

S-105307

No.
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between

FRIENDS OF DAVIE BAY, TEXADA ISLAND, SOCIETY

Petitioner

And

HER MAJESTY IN RIGHT OF THE PROVINCE OF BRITISH
COLUMBIA, and LEHIGH HANSON MATERIALS LIMITED

Respondent

PETITION TO THE COURT

This proceeding has been started by the petitioner for the relief set out in Part 1 below.

If you intend to respond to this petition, you or your lawyer must

- (a) file a response to petition in Form 67 in the above-named registry of this court within the time for response to petition described below, and
- (b) serve on the petitioner(s)
 - (i) 2 copies of the filed response to petition, and
 - (ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.

Time for response to petition

A response to petition must be filed and served on the petitioner(s),

- (a) if you reside anywhere within Canada, within 21 days after the date on which a copy of the filed petition was served on you,
- (b) if you reside in the United States of America, within 35 days after the date on which a copy of the filed petition was served on you,
- (c) if you reside elsewhere, within 49 days after the date on which a copy of the filed petition was served on you, or
- (d) if the time for response has been set by order of the court, within that time.

(1) The address of the registry is:

800 Smithe Street
Vancouver, British Columbia
V6Z 2E1

(2) The plaintiff's ADDRESS FOR DELIVERY is:

1200-925 West Georgia Street
Vancouver, British Columbia
V6C 3L2
Attention: David G. Perry

Fax number for delivery: 604-682-1283

(3) The name and office address of the petitioner's solicitor is:

Singleton Urquhart LLP
1200-325 West Georgia Street
Vancouver, British Columbia
V6C 3L2
Attention: David G. Perry

CLAIM OF THE PETITIONER(S)

Part 1: ORDERS SOUGHT

1. An order declaring that the *Reviewable Project Regulation*, B.C. Reg. 370/2002, (the "RPR") Part 3, Table 6 requires an environmental assessment for a new construction stone and industrial mineral quarry when the infrastructure, equipment and operational plan of a proposed project indicates that the project will have the ability to produce an output that exceeds the defined capacity of 250,000 tonnes per annum.
2. An order quashing any licenses, leases, permits or other types of authorizations provided to Lehigh Hanson Materials Ltd. for the proposed Texada South Quarry, the approval of which should have been subject to an environmental assessment under the *Environmental Assessment Act*, S.B.C. 2002 c. 43 ("the EAA").

Part 2: FACTUAL BASIS

The facts upon which this petition is based are as follows:

1. Lehigh Hanson Materials Ltd (“Lehigh”) has proposed to build and operate a quarry and loadout facilities in the Davie Bay area of Texada Island British Columbia (the “Proposed Texada South Quarry”).
2. The Environmental Assessment Office (the “EAO”), part of the Ministry of Environment, erred in its interpretation of the environmental assessment trigger for new construction stone and industrial mineral quarries found at s. 8, table 6 of Part 3 of the *RPR*. The EAO interpreted the term “production capacity” in the *RPR* as a proponent’s estimated annual extraction rate. The EAO, by incorrectly interpreting the *RPR*, failed to trigger an environmental assessment for the Proposed Texada South Quarry as required by the *EAA*.
3. As a result of the EAO’s conclusion that no environmental assessment was required, Lehigh has been given licenses, leases, permits or other types of authorizations that would not have been issued without the results of the environmental assessment being known.

A. The Parties

4. The Petitioner, Friends of Davie Bay, Texada Island, Society incorporation number S-56711 (the “Friends of Davie Bay”), is a not-for-profit society formed for the purpose of conserving and protecting the environment of the Davie Bay area of Texada Island according to the law and regulations of British Columbia and Canada.
5. Friends of Davie Bay was incorporated under the *Society Act*, R.S.B.C. 1996, c. 433 on May 18, 2010. The members of Friends of Davie Bay are residents of Texada Island and the surrounding communities and have a personal interest in the preservation of the natural environment in and around the Davie Bay area for the benefit of the public.
6. Prior to incorporation, Friends of Davie Bay existed as an ad hoc group of concerned citizens and was actively involved in lobbying various levels of government for environmental protection of the Davie Bay area.
7. Friends of Davie Bay’s involvement with regards to the Proposed Texada South Quarry began in May, 2009 and include:

- (a) Presentation to Powell River Regional District in July, 2009;

- (b) Soliciting and attending meetings with government bodies:
 - (i) Integrated Land Management Bureau, September 9, 2009;
 - (ii) Department of Fisheries and Oceans, October 14, 2009;
 - (iii) Transport Canada, February 10, 2010; and,
- (c) Providing submissions and reports to the Ministry of Environment, the Ministry of Energy, Mines and Petroleum Resources, the Ministry of Agriculture and Lands, the Department of Fisheries and Oceans, and Transport Canada.

