

SUPERIOR COURT OF JUSTICE

BETWEEN:

NICHOLS GRAVEL LIMITED

Applicant

and

HER MAJESTY THE QUEEN IN THE RIGHT
OF THE PROVINCE OF ONTARIO, MINISTRY OF NATURAL RESOURCES
AND THE COUNTY OF HALDIMAND

Respondent

Court No.

SUPERIOR COURT OF JUSTICE

BETWEEN:

NICHOLS GRAVEL LTD.

Plaintiff

and

HER MAJESTY THE QUEEN IN THE RIGHT OF THE PROVINCE OF ONTARIO, MINISTRY OF
NATURAL RESOURCES AND THE COUNTY OF HALDIMAND

Defendant

AMENDED NOTICE OF MOTION

THE Plaintiff will make a motion to the court (or judge) on the 15th of November, 2006 at 10:00 a.m., or soon after that time as the motion can be heard at the Court House at Cayuga, Ontario

PROPOSED METHOD OF HEARING: The motion is to be heard:

- in writing under subrule 37.12.1 (1) because it is (*insert one of* on consent, unopposed *or* made without notice);
- in writing as an opposed motion under subrule 37.12.1 (4);
- orally.

THE MOTION IS FOR

1. An order granting leave to Appeal to the Divisional Court, Superior Court of Justice pursuant to Rule 62.02.
2. An order extending the time within which an Application for Leave to Appeal to Divisional Court can be made.

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3. An order pursuant to Rule 63.02 (a) (2) and 63.02 (1) (b) to stay the decision of Ontario Municipal Board Chairman M.C. Denhez, dated September 27, 2006.
 4. An order that this Appeal be heard in conjunction with a pending Application for Judicial Review, being between Nichols Gravel Limited and the Ministry of Natural Resources and being Court Action No. 30/2006 issued at Cayuga, Ontario, on November 1, 2006 or such other date as the Court may direct.
 5. An order for the costs of this Motion.

THE GROUNDS FOR THE MOTION ARE:

A) 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) Keeping the existence of the 23 specific pre-operating conditions from the knowledge of the Minister of Natural Resources, when the Minister signed the license and signed the Revocation Order;

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 quarries, 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 its 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 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 the

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.

B) 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 prior to the issue of the license by a contractor. 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 it's 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

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.

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 neighbours 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 Mr. 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.

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. In this sense 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 there was no evidence that the Minister was ever aware of twenty-three specific pre-operating conditions 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 to spite 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.

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.

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.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- i) Aggregate Resources Act;
- ii) Nichols Gravel Limited customer petition to the Court to quash Revoke of License #103717;
- iii) Ontario Municipal Board Act, 1990, R.5.0 – chapter 0.28, Section 96;
- iv) The Affidavit of Gary Nichols, signed October 24, 2006;
- v) The exhibits and affidavits filed at the Ontario Municipal Board hearing.

December , 2006

ARRELL PLACE LAW LLP

41 Caithness St. W.

Caledonia, Ontario, N3W 2J2

Telephone: 905-765-5414

Fax: 905-765-5144

Paul J. Osier

LSUC #116531

Solicitor for the Applicant

TO County of Haldimand
c/o Sara Premi
Sullivan Mahoney LLP
Barristers & Solicitors
40 Queen St, Box 1360
St. Catharines, Ontario
L2R 5G3

AND TO Nicholas Adamson
Ministry of Natural Resources
Legal Services Branch
3rd Floor, Room 3420
99 Wellesley Street West
Toronto, Ontario
M7A 1W3

Minister March 25, 2003 (without pre-operating conditions) and the Aggregate Resources Act.

9. Board Chairman Denhez disregarded Aggregate Act legislation non-compliance by Ministry of Natural Resources officials:

Sec. 13.(3) A: Serve notice with reason to a licensee if a condition is proposed to be added, rescinded or varied to license.

Sec. 13.(7): Refer the matter to the Board for a hearing if a hearing is requested.

Note: There were no 23 specific pre-operating conditions directed in the Ontario Municipal Board decision (Order 1194 or the license 103717) as signed by the Minister.

Sec. 16.(5) A: Serve notice with reasons to a licensee regarding site plan amendments

Sec. 16.(9): Refer the matter to the Board for a hearing if a hearing is requested.

Note: Conditions of site plan #27, 29, 45, 50, 51, 52, and 53 were directed under the March 31, 2003 letter to be completed as specific pre-operating conditions without notification of change or amendment to Nichols Gravel Ltd. contrary to ARA legislation and enforcement.

10. Board chairman Denhez refused a motion and declined to completely acknowledge or address the declaratory order decision issued by Justice D. Reilly in his considerations of September 5 to 8 with respect to pre-operating conditions. Now produced and shown to me and marked as Exhibit B to this my Affidavit is a true copy of the said Judgment.
11. Under cross-examination of Emmilia Kuisma at the OMB Hearing, it was revealed that the Minister of Natural Resources was not informed of the imposition of the 23 specific pre-operating conditions nor that they were the basis of the licence suspensions and revocation.

Sworn before me at Haldimand County, in the
Province of Ontario, this ~~21~~ day of December,
2006.



Commissioner for Taking Affidavits
(or as may be)



Gary Nichols

NICHOLS GRAVEL LIMITED

and

HER MAJESTY THE QUEEN et al

Court File No.

ONTARIO COURT OF JUSTICE

PROCEEDING COMMENCED AT Cayuga

AMENDED AFFIDAVIT OF GARY NICHOLS

**ARRELL PLACE LAW LLP
Barristers & Solicitors
41 Caithness Street West
Caledonia, Ontario
N3W 2J2
Telephone: (905) 765-5414
Facsimile: (905) 765-5144
(Paul J. Osier)
LSUC #116531
Solicitor for the Plaintiff**

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THIS IS EXHIBIT ^A to the Affidavit
of GARY NICHOLS
SWORN before me at Haldimand County
this ~~24th~~ day of ~~OCTOBER~~
2006 ^{December}
A Commissioner, etc.