

CITATION: The Corporation of the Town of Georgina v. Marvin Blanchard and 1124123 Ontario Limited, 2015 ONSC 291
COURT FILE NO.: CV-14-119699-00
CV-14-119699-00
DATE: 20150212

SUPERIOR COURT OF JUSTICE - ONTARIO

Between: The Corporation of the Town of Georgina, Applicant

- and -

Marvin Blanchard and 1124123 Ontario Limited, Respondents

AND:

Between: Marvin Blanchard and 1124123 Ontario Limited and Baldwin 33, Incorporated (Counter) Applicants

- and -

The Corporation of the Town of Georgina, Her Majesty The Queen in Right of Ontario, The Ministry of Natural Resources and Forestry and The Ontario Aggregate Resources Corporation (Counter) Respondents

BEFORE: Justice B. G. MacDougall

COUNSEL: John Hart, Counsel, for the Applicant, The Corporation of the Town of Georgina

Ralph Cuervo-Lorens and Talia Gordner, Counsel for Marvin Blanchard and 1124123 Ontario Limited and Baldwin 33, Incorporated

Sarah Valair, Counsel for The Ministry of Natural Resources

Iris Fischer, Counsel for the Ontario Aggregate Resources Corporation

HEARD: January 5, 6 and 7, 2015

ENDORSEMENT

BACKGROUND

[1] The issues before the Court involves the ability of the property owners of the two abutting properties ("the Smith site" and "the Baldwin site") to import fill onto those vacant properties located in the Town of Georgina.

The Smith Site

- [1] The Smith site is currently owned by 1124123 Ontario Limited and Marvin Blanchard is a principal of that company. This site consists of approximately 144 acres.
- [2] From 1976 until 2013, the site was licensed, initially pursuant to the provisions of the *Pits and Quarries Control Act* and then pursuant to the *Aggregate Resources Act R.S.O., c. A.8* ("the *Act*") under the control of the Ministry of Natural Resources, now the Ministry of Natural Resources and Forestry ("the Ministry") as an aggregate extraction pit.
- [3] Sections of the Smith site have been used as an aggregate extraction pits since 1976 under various ownerships. The licence (Licence No. 6633), permitted the extraction of up to 227,000 tonnes of aggregate each year.
- [4] In 1989, the licence was transferred to a numbered company of which Marvin Blanchard was the president and in 2007, the licence was transferred to Mr. Blanchard personally.
- [5] The license provided:

Pursuant to the Aggregate Resources Act and regulations thereunder, and subject to the limitations thereof into the conditions of the license and the requirements of the site plan, this class A license is issued to Marvin Blanchard to operate a pit on 41.13 ha. Site located in Lot 3, Concession 3 Georgina Township. The license is subject to the following conditions: As shown on attached Schedule "A". Effective the 22nd day of March, 2007.
- [8] Schedule "A" consisted of the 4 pages of the site plans (Ex. 1), as described in detail below.
- [9] By Notice of Revocation of License dated October 21, 2013 and signed by the Minister of Natural Resources at the time, the Ministry revoked Blanchard's pit licence.
- [10] The Revocation Notice put Mr. Blanchard on notice that if he did not rehabilitate the entire site immediately, then pursuant to the provisions of the *Act*, the Ontario Aggregate Resource Corporation (TOARC) was authorized to enter the land, complete the rehabilitation and recover the cost of such rehabilitation from Mr. Blanchard.
- [11] Mr. Blanchard acknowledges that, although his aggregate licence has been revoked, as a former licensee, he still has an ongoing responsibility to complete "final rehabilitation" of the Smith site, however, there is a disagreement between Mr. Blanchard and the Ministry as to what constitutes "final rehabilitation" under the *Act*.
- [12] Simply put, Blanchard argues that, as the Smith site was formerly used to grow crops, he is entitled, as provided under the definition of "*rehabilitate*" as defined in s. 1(1) of the *Act*, to "*treat land [the Smith site] from which aggregate has been excavated so that the use or condition of the land is, (a) restored to its former use or condition.*"

