

**ONTARIO SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT**

BETWEEN:

THE CORPORATION OF THE COUNTY OF SIMCOE

MOVING PARTY

-and-

ARBOUR FARMS LIMITED, THE CORPORATION OF THE TOWNSHIP OF MULMUR, CONSERVE
OUR RURAL ENVIRONMENT AND THE AIRPORT ROAD GRAVEL GROUP

Responding Parties

NOTICE OF MOTION FOR LEAVE TO APPEAL

Pursuant to s. 96(1) of the *Ontario Municipal Board Act*, R.S.O. 1990, c 0.28

THE MOVING PARTY, The Corporation of the County of Simcoe will make a motion to the Divisional Court at a date and time to be fixed by the Registrar at 130 Queen Street West, Toronto, On M5H 2H5.

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

THE MOTION IS FOR:

An Order granting The Corporation of the County of Simcoe leave to appeal to the Divisional Court from a Decision of the Ontario Municipal Board ("the Board") dated December 23, 2016 (the "Board Decision") in the O.M.B. Case No. PL150119;

1. The Moving Party's costs of this Motion; and
2. Such further and other relief as this Honourable court deems just.

THE GROUNDS FOR THE MOTION ARE:

The Parties

1. The Corporation of the County of Simcoe ("Simcoe") is a municipal corporation and is the abutting neighbouring county to the Corporation of the County of Dufferin ("Dufferin") in which the land of the Applicant is located. Simcoe was granted party status by the Board to this application in the motion which is the subject of this request for leave.
2. Dufferin is likewise a municipal corporation.

3. The Corporation of the Township of Mulmur ("Mulmur") is a municipal corporation and is the township in which the lands which are the subject of the application which is the subject of the Board hearing are located (the "Lands").
4. Arbour Farms Ltd. ("Arbour Farms") is the owner of the Lands and which are the subject of the application for an licence under the Aggregate Resources Act R.S.O. 1990 c. A8 (the "Act"), which is the subject of the current proceedings before the Board out of which the motion for which leave is sought arose.
5. Conserve Our Rural Environment ("CORE") and the Airport Road Gravel Group ("ARGG") are not-for-profit corporations each representing certain residents within the Township of Mulmur who are interested in the application for licence. CORE and ARGG were granted party status to the Board hearing.

The Application for Licence

6. Arbour Farms applied to Mulmur to redesignate and rezone the Lands under its Official Plan and zoning bylaw respectively to permit an extractive operation for sand and gravel on its property. Mulmur adopted the proposed official plan amendment, which was appealed by certain individuals to the Board. Mulmur neglected to pass the rezoning bylaw, and that failure to pass was appealed by Arbour Farms to the Board. Simultaneously, Arbour Farms applied to the Minister of Natural Resources under the Act for a permit to allow the extraction. The Minister referred the application to the Board. All three matters were consolidated to be heard by the Board together.
7. One of the issues to be dealt with by the Board, as required by the Act, was the "Haul Route", the roadways by which the products mined from the Arbour Farms lands would reach market.
8. At a pre-hearing conference (the "PHC") held on July 8, 2015 the Board identified the parties who would be granted party status at the proposed hearing. Simcoe was served with notice of the PHC. Prior to the PHC, Simcoe had been circulated with the professional engineering and planning reports related to the proposed Haul Route. At that point, and according to the reports, a low number of more local deliveries were planned to take roads over which Simcoe had jurisdiction. Based on this, Simcoe did not ask for any status at the hearing.
9. The Board conducted a mediation among the parties to the hearing. Out of the mediation, or as an indirect result of same, CORE, ARGG and Arbour Farms entered into a "Road Restriction Agreement" (the "RRA") under which Arbour Farms, ARGG and CORE agreed between them that the bulk of deliveries would be directed over Simcoe roads, and only local deliveries would use the Dufferin roads which had been the original route, and which had been the subject of the previous reports. Neither Mulmur nor Dufferin are parties to the RRA. No notice of the RRA or

the proposal to change the Haul Route that had previously been circulated to Simcoe was given to anyone except the parties to the Board Hearing.

10. Only by coincidence, did Simcoe learn of the existence of the RRA, and learned of it just a short time before a "settlement hearing" before the Board was to take place at which it was proposed that the RRA would be placed before the Board as evidence in support of the use of Simcoe roads as the primary haul route. The request would not be opposed by Arbour Farms, Dufferin or Mulmur.

