

Information No. 03/0053

Information No. 03/0573

IN THE SUPERIOR COURT OF JUSTICE

B E T W E E N:

HER MAJESTY THE QUEEN

-and-

NICHOLS GRAVEL LTD., GARY NICHOLS,
MARGARET NICHOLS AND DWAYNE NICHOLS

Charges : ss.7(1) of the Aggregate Resources Act.
RSO 1990, Ch.A.8 as amended
ss.57(1) of the Aggregate Resources Act

REASONS FOR JUDGMENT

Given by Her Worship, Justice of the Peace W. Casey
on January 28th, 2005 in
Haldimand County, Cayuga, Ontario.

APPEARANCES:

Prosecutor

C. Szoke, Esq.

Counsel for the defendants

P. Osier, Esq.

Reasons by Her Worship W. Casey

January 28th, 2005

REASONS FOR JUDGMENT

THE COURT: Nichols Gravel Limited, Gary, Margaret and Dwayne Nichols were charged by the Ministry of National Resources under the Aggregate Resources Act between March 31st, 2002 and December the 1st, 2002 and May 31st, 2003 to August 3rd, 2003 with unlawfully operating a quarry without the authority of a license, contrary to subsection 7 (1) of the Aggregate Resources Act.

They were further charged with unlawfully obstructing an Inspector by refusing to furnish the Inspectors with information contrary to subsection 57 (5) of the Aggregate Resources Act.

A history of the allegations before the court:

- Nichols Gravel Limited acquired a farm in Walpole Township within the City of Nanticoke with the intention of having the land rezoned in order to operate a gravel pit.
- There was considerable opposition to the proposed pit and in 1999 the Ministry of Natural Resources (MNR) referred the matter to the Ontario Municipal Board (OMB) for a decision on rezoning the land and the issuance of a license to operate the quarry on that land.
- Evidence was heard by the OMB in July 2000 from Mr. Nichols as well as a number of representatives

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who were opposed to the gravel pit operations. Despite the opposition the OMB ordered the MNR to issue a quarry license to Nichols Gravel Limited.

- And interim order was issued dated April 3rd, 2001 and the final OMB order was issued July 25th, 2001.
- It wasn't until March 31st, 2003 that the license was issued by the MNR and delivered to Mr. Nichols on April 1st, 2003.
- On April the 14th, 2003, the MNR issued a notice of suspension to Nichols Gravel Limited alleging that it failed to complete 23 pre-conditions of the license issued to them and requiring them to complete by September 30th, to be completed rather, by September the 30th, 2003.
- On April 25th, 2003, the charges as read were laid.

A pre-trial Motion was made by the defence which alleges that the rights of Nichols Gravel Limited have been subject to an abuse of process under the law, and the individual rights of Gary, Margaret, and Dwayne Nichols have been violated under sections 7 and 15 of the Charter of Canadian Rights and Freedoms.

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The first day of evidence was heard on the Motion was April 29th, 2004 continuing for several days and concluding November the 5th, 2004.

I have reviewed all the evidence, the written Motions and arguments, in detail but will highlight only the testimony I consider relevant to this Motion.

Number 1:

MNR Inspector Strachan testified that the application for a license is normally made to the MNR and subject to conditions under the Aggregate Resources Act. Upon completion of a site place containing:

- a) the existing conditions of the land,
- b) the operating conditions of the quarry,
- and c) rehabilitation plans when the quarrying is completed,

the MNR would then issue the license if there is no opposition.

2: In this case there was opposition to the license and the matter was referred to the OMB for a hearing. the MNR, however, took no part in the actual hearing before the OMB when the license was granted.

3. The Ministry of the Environment (MOE) requested at the OMB hearing that the taking of water should be made by a permit issued by the MOE.

4. The first OMB order was issued on April the 3rd, 2001 and it states on page 9 at the end of the

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third paragraph, quote:

The Board does accept the request of the MOE and accordingly, the pit license will be conditional upon the issuance of a permit to take water by the MOE.

- 5. Although purportedly written Tuesday, April 3rd 2001 a further order was issued on July the 25th, 2001 by the OMB stating that, quote:

The applicant shall obtain a long-term Water Taking Permit issued by the Ministry of the Environment.