- [12] According to Blanchard, as there are insufficient materials onsite, he is required to import fill from off-site to complete final rehabilitation. He estimates that he will require - 140,478 m³ of fill and 13,193 m³ of topsoil – approximately 3500 truckloads of material.
- [13] The Ministry's position is that the final rehabilitation requires the use of onsite materials only and that in the area left to be rehabilitated, the rehabilitation is to be completed pursuant to the conditions in the Site Plans by spreading and sloping the existing topsoil and overburden and then seeding the site. The Smith site will then be rehabilitated under the provisions of the *Act*, pursuant to the definition of "rehabilitate" as defined in s. 1(1) (b) to "*treat land [the Smith site] from which aggregate has been excavated so that the use or condition of the land is or will be compatible with the use of adjacent land.*"
- [14] The Ministry argues that as the adjacent land is being used for pasturing and if the Smith site is rehabilitated as required, the Smith site can be used by the owner for pasture lands.
- [15] In June 2014, Blanchard started importing fill onto Smith site for "rehabilitation purposes". As a result of complaints made to Town officials by residents who resided near the Smith site, the Town officials contacted the Ministry officials and were advised by the Ministry officials that, from the Ministry's position, as the Aggregate Extraction licence had been revoked by the Ministry, the Smith site matter was no longer under provincial jurisdiction but was under Municipal jurisdiction.
- [16] On June 16, 2014, local Ministry officer, Ms. Catherine Douglas, notified in writing the Town and Blanchard that:
- i) the Site plan for the Smith site did not allow importation of fill for rehabilitation purposes and the rehabilitation must use on-site materials only; and,
 - ii) if Blanchard proposes to import fill, he needs a "fill or site alteration permit" from the Town as the Smith site is no longer licensed under the *Act* and any use of the property now comes under municipal control.
- [16] On June 18, 2014, Mr. Baskerville sent letter to Blanchard advising Blanchard of the Town's bylaw No. 2011-0044 which prohibits the importation of fill onto a previously licenced pit or quarry under the *Act* whether the lands have been rehabilitated or not.
- [17] The Town proceeded to issue a work order requiring Blanchard to stop importing fill and remove the imported fill.
- [18] On September 18, 2014, the Town applied for and obtained an interlocutory injunction against the Blanchard applicants restraining the Blanchard applicants from contravening sections 2(a) and 2(i) of By-law No. 2011-0044. The Town now seeks a permanent restraining injunction.

The Baldwin site

- [19] The Baldwin site abuts the Smith site and consists of 41.35 acres. Baldwin 33 is the owner of the Baldwin site and Blanchard is the tenant and agent for Baldwin 33.
- [20] At the time Blanchard wished to rehabilitate the Smith site, the Baldwin 33 also wanted to do some large-scale site alteration of the Baldwin site for agricultural purposes, specifically crop farming by importing fill onto that site.
- [21] The Town's By-law No. 2011-0044, entitled the "Georgina Site Alteration By-law" (the By-law") requires a permit to be issued for, among other things, the dumping of any fill or altering the grade of land.
- [22] The Baldwin 33 initially applied for a Site Alteration Permit in January 2011 and in December 2012 it submitted a revised application for a Site Alteration Permit for the Baldwin site. The application first sought a permit to import 700,000 m³ of fill and but that was subsequently revised and now seeks a permit to import 298,000 m³ of fill. The Town has not yet made a final decision with respect to that application.
- [22] The Blanchard applicants have brought an application seeking, among other things, an order requiring the Town to forthwith issue to Baldwin 33 the Site Alteration permit for the Baldwin site.
- [23] I have decided, with the consent of the parties, to bifurcate the issues involving the Smith site from the issues involving the Baldwin site. Accordingly, this endorsement only deals with the issues involving the Smith site. The issues involving the Baldwin site have been adjourned to March 3, 2015.

The Smith Site

Background

- [24] As noted, the Province of Ontario regulates aggregate through the *Aggregate Resources Act, R.S.O. 1990, c A.8* ("the Act") which is administered by the Ministry of Natural Resources and Forestry (the "Ministry").
- [25] Below are relevant sections of the *Act*.

