**

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Barristers & Solicitors  
41 Caithness Street West  
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N3W 2J2  
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(Paul J. Osier)  
LSUC #116531  
Solicitor for the Plaintiff**