DAVID ANDERSON CONSPIRACY, PERJURY AND FRAUD EVENTS 1 - 14 PRIMARY INFORMATION #1 WITH SUPPLEMENTARY DOCUMENTATION EVIDENCE

Southern Ontario Legal Reporting Agency, 81 Norfolk St. South, Simcoe, Ont.

- 44 -

Q. Am I correct that at the time of this meeting with Mr. Nichols you hadn't done any specific testing of the materials on that East Quarter Line Road in Windham?

A. No, I don't think they had done any testing.

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- Q. Has that ever happened to date?
- A. That they haven't done any testing?
- 297. Q. Have you done any testing of the materials supplied at East Quarter Line Road in Windham?
- A. No we haven't done any retroactive testing on that. We've just done visual examination of what's out there and how it's performed.
- 298. Q. And have you made any repairs or alterations to that road to date?
- A. The road, after the first winter, displayed a problem with bond...the surface treatment material bonding to the Granular "A" and it seemed to have quite a few pot holes. Those pot holes were cold patched and I think subsequent to that there has...there was a single surface treatment put on top of the initial product.
- 299. Q. Now, with respect to the road work done on the East Quarter Line in Windham in 1992, was there a base material supplied from a hydro right-of-way?
- *A. Yes there was. There was material we used as a back fill material that was supplied from Ontario Hydro to us at no cost. Ontario Hydro indicated to us that it had originally come from Nichols' pits. NOT LIKELY. MATERIAL FROM TILSCHBURG FLE SECTION ON Q. And would this material have been to a STEREIN specific spec? Was it supposed to be a specific spec?
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 Q. And would this material have been to a STERGINS

specific spec? Was it supposed to be a specific spec?

A. Well no, the material and the way we used it was as a select sub-grade material. We didn't use it as part of the road structure. Our basic standard for the design of the roads is a 300 millimetre granular base equivalent which is in essence 300 millimetres of Granular "A". So material below that

Township of DELHI





December 10, 1991

Ontario Hydro P.O. Box 70 SPRINGFIELD, Ontario NOL 2J0

Attention: Mr. Marty Dendecker

Dear Sir:

Re: Township of Delhi Purchase of Aggregate from Ontario Hydro

Further to your conversation with Mr. Reg Wood of the Township offices on December 10, 1991 this letter will confirm that the Township of Delhi will agree to purchasing the aggregate used during your tower line construction at a price of \$24.00 per load.

Should you require any further information or discussion in this regard, please contact this office. Please liaise with Mr. Reg Wood to co-ordinate field activities.

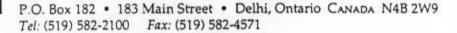
Yours very truly,

David Anderson Public Works Superintendent

DA: jb

cc: Reg Wood - Road Supervisor

Township of DELHI





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Yours very truly,

David Anderson Public Works Superintendent

DA: jb

cc: Reg Wood - Road Supervisor

Tario Andro Q

(CONSTRUCTION)
Springfield Construction Yard, SPRINGFIELD, Ontario NOL 2J0

December 31, 1991

file: 375, disc. #6

Township of Delhi P.O. Box 182 Delhi, Ontario N4B 2W9

Attention: Mr. Dave Anderson

INVOICE #50

Surplus gravel from Ontario Hydro right-of-way delivered between December 11, 1991 and December 19, 1991 inclusive.

345 Loads @ \$24.00 per load = \$8,280.00

7% G.S.T. = \$ 579.60 G.S.T.#R119382901

Total Payable = \$8,859.60

Kindly make cheque payable to 'Ontario Hydro' and remit to:

Ontario Hydro Attention: Mr. M. Dendekker P.O. Box 70 SPRINGFIELD, Ontario NOL 2J0

(Please quote invoice number)

1328-4052-0 \$ 8,528 40 042:84

June 27, 1995 Church Street Incident. Anderson in Chief.

Page 785 #1 (Transcript #5 to #30)

Anderson stated that the Contract Administrator Tottem Simms Hubicki Supervisor John Lavigne, reported to him that Nichols was hauling gravel to the job site, and that he went up to Andersons' office and asked him to deal with it. The Contract Administrator had full authority under the contract to deal with any problem, yet he did not contact Carlos who was Elgin Constructions' onsite supervisor, nor did he make any comment to Nichols Gravel in respect to the gravel. What was this a secret problem?

Page 789 #2 (Transcript # 15 and #20) Anderson in Chief

- Q. Okay. Now specifically you're telling these people that the material was unacceptable and what is the basis for that?
- A. Well it's unacceptable because they are not an approved supplier to that job.

Page 978 #3 (Transcript #15 and #20) Anderson Cross Examination

- Q. Unacceptable. And I appreciate you didn't elaborate on this at that time, but was one of the reasons why in your view it was unacceptable was because of your concern about its' quality?
- A. It was unacceptable on site because Nichols Gravel was not an approved supplier to that job site.

Comment:

That is not what was described in Constable Mackies' Police Report, at the time of the incident June 27, 1995.