Purposes of the Act

s. 2 *The purposes of this Act are:*

- a) to provide for the management of the aggregate resources of Ontario;*
- b) to control and regulate aggregate operations on Crown and private lands;*
- c) to require the rehabilitation of land from which aggregate has been excavated: and*

d) to minimize adverse impact on the environment in respect of aggregate operations.

s. 7 provides that:

No person shall, in part of Ontario designated under section 5, operate a pit or quarry on land that is not land underwater and the surface rights of which are not the property of the crown except under the authority of and in accordance with the license.

s.8 (1) - *Every application for a license shall include a site plan in accordance with the regulations.*

s.13(1) - *When a license is issued, the Minister may include in the license such conditions as he or she considers necessary.*

s.15 - *Every licensee shall operate the licensee's pit or quarry in accordance with this Act, the regulations, the site plan and the conditions of the license.*

s. 16(2) - *a licensee may amend the site plan at any time, after obtaining the Minister's written approval.*

s. 20(1) - *The Minister may revoke a license for any contravention of this Act, the regulations, the site plan or the conditions of the license.*

s. 37 - *and aggregate permit is issued, the Minister may include in the permit such conditions as a Minister considers necessary.*

s. 36(1) - *every application for an aggregate permits shall include a site plan in accordance with the regulations.*

s. 37(8) - *An aggregate permittee may amend the site plan at any time with the approval in writing of the Minister.*

s.40- *Every aggregate permittee shall carry on the operation in accordance with this Act, the regulations, the site plan, if any, and the conditions of the permit.*

Under Part VI of the Act –REHABILITATION

Under Duty to rehabilitate site

s.48(1) *Every licensee and every permittee shall perform progressive rehabilitation and final rehabilitation on the site in accordance with this Act, the regulations, the site plan and the conditions of the license or permit to the satisfaction of the Minister.*

Minister's order requiring rehabilitation

(2) *On being satisfied that a person is not performing or did not perform adequate progress of rehabilitation or final rehabilitation on the site in accordance with subsection (1), the Minister may order the person to perform, within a specified period of time, such*

progressive rehabilitation or final rehabilitation as a Minister considers necessary, and the person shall comply with the order.

Act overrides municipal by-laws, etc.

S.66(1) *This Act, the regulations and the provisions of licences and site plans apply despite any municipal by-law, official plan or development agreement and, to the extent that a municipal by-law, official plan or development agreement deals with the same subject-matter of this Act, the regulations or the provisions of a licence or site plan, the by-law, official plan or development agreement is inoperative.*

S. 1 Definition

“progressive rehabilitation” means rehabilitation done sequentially, within a reasonable time, in accordance with this Act, the regulations, the site plan and the conditions of the license or permit during the period that aggregate is being excavated.

“final rehabilitation means rehabilitation in accordance with this Act, the regulations, the site plan and the conditions of the license or permit performed after the excavation of aggregate and the progressive rehabilitation, if any, have been completed.

“rehabilitation” means to treat land from which aggregate has been excavated so that the use or condition of the land,

- (a) is restored to its former use or condition, or*
- (b) is changed to another use or condition that is or will be compatible with the use of adjacent la*

The Blanchard Aggregate Permit

[26] In 1992, the corporate applicant of which Blanchard was the president, in applying for a Class A Aggregate Pit licence was required to submit to the Ministry a site plan which was to include a *Progressive Rehabilitation Plan* and a *Final Rehabilitation Plan*. These plans were submitted and approved by the Ministry.

[27] In the *Progressive Rehabilitation Plan*, the Notes provided:

- 1) Areas will be stripped and excavated in sequence (see phasing).*
- 2) Overburdened and topsoil will be stockpiled for future rehabilitation.*
- 3) As excavation progresses into a new phase, the previous phase will be rehabilitated by sloping all excavated areas (grade to be less than 3:1), replacing overburden, topsoil and seeding.*
- 4) Stockpiled to be located near working phase from time to time.*
- 5) Drainage of property will be towards pond.*

- 6) *No erosion or siltation shall occur from license property into adjacent lands.*
- 7) *Existing water table 228.97 m.*
- 8) *Area licensed is 39.873 ha.*
- 9) *Area to be excavated within phase 2 will be maximum 2.53 ha in area.*
- 10) *For existing gates-see page 1 (existing conditions).*