The Motion by Simcoe and the Board Decision

11. On or about November 16, 2016 Simcoe filed a motion before the Board asking to be granted party status. The responding parties herein are those who filed notices of response to that motion or who attended on same. In addition, the Corporation of the Township of Adjala-Tossorontio ("Adj-Toss"), the township within Simcoe through which the proposed Haul Route would run, also filed a response and indicated that it would attend on the return date, which was set as November 24, 2016, the date that was otherwise to be the settlement hearing.
12. The motion was heard on that date. Simcoe argued to be given full party status to lead evidence on and to argue all aspects of the Haul Route issue, in particular the "social impact" (i.e. the impact on the residents living alongside the Haul Route) and to be allowed to compare the Simcoe route to the originally proposed Dufferin route for safety, operational and social aspects. An oral decision was given, to be followed by a written decision, with reasons, and an order.
13. On December 23rd, the written decision (the "Decision") and order were issued.
14. By that Decision, Simcoe was granted party status, however, its participation was ordered limited to "any incremental impact from an increase in the number of trucks from Arbour Farms pit on Simcoe County Roads 12 and 13 in terms of operational issues and in terms of safety".
15. Simcoe seeks leave to appeal the condition that was placed on its participation in this hearing.

Errors in the Board's Decision

16. The hearing into the three consolidated matters (the "Future Hearing") is scheduled to begin March 27, 2017 and to run approximately 14 hearing days, failing any further adjournments that might be requested or ordered by the Board, or a settlement.
17. The Decision limits Simcoe to leading evidence on and arguing at the Future Hearing only the increased numbers of trucks that might use the Simcoe route and only on two specific points.
18. The Decision denies Simcoe the right to lead evidence or argue at the Future Hearing, the impacts of the Simcoe route on the persons who will live along the route, nor to compare all of the impacts (operational, safety and social) of the Simcoe route according to the same criteria as applied to the Dufferin route.

19. The Simcoe route will pass through two villages, will require 2 turns, will pass some 200 homes and will cross in front of an elementary school. There has been no analysis of how these conditions compare to those along the originally proposed Dufferin route. The Decision will not allow Simcoe to present evidence or to argue these differences at the Future Hearing.
20. If the Board's conditions are left to be imposed, the ultimate Haul Route decision will become merely a numbers exercise and only applied to the Simcoe route. The Board will be limited in its ultimate deliberations to consider only the increased number of trucks (which for a new operation would be no more than an estimate) which will be generated by the Arbour Farms operation. It will not be able to consider the impact on the persons who live on the route. And, since at this point it appears that neither Mulmur nor Dufferin propose to lead any evidence on the Haul Route (they have filed no expert reports on the Simcoe Route to date), the only evidence that the Board will have in order to make this important decision, will be any limited (numerical) evidence from Simcoe and the self-interested evidence comprising the RRA. The Board will, in essence, have very limited professional engineering and planning evidence and will be determining only if the Simcoe route is not a "bad route" and not whether it is the best Haul Route.
21. The Decision applied no restrictions or requirements on the evidence or argument that might be placed before the Board by any of the other parties to the Future Hearing.
22. The result of the Decision is that the Board is denying itself the jurisdiction to hear the best evidence that is required to decide the important Haul Route decision. The Board will not have the opportunity, as is the case in practically every other aggregate hearing, of comparing haul routes and selecting the one that is the best in terms of operation, safety, social and overall land use planning considerations. In essence, it will be deferring its decision-making jurisdiction to those who have signed the RRA – none of whom are impartial government agencies.
23. Further, and perhaps of greater importance, the members of the public for whom Simcoe is the representative will be denied the natural justice of having their case fully made before the Board. The social impact of noise and dust will not be canvassed. And, only the "incremental impact" in number of trucks, not the actual impact of the aggregate traffic in total, will be considered by the Board.
24. Simcoe, representing the residents along the proposed Simcoe Haul Route should be allowed full rights to canvass the pros and cons of both proposed routes. As part of their public responsibility for reviewing haul routes, Mulmur and Dufferin should have reviewed the Dufferin and Simcoe alternatives when they determined, as they apparently have, not to oppose the RRA agreement. It is only fair and just that Simcoe, on behalf of the residents on the Simcoe route, should be allowed to hear that evidence, and test it through cross-examination and by

evidence of its own. To do otherwise denies natural justice to Simcoe and the residents it represents. It further gives this important decision to the owner (Arbour Farms) and to those others signing the RRA instead of making the decision as part of its jurisdiction.