Andersons' reason that Nichols Gravel was unacceptable changed from that which was recorded in the Police Report, after Gary Nichols provided the Township with a consultants' test result dated August 9th, 1995 #4 from the rejected load which confirmed that the gravel rejected, met all specifications of the contract. At that point Anderson Applied a contract condition that a change of Sub Contractors had to be approved by the (owner) the Township.

Because John Lavigne did not make any comment to Elgin Construction Supervisor Carlos or to Nichols Gravel in respect to Granular A gravel brought to the road project we don't believe that John Lavigne requested Mr. Anderson to address a problem. Instead we believe Mr. Andersons' men were directed to watch the job site and immediately report when any gravel was brought to the site by Nichols Gravel.

- See copy of test results #4 from rejected load.
- See: Copy of Allan Jacques witness statement #5 (Driver for Nichols)
- See: Police Report #6 and Andersons' comment to Constable Andrew Mackie as recorded in his report Dated June 27th, 1995. Quote: Anderson came on the scene and was not satisfied with the stone coming in. Anderson felt it was substandard. unquote. Anderson made absolutely no comment to the police officer at the time of the incident, about Nichols Gravel not being an approved supplier to the job site. Andersons' comments was directed to the quality of the gravel and nothing else. His statements in court therefore do not reflect the truth.

Anderson Cross Examination

Page 979 #7 (Transcript #7)

- A. Well I think we did have other knowledge of current testing on Nichols products at that time.
- Q. What information was that?
- A. We're aware that some Granular A and surface treatment aggregate had been tested by both the Ministry of Transportation and Mountainview Geotechnical of Mr. Nichols Granular A stockpile and Class 5 aggregate and they had failed and that would have been June of 1995.

Wrong.

See: Test results faxed from M.T.O to Delhi Township #8
 Then note fax date of June 29th, 1995 12:24 from M.T.O. London to Delhi Township Fax #519-582-4571.

This fax was received at Delhi Township offices 2 days <u>after</u> the Church Street event on June 27th, 1995.

1994 Summary of Aggregate Quotations and Acceptability as Per the Ministry of Transportation Ontario Aggregate Sources List.

Comment:

This was, and remains a falsified document produced by David Anderson. See document with designations for various suppliers for various products for approval as per the Ministry of Transportation Aggregate Sources List (Yes) or (No) as interpreted by David Anderson

Anderson stated in chief Page 832 #1 (Transcript #1 to 5):

- Q. Okay can you tell me what aggregate sources list you used to prepare the chart?
- A. I used the list that had been provided to me in later 93 and it was an aggregate source list that had been prepared or M.T.O. had put out for a 1991 contract in the area. #20
- Q. Okay can you tell me, this is the list you had in your possession at the time that you did this chart?
- Yes that's correct.

Page 834 #2 (Transcript #10)

- Q. Okay. Class Five doesn't appear to be one of the products on the ____, Shown on the Aggregate Source List.
- A. That's right. (Anderson)

Comment:

Common sense and logic would question as to how is it possible then to make a conclusion for acceptability in relation to Class 5 Aggregate when there is <u>no</u> designation or information on the Ministry of Transportation Aggregate Sources List for this product. The Quality Assurance Policy Resolution passed by Delhi Council made no provisions for anyone to make determinations or correlations between various products to arrive at interpretations or conclusions other than information as provided <u>on the M.T.O. Aggregate Sources List</u>. It is either on the list or there is no such information available. Any other determination is not true and not valid, as each product as listed has its' own specific and different O.P.S. and M.T.O Specification and that is a fact.

- See: ASL 91-06 #3
- See: specification 1994 Aggregate Quotation, Class 5 Aggregate #4

 See: Letter January 6, 1996 Winston Oostenbrug M.T.O #5 confirming no information on A.S.L for Class 1 and 5 aggregate.

This Summary is False for Additional Reasons:

Anderson stated: Cross Examination Page 927 #6 (Transcript #15)

One of the documents received from Winston Oostenbrug was a letter to Winston from Doug C. and (Transcript #20) a letter dated July 9th 1990 from R. Puccini M.T.O. to Nichols Gravel and Page 929 (Transcript #15) also provided a copy of ASL 91-06

Page 931 #8 (Transcript #15) Anderson agrees that the only entry in the 1991 ASL 91-06 #7 is in reference to only one Nichols Pit. (Pits 2 &4) M.T.O. B13-140.

Page 932 (Transcript #20)

Q. All right so what, those are the three pieces of paper they gave you about Nichols Pits. Is that right?

A. Yes.

Comment:

If we reference Andersons' 1994 Aggregate Summary and compare it to ASL 91-06, we find information on the summary with designations and descriptions for acceptability for four pit sources not even listed on ASL 91-06: Nichols Pit 3 and Pit 1, Cayuga Materials, Holbrook Pit, and Van Aqua, Burford. If Anderson only received 3 documents which included ASL 91-06, where then did this information come from on his summary?