Outline of the Position of the Ministry

[28] As noted above, the Ministry's position can be summarized as follows:

- i) The terms of the 1992 site plans including the Notes, govern what constitutes "rehabilitation".
- ii) Those plans do not allow for importation of fill for rehabilitation purposes.
- iii) If importation of fill was required to achieve a 3:1 sloping so that the site would be "compatible with adjacent pasture", an amendment to the site plans would be required.
- iv) The onus would be on the licensee to demonstrate that there were insufficient materials on-site to complete the rehabilitation.
- v) Given the amount of fill Blanchard says he needs to achieve his version of "rehabilitation" to allow him to grow alfalfa, that would not constitute a *minor* amendment that would be a *major* amendment to the site plans.
- vi) However, in any event, since the aggregate pit license for the Smith site has been revoked by the Ministry, Blanchard has no status under the provisions of the *Act* to bring a request to amend the site plans. Therefore, Blanchard would need the Town's permission to import fill to the Smith site.
- vii) As also noted, the Town's bylaw No. 2011-0044 prohibits the importation of fill onto this site as it is a "*previously licensed pit*".

Outline of the Position of Blanchard

- [29] The revocation of the Blanchard license by the Ministry became final in May 2014 when the Blanchard withdrew his appeal to the Ontario Municipal Board.
- [30] Prior to the Ministry serving the Notice of Revocation of License on October 21, 2013, the Minister had not made in order requiring Blanchard to perform "*progressive rehabilitation*" or "*final rehabilitation*" pursuant to the provisions of s. 48(2) of the *Act*.
- [31] There are insufficient materials onsite to rehabilitate the site "so that the use of the land , (being crop lands) is restored to its former use as defined in s. 1(1)(a) of *the Act* under the definition of "rehabilitate" and, in order to comply with his responsibility to rehabilitate the site, he needs to import the necessary material onto the site.

Analysis

- [31] The amended license issued by the Minister under the provisions of the *Act* on March 22, 2007 provided that the licence was subject to “*the conditions of the license and the requirements of the site plan*”. The notes on the site plans set out, as conditions of the licence, what the licensee was specifically required to do with respect to this specific site, to fulfill the general requirements to complete “progressive” and “final rehabilitation”.
- [32] The Site plan required:
- With respect to “progressive rehabilitation”:
- 1) *areas will be stripped and excavated in sequence (see phasing).*
 - 2) *overburden and topsoil will be stockpiled for future rehabilitation.*
 - 3) *As excavation progresses into a new phase, the previous phase will be rehabilitated by sloping all excavated areas (agreed to be less than 3:1), replacing overburden, topsoil and seeding.*
 - 4) *Stockpiled to be located near working phase from time to time.*
- [33] The Final Rehabilitation site plan required:
- 1) *All faces to be slope to less than 3:1 grade*
 - 2) *topsoil to be replaced on slopes and seeded.*
 - 3) *Area licensed is 39.873 ha.*
 - 4) *Area to be rehabilitated is 8.52 ha.*
- [34] There is no provision in the site plans for the importing of materials/fill onto the site for rehabilitation purposes.
- [35] As noted previously, the thrust of Blanchard’s argument that is that what gives him the right to import material/fill to complete rehabilitation is the definition of “rehabilitate” in s.1 of the *Act*. In my view, that argument fails for several reasons.
- [36] By focussing solely on this definition, Blanchard is ignoring that his aggregate pit licence was subject to specific conditions which included the provisions in the Site plans. In this case, those Site Plans provide specific conditions as to how *progressive* and *final rehabilitation* was to be done.
- [37] The definitions in the *Act* defining *progressive* and *final rehabilitation* both refer to, “... *in accordance with ... the site plan and the conditions of the licence...*” along with *the Act and the regulations*.
- [38] Throughout the *Act*, there are repeated references to “*the site plan and the conditions of the licence*” as important aspects for the Act to accomplish its purpose as described in s. 2 of *the Act*. As noted above, one of the specific purposes of the *Act* as described in 2(c) is, *to require the rehabilitation of land from which aggregate has been removed.*

- [39] On June 12, 2007, the Ministry issued a Rehabilitation Order that ordered Blanchard as licensee, to comply with subsection 48 (1) of the *Act*. That order required rehabilitation of specific sections of the aggregate pit. The Order stated:

Progressive and final rehabilitation shall be in accordance with the site plan approved on September 22, 1992. This includes the use of on-site material for the grading of slopes at minimum of 3:1, replacement of overburdened and topsoil and seeding in accordance with the rehabilitation notes on progressive rehabilitation and the final rehabilitation plan.