25. In summary:

- a. The Decision determines an important point of process for the Future Hearing – a hearing which has yet to take place and is months away;
- b. Simcoe is a proper party to a hearing regarding an application under the Act for a licence or permit in a neighbouring municipality, such as Dufferin;
- c. Dufferin and Mulmur determined to consent to or not oppose a major change to the Arbour Farms application, a change that would directly impact Simcoe, without notice to Simcoe;
- d. The Decision denies Simcoe, on behalf of the residents that it represents, the right that it would normally, and legally, have to make a full case at the hearing – a hearing that is still months away;
- e. By the Decision, the Board has denied itself the jurisdiction to make its ultimate decision on the fullest and best evidence that would otherwise be available to it.

The Test for Leave to Appeal

26. There is a two-fold test for leave to appeal a decision of the Board to the Divisional Court:

- a. That there is a point of law sufficient to warrant the attention of the Court; and
- b. Some reason to doubt the correctness of the Board's decision. It need not be shown that the decision was wrong, only that there is some reason to doubt its correctness on a point of law.

27. A tribunal such as the Board commits an error of law and loses jurisdiction where it fails to admit evidence relevant to its consideration of the matter before it.

28. The Board has rules of procedure that govern the conduct of its hearings and other procedural matters (the "Rules"), such as motions. These rules are authorized by section 25.1 of the Statutory Powers Procedure Act, R.S.O. 1990, c.S22 (the "SPP Act"). The Rules, as set out in Section 3, are required to be "liberally interpreted so as to secure the just, most expeditious and cost-effective determination of every proceeding on its merits". This is almost identical to the provision in section 2 of the SPP Act.

29. In default of a matter being dealt with under the Rules, section 4 defers to the Rules of Civil Procedure. Rule 5.04(2) of the Rules of Civil Procedure allows a Court at any stage of the proceedings to add a party unless there is prejudice to another party which cannot be compensated for by way of costs or an adjournment. No such prejudice was argued by any of the opposing parties on the motion.

30. No reasons are set out in the Decision as to why the participation of Simcoe should be limited as set out in the conditions imposed.
31. No issues list had yet been prepared for the hearing. The issues list is tantamount to pleadings in a court proceeding. Rule 26 of the Rules of Civil Procedure would typically allow amendments to pleadings as of right subject to prejudice that could not be compensated for by costs or an adjournment. Here, the "pleadings" are yet to be set, and could include the issues that Simcoe wishes to be canvassed. No prejudice would be suffered by any of the other parties.
32. As opposed to the above, Simcoe and the residents it represents, would be denied natural justice by not being permitted to fully enter evidence and argument on key issues bearing on the impact of the Haul Route on its residents. Similarly, the Board will be denied that evidence, and will also be denied appropriate comparisons in order for it to be able to measure the efficacy of the Simcoe Route compared to the Dufferin Route.
33. This issue is important and should merit the attention of the Court in that
 - a. The limitation on the rights of Simcoe will impact a significant number of residents along the Simcoe Route who will otherwise not have a representative voice at the hearing of this important matter;
 - b. The precedent set will be that significant changes can be made to a proposal by virtue of a settlement between some parties only, and those who would otherwise be entitled to be heard can be denied an appropriate voice on the amended proposal;
 - c. The result is a significant denial of natural justice which leads to a denial of jurisdiction by the Board and is worthy of intervention by the Court.
34. Particularly due to the lack of reasons given by the Board for its decision, there is ample evidence upon which to cast doubt on the correctness of the Board's Decision to impose the stated conditions on Simcoe's party status.
35. *The Planning Act*, R.S.O. 1990 c.P13.
36. *The Statutory Powers Procedure Act* R.S.O. 1990 c. S22
37. *The Rules of Civil Procedure*, R.R.O. 1990, Reg 194 under the Courts of Justice Act, R.S.O. 1990 c. C43.
38. *The Aggregate Resources Act*, R.S.O. 1990 c. A8
39. *The Ontario Municipal Board Act*, R.S.O. 1990 c.O28

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

1. The content of the Board's record on the Motion;

2. The Board Decision; and
3. Such further materials as counsel may advise and this Court permit.

January 9, 2016

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THE CORPORATION OF THE COUNTY OF SIMCOE

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ARBOUR FARMS LIMITED

COURT FILE NO.:

**ONTARIO SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT**

PROCEEDING COMMENCED IN TORONTO

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