The ASL 91-06 indicates GMC Sand and Gravel as (1) requires investigation, but Andersons' summary indicates (Yes) for Granular A, Granular B, and HL3 for acceptance? Obviously Anderson had other information which he told the court he did not have, in which case he lied, or in the alternative he had <u>no</u> other information in which case he just guessed at it, in which case he then produced a falsified document. (This didn't ring any bells for Justice Cavarzan either.) Reference my Letter #9, May 16, 1994 entered in evidence which clarifies the falsities, and the fact there was more current information on our pits available on a March 23rd, 1994 ASL 94-04 #10 which further confirmed the falsities contained in the 1994 aggregate summary produced April 7th, 1994 by David Anderson and Council Approved April 13th 1994.

Page 937 #11 (Transcript #15 to 30)

Q. All right. Now after you had discovered this information from the Ministry I take it you didn't inquire whether there were any more recent ASLs' beyond the 1991 they'd given you?

- A. No I did not. I assumed that since I had made an inquiry to M.T.O. that the information they provided me with was the most recent.
- Q. That is an ALS of April 1992 for Contract 92-05.
- A. Correct.
- Q. And you will see the location of that is from Courtland, easterly to Delhi.
- A. Correct.

Page 938 #12 (Transcript #5 to 30)

- Q. Including Big Creek Bridge. (Delhi)
- A. Yes.
- Q. So this was in the geographical confines of the Township of Delhi?
- Q. Would you have been aware that M.T.O. was doing that work in 1992?
- A. Yes I was aware that they did that work.
- Q. You would have expected they would have had an A.S.L. for that work?
- A. Well at the time I didn't, in 92 which predates my asking for information from the Ministry of Transportation.
- Q. All right. Can I turn you to Tab 30. This is a 1993 A.S.L., April 7th, 1993 Contract 93-06.
- A. Yes.
- Q. And it indicates that this is for a construction project on Highway 24 from Forestville Road, Easterly to Port Ryerse Road. Is any part of that within the geographical confines of the Township of Delhi?
- Yes a portion of it is.
- Q. Were you aware of that M.T.O. Contract.....In the summer of 93?
- A. Yes.
- A. I was aware that contract was going on yes.

Page 939 #13 (Transcript #5)

Q. And I gather you didn't think at the time in the summer of 1993 to say, gee maybe there is an A.S.__, a more up to date A.S.L. for that contract.

A. No I didn't.

Comment:

This is quite unbelievable in respect to the fact that the confrontation in the Mayors Office occurred <u>June 29th</u>, 1993. Mr. Anderson brought his report to council <u>July 21st</u> and requested information from M.T.O identified by phone calls <u>August 1993</u>. What makes this story even more unbelievable is information received through a F.O.I. Request to Norfolk Township for information provided to Norfolk Township and received from Winston Oostenbrug of M.T.O. Date stamped <u>February 1994</u> which included a copy of the March 23rd, 1994 A.S.L.

The question that begs to be answered is why would Winston Oostenbrug who suggested to David Anderson that he adopt this A.S.L. policy, why would he send a copy of this up to date March 23rd, 1994 A.S.L to Jamie Francisco of Norfolk Township and <u>not</u> send a current copy to David Anderson for his record in respect to the adoption October 1993 of the Delhi Township A.S.L. Policy, which Oostenbrug suggested in the first place??

This all connect to a Freedom Of Information Request 4–93 November 18th, 1993 #14 for information held in Township files in respect to Nichols Gravel. See Clerks estimated of cost was for 50 copies, but when the information was received only 7 copies were made available. This appeared very suspicious and was appealed to the F.O.I. Commissioner in Toronto. But no further documents were provided. I am certain, that when Anderson requested information on Nichols Pits, M.T.O. supplied everything that they had, on file and this would have been far in excess of 3 document or 7 pages. People that know what happened in this respect are: Winston Oostenbrug, David Anderson, Betteanne Cadman and Judy Boughner.

• See: F.O.I. Delhi Township Request #4-93 November 18th, 1993

Township of DELHI





February 13, 1996

Nichols Gravel Ltd. R. R. #2 Delhi, Ontario N4B 2W5

Attention - Mr. Gary Nichols

Dear Mr. Nichols:

SUBJECT: DEPUTATION DECEMBER 6, 1995 - PUBLIC WORKS COMMITTEE

On December 6, 1995, you appeared as a deputation before the Public Works Committee of the Township of Delhi. At that time, you requested information concerning the Township of Delhi's 1995 Winter Sand purchase.

I have attached a copy of report #CAO-04-96 which explains why the Township has ceased commercial operations with your company. This report was received by Council as information on February 12, 1996.

If you require any further information, please let me know.

Yours truly,

F. D. Gelinas

C.A.O.

/mb

Attach.



REPORT

DATE: January 17, 1996	REPORT NO.: CAO-04-96
TO: Public Works Committee	
PREPARED BY: F.D. Gelinas	
SUBJECT: Nichols Gravel Ltd	Deputation December 6, 1995
TO COMMITTEE: February 7, 1996	APPROVED Y N OTHER
TO COUNCIL: February 12, 1996	APPROVED Y N OTHER

RECOMMENDATION:

THAT Report #CAO-04-96 Nichols Gravel Ltd. deputation December 6, 1995 be received as information.