- [40] That Order required the rehabilitation as described in the order to be completed to the Minister's satisfaction by August 6, 2007.
- [41] Even if Blanchard was not aware of the actual condition of the site when he became the licensee in 2007, and how the rehabilitation of the site would be accomplished, the Rehabilitation Order issued to him by the Ministry on June 12, 2007 clearly described how the rehabilitation of the site was to be done using onsite materials.
- [42] If Blanchard was of the opinion that, because in the past, when the pit was operated by previous licensees, sufficient overburden and/or topsoil had not been preserved onsite and therefore imported materials are required to complete the rehabilitation, prior to the revocation of his licence, Blanchard, as a licensee, had the option of requesting the Minister's approval for an amendment to the site plans under the provision of s.16(2) of the *Act*. He could have applied for approval to import fill to perform the rehabilitation as he claims he wishes to do. He failed, however, to make any such request during the time that he was the licensee and that option disappeared when the revocation of the licence became final.
- [43] Once Blanchard's pit licence was revoked, he no longer was a "licensee" under the provisions of the *Act* and could not request an amendment to the site plans to import off site materials/fill for the purposes of completing final rehabilitation of the Smith site.
- [44] To reiterate, I do not accept Blanchard's argument that he can ignore the conditions in his licence as described in the site plans and then proceed under the general definition of "rehabilitate" under the Act.
- [45] To repeat, "final rehabilitation" means *rehabilitation in accordance with this Act, the regulations, the site plan and the conditions of the license or permit performed after the excavation of aggregate and the progressive rehabilitation, if any, have been completed.*
- [46] Even if Blanchard could satisfactorily demonstrate that the land on which the aggregate pit was formerly used for farm crops, and that there was inadequate materials onsite to raise the level of the pit to a level suitable for growing farm crops and therefore needed to import off site materials, he cannot ignore the specific conditions of his licence as described in the site plans that set out the requirements for "final rehabilitation" that did not permit the importing of offsite materials.

Conclusions

- [47] Blanchard is not entitled to import fill onto the Smith site for the purposes of completing “*final rehabilitation*” as required under the provisions of the *Act*.
- [48] As noted earlier, the Town's by-law No. 2011-004, entitled the “Georgina Site Alteration By-law at Part 2(i) provides:
- (i) *Notwithstanding anything else contained in this bylaw except for Part 3, no person shall cause, permit or perform a site alteration on any lands which were previously licensed or permitted and used as a pit or quarry under The Aggregate Resources Act, R.S.O...1990, c.A.8, as amended, (or any predecessor legislation thereof), or otherwise, whether such lands have been rehabilitated or not.*
- [49] As Blanchard is prohibited by the Town's by-law from performing *site alteration on the previously licensed pit, whether such lands have been rehabilitated or not*, the Town's application for a permanent injunction is granted.
- [50] Blanchard's application regarding the Smith site is dismissed against the Ministry and against The Ontario Aggregate Resources Corporation.

Costs

- [51] If the parties are unable to agree on costs then any party that is seeking costs shall submit brief written submissions [no longer than five pages] within 15 days from the release of these reasons with a similar reply within 10 days thereafter.

Evidentiary Rulings

- [52] Blanchard sought leave to file the Third Supplementary affidavit of Marvin Blanchard (November 25, 2014), the fourth supplementary affidavit of Marvin Blanchard (November 26, 2014) and the affidavit of Bill Shad (December 11, 2014) pursuant to Rule 39.02 (2). The contents of these affidavits did not contain material information, given my analysis, however, leave is granted for the purpose of having a complete record.



MacDougall, J.

Date: February 12, 2015