- 6. Inspector Strachan told the court that he needed clarification from the Board at this point as to whether or not Mr. Nichols had to obtain a permit to take water before they issued the license. He stated that of the 55 conditions the Board put on the ruling the pit would have to be operating to fulfil those conditions.

- 7. On page 31 of the transcript Inspector Strachan was asked the question by Mr. Osier, counsel for Mr. Nichols:

Q. And in the case of Nichols, can you assist us as to whether or not at least initially there was an absolute requirement to pump water?

A. At the every beginning, no, there would be, You'd have to get down to the water table before you'd do that.

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- 8. Inspector Strachan did not issue the license, although he tried on a number of occasions through various people to obtain clarification of the order. One of the responses came from Andy Dawang at the Attorney General's web site, Exhibit Number 4, which states in part that all conditions had to be cleared before the license could issue. This is clearly impossible as 55 of the conditions require that the pit be operational at the time the conditions are required to be fulfilled. The Inspector then directly e-mailed Garry Harron, the member who made the OMB ruling, but did not get a response.

- 9. Throughout his testimony Inspector Strachan reiterated the fact that the MNR did not have the power to change an order of the OMB and that was the reason he could not issue the license.

- 10. On August the 12th, 2002 Inspector Paul Cutmore replaced Inspector Strachan and he was the next person to testify at the hearing. He testified that as the result of a complaint he received concerning unlicensed activity, he visited the Nichol's site August the 27th, 2002, and formed the opinion that because of gravel being stock-piled on the site, it was an indication that there was a quarry being run. He did not visit the site itself but took pictures at the entrance to the site, and on September the 5th, 2002 he issued a Cease and Desist Order to Mr.

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Nichols, although Mr. Cutmore himself never saw a stone being taken out of the ground.

- 11. On October 21st, 2002, Inspector Cutmore wrote the OMB for further clarification of their Order issued July 25th, 2001. A response came Mark Michaels, counsel for the Board on December the 18th, 2002, Exhibit number 11. In essence the letter said that the, "clarification" of the Order given by Andy Dawang, a member of the Board's staff was not correct in that:

'the Board does not intend that any condition imposed by it be incapable of being fulfilled by reason that a "technical impossibility" makes compliance with the conditions impossible or for any other reason that makes compliance with the Order impossible.'

Further, the last paragraph of the letter reads: 'Accordingly, in order to give effect to the Order and the Boards having directed the issuance of a license, condition 1 of the Order provides that the license is to be issued (providing that all other conditions have been or are being fulfilled) - that is in brackets - subject to the requirement that, at the point where the water table is reached, Nichols is required to seek and obtain the Permit prior to Nichols continuing any further extractions.'

- 12. Inspector Cutmore as he indicated on page 101 of the transcript was, quote, "the person with

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the prime responsibility for issuing the license," but did not do so until March 25th, 2003, over three months after receiving the letter. He explained the delay from the 30 days which Inspector Strachan acknowledged as the norm for licenses to be issued, to his having to check with other people in the Ministry to clarify the legal terminology of the letter.

- 13. "When the license was delivered to Mr. Nichols, Inspector Cutmore had drafted a letter which Mr. Denys, his supervisor, signed attaching a specific list of 23 of the original conditions entitled, "Specific pre-Operating Conditions which must be satisfied prior to the operation of the quarry or removal of material from the licensed property."
- 14. Throughout the trial Inspector Strachan, Mr. Denys and the OMB itself made it clear that no one had the right to change the OMB Order. Yet Inspector Cutmore told the court he had the right as an Inspector to add these pre-operating conditions not specified as such by the OMB or specified as such on the site plan.
- 15. As the court previously heard it was not possible to comply with pre-operating conditions when the quarry was not in operation. The term pre-operating conditions is one which only Inspector Cutmore used.

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- 16. Mr. Nichols in his testimony explained that one of the pre-operating conditions was to construct an internal water collection system which requires the establishment of a sump hole at a lower level within the quarry. An impossible condition to comply with as the area then has to have been quarried before the sump hole could be established.