REPORT:

On December 6, 1995, Mr. Gary Nichols attended the Public Works Committee as a deputation and discussed, among other things, the 1995/96 Winter Sand Quotation Process. Mr. Nichols questioned why the Township of Delhi was not purchasing sand from Nichols Gravel Limited.

As Committee is aware, the Township of Delhi has had a great deal of difficulty dealing with Nichols Gravel in the past. More specifically, in March of 1995, Mr. Nichols refused to complete a previous contract we had for winter sand. Consequently, legal proceedings ensued and the municipality's actions were confirmed by the courts. This was a very expensive and time consuming process.

Needless to say, our working relationship with Nichols Gravel is very poor. Given the March 1995 winter sand problem and the outstanding litigation situation, Council directed staff to cease commercial operations with Nichols Gravel. This action is in accordance with our purchasing policy which provids that past performance may be considered when making a purchasing decision. Consequently, even though Nichols Gravel may have been the lowest quote, the Township of Delhi chose the next lowest acceptable bid.

F. D. Gelinas, C.A.O.

- Q. Now do you suggest in the last paragraph of that report that Council direct its staff to cease commercial operations with Nichols Gravel? When did Council do that, sir?
- A. There were two specific directions. One was I believe in August of '95 ... one in August of '94 just following the filing of the suit and the staff was directed to no longer purchase aggregate materials from Nichols Gravel. However we did proceed to purchase winter sand and then following the conclusion of the legal proceedings with respect to the winter sand in August of '95 direction was then provided to staff to no longer purchase any materials from Nichols Gravel.
- Q. Did that arise out of an in camera meeting of Council?
 - A. Yes.
 - Q. That is materials of any kind?
 - A. Yes.
- Q. Regardless of what specification they might meet?
 - A. That's correct.
- Q. And regardless of what additional cost the Township might be put to to purchase from a competitor?
 - A. That's correct, that was the direction.
- Q. And that direction remains in force so far as you are concerned?
 - A. I think so, yes.
- Q. And I take it part of your responsibilities are to ensure that members of staff implement that policy?
 - A. That's correct.
 - Q. And so far that is a policy you have been

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MR. AMEY: Q. But there'd be a reason for it such as past performance or the lowest bidder?

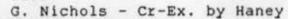
- A. Past performance yes.
- Q. Or some other concern about the ability of that low bidder to perform in some fashion?
 - A. He may have insufficient capital or plans or-, we feel to do a job yes. That would be another concern.
 - Q. All right. If you'll just give me a moment I think I'm just about finished Mr. Anderson. Mr. Anderson, had you tested any of the plaintiff's materials in 1994?
 - A. No I did not.
 - 0. 1995?
 - A. No I did not.
 - 0. 1996?
- A. No. Oh sorry, aggregates or winter sand. We tested winter sand in 1994.
 - Q. All right, on aggregates.
 - A. Okay.
- Q. And had you asked Mr. Nichols to provide you with test results in 1994?
- A. No I did not. Mr. Nichols was not the low-, lowest quotation on any of the products and I don't believe he was second or third low on a lot of them either so I had no requirement to ask for a test from him. (FALSE)
- Q. All right. All I wanted to know is that you have chosen-, you have not asked him for any test results with respect to his materials in '94, '95 or '96.
- A. Well in '94 I wouldn't have cause to FALSE because he wasn't the low bid at the, or the low quotation. In 19-, towards the end of 1994 the council provided us with direction, verbal direction not to buy aggregate products

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by looking at the wrong page I didn't and I, what I wanted to ask is for leave to ask this questions on this one other unrelated area and if I'm going to do it obviously it would be subject to right of cross-examination so the sooner I, if I'm going to get that permission to do I ask for it now and it is unrelated to all of the questions and I'm not sure which of Mr. Haney or Mr. Cline would wish to cross-examine about that.

HIS HONOUR: All right.

FURTHER RE-EXAMINATION BY MR. AMEY:

- Q. All right, thank you, Your Honour. Mr. Nichols, Mr. Gelinas and Mr. Anderson both gave evidence that they had been instructed by Township Council not to do business with you in I believe 1994 and 1995. Did, did you have any contact with Township officials concerning any possible direction that the Township ought no longer to do business with you?
- A. Yes, I did after I had received the letter of clarification from Mr. Gelinas I, I think possibly the next day I met, met with the Mayor of the Township.
 - Q. Is that Mayor Lee?
 - A. No, this is Mr. Vermeulen.
 - Q. Yes.
- A. And I made inquiries of Mr. Vermeulen if he had any recollection of this action being taken by council. He was reluctant to make any comment and in fact he stated that he was under, in fact the council was under strict orders by their solicitor not to make any comment on the case or to take

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G. Nichols - Further examination in reply by Mr. Amey

any action whatsoever so he didn't confirm or deny that there had been action taken.

- Q. Did you speak to any other councillors?
- A. Yes, after that I contacted another councillor I'm acquainted with, Mike Columbus.
 - Q. I'm sorry, Mr. Columbus?
- A. Yes, Mr. Columbus who also sits on the public works committee. I inquired of him if he had any recollection as to this discussion or or action taken by council and he said he couldn't recall any and that he would look into the matter which he did.
 - Q. Did you inquire of any other councillor?
- A. Yes, I, I inquired of another councillor I'm acquainted with, Nick VanGroningen as to whether he had any recollection of this action directed by council and he said no, he hadn't hadn't heard any discussions.
- Q. And aside from your inquiries of three members of council did you do anything else to attempt to determine whether or not Messrs. Gelinas and Anderson had been so directed by council?
- A. Yes, I went through Freedom of Information request to try to obtain minutes of council meetings or any resolution by council so directing staff not to deal with our company.
 - Q. And what was the result of that inquiry?
- A. There was no evidence found that there was any direction.
 - MR. AMEY: All right, thank you. That was the area.

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Court File No. 1511/94 Court of Appeal File No.

COURT OF APPEAL FOR ONTARIO

BETWEEN:

NICHOLS GRAVEL LIMITED

PLAINTIFF (APPELLANT)

- and -

THE CORPORATION OF THE TOWNSHIP OF DELHI,
DAVID ANDERSON, and FRANK GELINAS

DEFENDANTS (RESPONDENTS)

NOTICE OF APPEAL

THE PLAINTIFF (APPELLANT) APPEALS to the Court of Appeal from the judgment of Mr. Justice Cavarzan dated August 23, 1996 made at Simcoe, Ontario.

THE APPELLANT ASKS that the judgment be set aside and judgment be granted as follows: (Set out briefly the relief sought.)

- a) judgment for the Plaintiff for damages against the Defendants in an amount to be determined by the Court of Appeal;
- b) pre-judgment interest on such award of damages; and
- c) costs of the trial and appeal to the Plaintiff.

THE GROUNDS OF APPEAL are as follows: (Set out briefly the grounds of appeal.)

The learned Trial Judge made palpable and overriding errors in his judgment, in particular:

- (a) his failure to find, on all of the evidence, malice towards or intention to cause injury to the Plaintiff's business on the part of the Defendant David Anderson;
- (b) the finding of problems with the Defendant Township's Delhi parking lot as well as East 1/4 Line, Windham and Township of Delhi (Windham) Road 6 caused or contributed to by the poor quality of the Plaintiff's aggregate materials in the absence of any attempt by the Defendants to test the Plaintiff's said materials;
- (c) the failure to find that the words published in the May 4, 1994 issue of the Delhi News-Record newspaper were false, namely that Class 5 aggregate from the Plaintiff's pit #1 (Delhi) was unacceptable, having regard to:
 - no express reference in the Aggregate Sources List (A.S.L.) to Class 5 aggregate;
 - (ii) a reasonable explanation for any deficiencies in HL3CA by way of gradation or percentage crushed deficiencies; and
 - (iii) use by the Defendant David Anderson of an outdated (1991) A.S.L. when a more recent A.S.L. had been published by the Minister of Transportation, in particular a March, 1994 A.S.L. which expressly approved the Plaintiff's aggregate "by stockpile";

(d) his failure to find unlawful means employed by the Defendants having regard to an admitted discussion between the Defendant David Anderson and Winston Oosterbrug of the Ministry of Transportation and documentation provided relating to the Plaintiff's quality of aggregate products and the adoption of the A.S.L. as a part of the

accordingly a failure to find:

(1) conspiracy at common law; or

(2) conspiracy within s. 36(1) of the Competition Act,

quality assurance program for the Defendant Township and

(e) the failure to find that the Defendant Township owed to the Plaintiff a duty of care in the observance of its purchasing policy adopted by

resolution of Township Council in 1980 and amended in 1994;

(f) the finding that the Defendant Township's practice of soliciting written price lists was in compliance with said policy; and

(g) the failure to find any damages caused to the Plaintiff by the Defendants' wrongful actions.

Date: September 19, 1996

(Name, address and telephone number of appellant's solicitor or appellant)

WATEROUS, HOLDEN, AMEY, HITCHON Barristers & Solicitors 20 Wellington Street Brantford, Ontario N3T 5V6

Attention: Paul D. Amey (519) 759-6220

Court File No. 1511/94 Court of Appeal File No.

COURT OF APPEAL FOR ONTARIO

BETWEEN:

NICHOLS GRAVEL LIMITED

PLAINTIFF (APPELLANT)

- and -

THE CORPORATION OF THE TOWNSHIP OF DELHI, DAVID ANDERSON, and FRANK GELINAS

DEFENDANTS (RESPONDENTS)

APPELLANT'S CERTIFICATE

The Appellant certifies that the following evidence is not required for the appeal, in the Appellant's opinion:

- 1. Exhibits numbers none.
- 2. The evidence of none.