- 17. On April 14th, 2003, 20 days after he issued the license to Mr. Nichols, Inspector Cutmore suspended it citing non-compliance of the 23 conditions stipulated in the pre-operating conditions and four site plan contraventions.

- 18. Page 166 of the transcript, line 18, on cross-examination by the prosecutor, Inspector Cutmore was asked:
 - Q. Do you have personal knowledge, sir, that this particular site has or is presently operating as a gravel pit?
 - A. Personally I don't have that information, sir.

- 19. On April 25th, 2003, the charges of operating a quarry without a license and with unlawfully obstructing an Inspector by failing to provide an Inspector with information under the Aggregate Resources Act were laid.

CONCLUSIONS:

The court has been asked to rule that the charges

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before it are an abuse of process against the company and the individual shareholders.

Under section 7 and 15 of the Charter of Rights and Freedom,

Section 7 concerns legal rights and it states in part;

Everyone has the right to Life, Liberty and Security of person, and the right not to be deprived thereof, except in accordance with the principles of fundamental justice.

Section 15 concerns Equal Rights and it states; Everyone is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination.

When the OMB issued the Order to the MNR to issue a license to Mr. Nichols to operate a gravel pit the license was a fait accomplis.

The OMB is the highest authority for this type of dispute, there is no appeal from this Order and as testimony revealed even the Board cannot change the Order it made.

What happened next was a series of events resulting from a non-specific addition to the license regarding a Water Taking Permit requested by the MOE. A request for clarification of the Order from Inspector Strachan resulted in further problems when Andy Duwang, a member of the Board's staff, responded without any authority to do so or knowledge of the

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implications of his reply.

Over 18 months after the Board approved the license clarification came from Mark Michaels, counsel for the Board, stating that it was not the intention of the Board to put on the license any conditions which could not be fulfilled and ordered the MNR to issue the license.

It is this court's opinion that any conditions the Board put on the license were ones to be completed after the license was issued and as the project was naturally evolving. All these problems were systemic, including the MNR's inability to communicate with the OMB.

On December 18th, 2002 or within 30 days of Mark Michael's response, Inspector Peter Cutmore should have issued the license to Mr. Nichols as directed. He chose not to do this, instead indicating to the court that he needed clarification from a number of people and he delayed the issuance of the license until March 25th, 2003.

Inspector Cutmore's testimony regarding his motives for not issuing a license were not believable, the letter was self-explanatory and required no interpretation.

The court can come to no other conclusion than when Inspector Cutmore delivered the license with 23 pre-operating conditions, many of which were

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impossible to comply, he set up Mr. Nichol to fail in his bid to operate the quarry on a productive basis.

He had no legal authority to change the OMB ruling and his explanation for why he made up pre-operating conditions was also not believable.

Inspector Cutmore issued the Cease and Desist Order to Nichols Gravel on information given to him through resident's complaints, having visited the site only once and making his observations from the gate.

It is this court's opinion that when Inspector Cutmore issued that Cease and Desist Order he entered into the arena on the side of the people opposed to the quarry.

Gary, Margaret and Dwayne Nichols have the right to the equal protection and equal benefits of the law without discrimination, and Inspector Cutmore deprived them of their rights by issuing orders they could not comply with. And when they could not comply with the order, he charged them along with the company under the Aggregated Resources Act.

The Ministry of Natural Resources must bear some responsibility for the actions of one of their Inspectors, when they not only allowed him to issue illegal orders under the authority of his supervisor, but did little, if anything, to assist Mr. Nichols in his dilemma over the OMB ruling, (with the excep-

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tion of former Inspector Strachan).

I considered the case of Abitibi Paper Company Limited, in which Jessop, JA stated:

While there does not exist a broad jurisdiction to stay criminal proceedings as an abuse of process, the doctrine of abuse of process does exist, limited, however, to the most exceptional circumstances.

In any event there is no question of the existence of the doctrine in civil proceedings and the charges in this case,

- which applies to this case also - being for a breach of provincial statutes are matters of civil law.