Date: September 19, 1996

(Name, address and telephone number of appellant's solicitor or appellant)

WATEROUS, HOLDEN, AMEY, HITCHON Barristers & Solicitors 20 Wellington Street Brantford, Ontario N3T 5V6

Attention: Paul D. Amey (519) 759-6220

Of Counsel for the Appellant



(Name and address of respondent's solicitor or respondent)

MOLLISON, McCORMICK, McINTYRE & McGEE Barristers and Solicitors 71 Weber Street East Kitchener, Ontario, Ontario N2H 6L2

Attention: Michael T. Mollison (519) 579-1040

Solicitors for the Respondents

CLINE, BACKUS & NIGHTINGALE Barristers and Solicitors 28 Colborne Street North P.O. Box 528 Simcoe, Ontario N3Y 4N5

Attention: Thomas A. Cline

Court of Appeal file No. C25629

COURT OF APPEAL FOR ONTARIO

THE HONOURABLE MR. JUSTICE OSBORNE OF DECEMBER 1996

BETWEEN:

NICHOLS GRAVEL LIMITED

(APPELLANT)

- and -



THE CORPORATION OF THE TOWNSHIP OF DELHI. DAVID ANDERSON, and FRANK GELINAS

> **DEFENDANTS** (RESPONDENTS)

ORDER

UPON CONSENT of both parties, filed,

1. THIS COURT ORDERS that the appeal herein be and the same is transferred to the Divisional Court at Hamilton for hearing.

ENTEREO ATANSCRIT À TORONTO ON/BOOK NO: LE/DANS LE REGISTRE NO:

AJSISTANT REGISTRAN

Hydro Salvage Pit Run Delhi Township Road 6.

Cross Examination Page 894 #1 Anderson (Transcript #5 and #10)

- Q. Now can you help me? Did you use if I recall the Hydro easement subgrade material on the East Quarterline?
- A. Yes we did.
- Q. Did you use that same material in connection with the Delhi Arena Parking Lot?
- A. The Hydro subgrade material?
- O. Yes.
- A. No.
- Q. No? And did you use it on Township Road 6?
- A. No.

Cross Examination Page. 923 #2 (Transcript #10 & #15)

- Q. Now Windham Road No.6. was also constructed using Nichols Material in 1992?
- A. Yes.
- Q. And am I not correct that there was a, the Hydro Pit Run that was put down there?
- A. No. I don't believe there was a Hydro Pit Run put down there.
- Q. Was there any kind of subgrade material hauled to the site?
- A. That isn't my recollection, no. I thought we had just used completely Granular A on that.

Anderson in Chief describes Construction Methods for the East Quarterline and Township Road #6.

Page 847 #3 and Page 848 #4 Page 847 (Transcript #15 – 30)

Q. Okay and can you give us a little bit of what you would have told him? (Mr. Katona)

A. I had told him essentially as I had related earlier as to the construction there in 92 that we had pulverized the road, put down a filter media, corrected the vertical deficiencies with a select subgrade material (Hydro) and then provided a Granular road base of 300 millimetres of Granular A from Nichols Gravel pit source and double surface treated it.

Page 848 (Transcript #20 to #30)

- Q. Now with respect to the next site, Delhi Township Road Six. Once again you took Mr. Katona to the project site?
- A. Yes.
- Q. And did you give him any information about the initial construction, the reconstruction and source of material?
- A. Yes. I went through that scenario of having placed some of Nichols Granular A leaving it for approximately two years or one and three quarter years, subsequently covering it with a Granular A from G.M.C. material and then double surface treating it.

Comment:

 You will note that Anderson makes no comment whatsoever in respect to using any select subgrade Hydro material on this particular project, on Road 6.

In dispute with these statements, See letter dated <u>10/26/96</u> from Mr. and Mrs. Walker #5 and letter dated <u>October 27th</u>, 1996 from Mr. And Mrs. Waugh #6 residents on Road 6.

Also find witness statement #7 from former Delhi Township truck driver at the time, Mr. Les Kovacs confirming the use of Hydro Pit Run on Township Road 6 in 1992.

Confirm Oxford Sand and Gravel Class 5 Stone Chip as shown on 1994 Summary of Aggregate Quotations At \$4.60 per tonne at Woodstock Pit and Delivered Price at \$6.60 per tonne.

Anderson in Chief Page 748 and Page 749 Page 748 #1 (Transcript #5) Page 749 #2 (Transcript #5)

Comment:

Confirms Oxford's quote of \$2.00 per tonne for delivery with total delivery cost \$6.60 per tonne. This stated total delivered cost to Delhi Township yard confirmed to be false.

See F.O.I. response dated April 6, 1995, Request 2–95 #3

Total tonnage stone chips purchased 1994 Oxford Sand and Gravel Class 5, 352.78 tonnes delivered \$8.00 without tax. \$8.24 with tax?

Anderson stated Oxford Sand and Gravels' quote to haul stone chips 42 Kilometers from their Woodstock pit to Delhi Township was \$2.00 per tonne, but if you subtract \$4.60 per tonne cost of stone chips from the delivered price of \$8.00 per tonne, it leaves a trucking cost of \$3.40 per tonne Not \$2.00 per tonne.

In respect to Mr. Anderson testimony for Oxford Sand and Gravels' delivered quote to Delhi Township yard of \$6.60. The response to F.O.I. Request 2 – 95 #3 would confirm that the price paid was \$8.00 per tonne. This response would confirm this statement for stone chips purchased in 1994 from Oxford Sand & Gravel to be wrong and false. This would also confirm that the cost of trucking was inaccurately stated.

Page 968 #5

Anderson confirms that Oxford Sand and Gravels' Class 5 Aggregate failed specification and was disqualified which make it irrelevant at that point whether or not they were the low bid. However, the record shows that 352.78 tonne of Class 5 was purchased anyway in contravention of quotation conditions, In respect to meeting the specifications for Class 5 Aggregate so designated in the 1994 Aggregate Quotation.

Comment:

David Andersons' Curriculum Vitae presented in evidence to the court overstated and misrepresented his experience, knowledge and authority

SEE: Curriculum Vitae #1

Page 724 #2 (Transcript #5) Andersons Statements in Chief.

- A. I was the construction manager for the Town of Ajax.
- Q. Okay and what type of responsibilities did you have with that position?
- A. In Ajax I was responsible for the entire capital works program.

False.

See: Ajax F.O.I. Response dated October 4th 1996 and March 6, 1997 #3. Mr. Frank Hull was in charge and responsible for road projects, and all items in response to F.O.I. request #100-97000004 numbered 1 to 4. Mr. Anderson was responsible only for contract supervision on individual road construction projects to which he reported to his supervisor Mr. Frank Hull.

This F.O.I. request relative to Mr. Anderson presentation to the court on his Curriculum Vitae which confirms Item 1 to 4 that he was <u>NOT</u> responsible as stated. <u>Mr. Frank Hull</u> was responsible. Obviously a false presentation

Anderson Explaining Testing Requirements HL3 Course and Fine Aggregate.

Page 974 #1 (Transcript #20) Anderson Cross Examination in respect to HL3 Fine and HL3 Course Aggregates.

- A. We're just talking about materials above and below the 4.75 millimetre sieve, so I'm not sure how you could have a failure because you aren't <u>truly doing a gradation</u> there. You're just saying material of a certain <u>general size</u> we're looking at here so maybe it failed the, what do you mean by failing? The course aggregate component maybe it all fell through the sieve and it, it was in the fine aggregate like.......
- Q. But the gradation, the sieving requirements sets in effect a limit to that particular category of aggregate.

Page 975 #2 (Transcript #5)

A. But they're only talking on the A.S.L. when they talk the difference between the course aggregate of the hot mix, they're <u>only talking about one sieve</u>. They're not talking about a <u>nest of sieves</u>, they're saying material bigger than a certain size and material smaller that a certain size.

Comment:

These statements are absolutely false. See Ministry of Transportation response F.O.I. request April 23, 1997 SWR97000044 and SWR97000045 for specifications for M.T.O. Asphaltic Concrete hot mixed and hot laid. #3

Page 936 #4 Anderson cross examination #5 to #20 in reference to ASL 91-06 Nichols HL3 Fine aggregates

- Q. Now it does point out with respect to HL3 fine aggregate that its, it appears to be, it says grades fine with excess fine. Does that mean it's too fine? That's the gradation isn't it.
- A. They're making a designation yes between above and below the four point seven millimetre sieve that not like putting in whole mess of sieves to check the gradation there. They're referencing to a general size, not a specific size.

Comment:

Wrong and false.

• See: OPS Gradation Specification for HL3 Fine Aggregate #7

Actually in fact there are 8 different sieve designations for this specification for this product which is tested by M.T.O. in order to provide this information on the M.T.O Aggregate Sources List.

Page 2 Under Table 1 Gradation Requirements for HL3 Fine Aggregate the material must meet the sieve gradation requirements on 8 separate and different sieve designations. If the material fails to meet the sieve requirements on just one of the eight sieve designations it fails and is disqualified.

Under Table 2 Gradation Requirements for Course Aggregate HL3 the material must meet sieve gradation requirements on 4 separate and different sieves. Failure on just one sieve is grounds for disqualification of material.

Mr. Anderson's statements **Pages 936, 974 and 975** as noted are false and totally without basis in truth and fact.

David Anderson IN - CH

Mr. Andersons' Reasons for Tender Change for Stone Chips from "Supply," "To Supply and Apply."

Page 775 (Transcript #5 to 15)

Motivation: This further helped the Township prevent Nichols Gravel from bidding on the supply of Stone Chips.