In my opinion these are exceptional circumstances. The interference in the proper administration of valid orders by Ministry personnel in what appears to be a highly politicized situation is not to be tolerated.

The charges against the company and the individuals cannot be allowed to proceed, and all counts on Information 03-0053 and Information 03-0573 against Nichol Gravel Ltd., Gary Nichols, Margaret Nichols and Dwayne Nichols are stayed.

It is this court's opinion that Nichols Gravel Ltd.,

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is legally entitled to be operating the quarry by virtue of the order of the OMB directing the MNR to issue the license. That is the end of my Judgment.

MR. OSIER: Thank you, Your Worship.

MR. NICHOLS: Thank you.

Transcribed from a recording to the best of my skill and ability.

M. Hudacin
M. Hudacin, Official Court Reporter.

Sworn before me at the
Assermenté devant moi au

HALDIMAND COUNTY

this
le

14

day of
jour de

APRIL

2003

Judge or Justice of the Peace in and for the Province of Ontario
Juge ou juge de paix dans et pour la province de l'Ontario

[Signature]
Informant/Dénonciateur

Sec. 23/art. 23

Summons for
 Sommission pour

20

Confirmed on
 Confirmée le

20

Justice of the Peace/Juge de paix

Date/Date	Defendant / Prévenu	Pleas / Plaid Guilty to Counts Coupable sous les chefs	Pleas / Plaid Not Guilty to Counts Non coupable sous les chefs	Found Guilty on Counts Déclaré coupable sous les chefs	Not Guilty on Counts Déclaré non coupable sous les chefs
JAN 28 2005	All Charges Stayed		1, 2		

Date

In Absentia / ex parte

counts/chefs d'accusation

Fined \$ _____ & \$ _____ costs. Time to Pay
amende de \$ et \$ de frais. Délai de paiement

Date of Birth _____
date de naissance D/J M Y/A

Probation
Période de probation de _____
Sentenced to Imprisonment for
Peine d'emprisonnement de _____

withdrawn accusation(s) retirée(s) sentence suspended condamnation avec sursis

counts/chefs d'accusation

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[Signature]
Judge or Justice of the Peace in and for the Province of Ontario
Juge ou juge de paix dans et pour la province de l'Ontario

Ministry of
Natural Resources

Ministère des
Richesses naturelles



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* April 15, 2005

Nichols Gravel Limited
R.R. # 2 Delhi, P.O. Box 172
Delhi, Ontario N4B 2W9

Attention: Mr. Gary Nichols

RE: Revoked Aggregate Resources Act Licence No. 103717
Part Lots 10, 11 & 12, Concession 12, Haldimand Co. (Walpole Twp.)

On September 30, 2004 the Honourable David Ramsay, Minister of Natural Resources, signed an order revoking *Aggregate Resources Act* Licence No. 103717. Notice of Revocation was served on October 7, 2004.

Licence No. 103717 issued to "Nichols Gravel Limited" of Delhi, Ontario remains under revocation. The status of the revocation is not altered by the dismissal of charges under the *Aggregate Resources Act* on January 28, 2005. Nor is the status of the revocation altered by the fact that you have launched an appeal of the revocation.

Section 7(1) of the *Aggregate Resources Act* applies. At the property in question (Part Lots 10, 11 & 12, Concession 12, Haldimand Co. (Walpole Twp.)) you are not to operate a pit or quarry "except under the authority of and in accordance with a licence." In your case, no valid licence exists – your licence is revoked. You must not operate.

The Ministry of Natural Resources reserves the right to lay additional charges under the *Aggregate Resources Act* for ongoing operations in breach of the revocation.

Yours truly,

Alec Denys
District Manager
Aylmer District

** ASTOUNDINGLY, EVEN AFTER THE COURT DECISION OF JAN 28, 2005 WHICH STAYED ALL CHARGES, AND FOUND M.N.R. ABUSE OF AUTHORITY AND ABUSE OF PROCESS, M.N.R. CONTINUES TO INTIMIDATE AND PROMOTE THIS FRAUD ON THIS FAMILY BUSINESS. IS THIS BRAIN DEAD GOVERNMENT OR WHAT? A.L.M.*