Andersons' reason for the change:

- Q. Okay. And why did, why did you make that particular change?
- A. Well there was, this, this, the difference in this one is that this one has one single contractor supplying and applying the material. The biggest reason for having one contractor do it is in the event that there is a problem like a quality problem or a performance problem with the materials. Under the old set up it would be, you know, the contractor could say well it was your aggregate that didn't bond with the emulsion and then us as the aggregate supplier if you will would say no, we think it's your emulsion and it became difficult and more expensive to the Municipality to resolve a problem. So in order to ___, What I've done with this is removed ourselves from in effect being the General Contractor and just becoming the Owner and Contract Administrator. We've now asked somebody else to be the General Contractor and then if there is a problem we can just go to the General Contractor and say we have a problem. Fix it.
- See F.O.I. Request April 8th, 1997, #05–97 #3 to confirm past problems as described by Mr. Anderson. Request #1, a copy of any report or claim launched against any contractor regarding performance failure related to and Township single surface treatment contract. Township response: May 7th 1997 after three attempts to get this information Quote: "No records have been located."
- See letter Dated April 8th, 1997, April 10th, 1997, April 11th, 1997, May 7th, 1997.
 Coverup, Coverup, coverup. Spin Job

Exam for Discovery

Stone Chip Purchase T.C.G. Ltd.

Page 81 (Transcript #25) Page 82 (Transcript #5 to 15)

What happened was we got later in the summer, a T.C.G. salesman (Name?) was around and indicated they had now started producing that kind of product and would we be interested in a few loads of their material to try it out." unquote.

Wrong. T.C.G. have been producing Class 1 and Class 5 Aggregate formerly known as 3/8 and 1/4 chips for as long as they have operated pits at Brantford, 20-30 years or longer.

#15 Quote: "So they're an acceptable supplier, and I can't recall what the unit cost was, but we did try some material from them." unquote.

Wrong. To be an acceptable supplier you must meet the specification as designated in the 1994 Quotation #4 for Class 5 aggregate."

- See: Quotation #4
- See: Specification #1
- See: Test Results. #2 T.C.G. failed to meet specification for Gradation, 858.21
 Tonnes, accepted anyway.
- See: F.O.I. Respones 2–95 #3 which confirms purchase by the Township even though T.C.G. failed to meet the specification of quotation.

No testing done 1994 on Nichols Class 5 Aggregate at less cost with lower bid.

Exam Discovery

Anderson Describing Nichols Class 5 Stone Chips.

Page 8 (Transcript #15)

Quote: "I mean, it's all over the place. And this is the nature of the failure, the stone is too soft so it's the problem for us is when the stone fractures then it bleeds, that bleeding area is much slipperier." unquote.

Anderson had done no testing in 1994, 1995, 1996 to confirm that Nichols Stone Chips were soft, and the only hardness test performed on Nichols Stone Chips was by Ministry of Transportation September 6, 1995, confirmed a petrographic hardness number of 122.9 well under the specification limit of 135. The judge missed that point too.

- See: M.T.O. Test Results entered in evidence at Court. #5 Nichols Gravel Aggregate.
- See: Cross Examination Page 988 #7 (Transcript #5 to 30) Page 989 #6 (Transcript #5). Andersons' evidence no testing done on any Nichols Aggregate 1994, 1995, or 1996.
 Anderson had no information whatsoever which would support or confirm that Nichols Stone Chips, Quote: "The stone is too soft." unquote. This was nothing but speculation and assumption without basis in fact that he provided in evidence and was completely false.

In du.

WATEROUS, HOLDEN, AMEY, HITCHON BARRISTERS & SOLICITORS

RICHARD N. WATEROUS
PETER B. FORBES
PAUL D. AMEY
PATRICK R. CORLESS
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May 30, 1997

SENT BY COURIER

Ontario Court (General Division) Court House 50 Main Street East Hamilton, Ontario L8N 1E9

Attention:

Lynne

Divisional Court Office

Dear Madam:

Re: Nichols Gravel v. Township of Delhi

Divisional Court File No. D799/96

We are the solicitors for the Appellant in the this matter, Nichols Gravel Ltd. We enclose herewith three copies of the transcripts prepared with respect to the proceedings at trial along with our Affidavit of Service to be filed.

Yours very truly,

WATEROUS, HOLDEN, AMEY, HITCHON

Paul D. Amey

PDA:vlp Encl.

BERREITER

-US- 0 4 1007

CTI THE STATE

Court file no. D799/96

ONTARIO COURT (GENERAL DIVISION) DIVISIONAL COURT

BETWEEN:

NICHOLS GRAVEL LIMITED

PLAINTIFF (APPELLANT)

and -

THE CORPORATION OF THE TOWNSHIP OF DELHI, DAVID ANDERSON, and FRANK GELINAS

> DEFENDANTS (RESPONDENTS)

AFFIDAVIT OF SERVICE

I, VICKI PORTER, of the Town of Paris, in the County of Brant, MAKE OATH AND SAY
AS FOLLOWS:

I served the Respondents with five volumes of the transcripts of the proceedings
at trial by sending copies by Priority Courier, a courier to Mollison, McCormick,
McIntyre & McGee, the solicitors for the Respondents at 71 Weber Street East,
Kitchener, Ontario.

08 | VSD n 3 1997

2.

The copy was given to the courier on May 30, 1997.

SWORN before me at the City of Brantford, in the County of Brant, on May 30, 1997

VICKI PORTER

(Signature of deponent)