8. Members of Friends of Davie Bay have expended significant time and personal resources to provide government bodies and ministries with accurate and reliable information about the environment of the Davie Bay area and potential risks associated with the Proposed Texada South Quarry.

9. The Respondent, Lehigh, is a federally incorporated company registered as an extra-provincial company in British Columbia. Lehigh is an amalgamation of numerous former corporations including: Lehigh Northwest Materials Limited.

10. Lehigh is the proponent of the Proposed Texada South Quarry and its business includes the supply of aggregate building materials throughout the Pacific Northwest.

11. The Respondent, the Queen in right of the Province of British Columbia (the "Provincial Crown"), has the mandate under the *EAA* to assess projects based on specified criteria in the *RPR*. This mandate is to be fulfilled by the EAO which is part of the Ministry of the Environment.

B. Summary

12. The Petitioner says, in summary, that:

- (a) Lehigh has proposed a quarry and loadout facilities at Davie Bay on the southwest shore of Texada Island, British Columbia for the supply of quarried building materials.

- (b) The area surrounding Davie Bay is a valuable and diverse natural environment that includes: cave and karst systems, a Rockfish Conservation Area, eelgrass beds, a marine mammal environment, Blue Listed species and a biogeoclimatic Coastal Douglas Fir zone.
- (c) Lehigh's Proposed Texada South Quarry Mine Plan of May 15, 2009 ("Lehigh's Mine Plan") provides that the planned production rate for the quarry will be up to 20,000 tonnes per month or 240,000 tonnes per year. However, the infrastructure equipment, operational plan that Lehigh proposes for the Proposed Texada South Quarry, which is set out in their Quarry Operation Notice of Work dated May 20, 2009 ("Lehigh's Notice of Work"), results in a production capacity a degree of magnitude greater than the stated intended capacity.
- (d) Under the *Environmental Assessment Act*, S.B.C. 2002 c. 43 (the "EAA"), an environmental assessment is triggered pursuant to the *RPR*. Part 3 of the *RPR* requires that a construction stone and industrial mineral quarry will be a reviewable project under the *EAA* when:
 - “A new quarry facility or other operation that:
 - during operations, will have production capacity of
 - ≥ 250,000 tonnes per year of quarried product.”
- (e) The EAO has interpreted production capacity in the *RPR* as the capacity authorized by the *Mines Act*, which according to the EAO is the estimated extraction rate set out in the proponent's Notice of Work Application. As Lehigh's estimated extraction rate in its Notice of Work Application for the Proposed Texada South Quarry was 240,000 tonnes per year, 10,000 tonnes below the amount that would trigger an environmental assessment under the *RPR*, the EAO did not initiate the environmental assessment.
- (f) Given the production capacity as determined by the infrastructure, the equipment and operational plan set out by Lehigh for the Proposed Texada South Quarry, an environmental assessment was triggered by the *RPR* and the EAO should have

taken the appropriate steps under the *EAA* to assess the Proposed Texada South Quarry.

- (g) The Petitioner says that the EAO has incorrectly interpreted Part 3 of the *RPR* as it relates to construction stone and industrial mineral quarries and as such has failed to take the necessary steps to trigger an environmental assessment of the Proposed Texada South Quarry as required by the *EAA* and *RPR*.

C. Lehigh's Proposed Texada South Quarry

13. Lehigh's Proposed Texada South Quarry includes two inland quarry locations, an overland conveyor system and a marine loadout terminal. The rock will be mined inland, crushed either at the lower quarry location or near the foreshore before being transferred by the conveyor to the marine loadout terminal for shipment to Lehigh's target markets.

14. Lehigh's Notice of Work establishes that they intend to operate the Proposed Texada South Quarry continuously throughout the year with a single shift of workers employed from 7:00 a.m. to 3:00 p.m., 5 days per week. Even if the Proposed Texada South Quarry is only operational 48 weeks of the year the mine could produce only 5000 tonnes per week or 1000 tonnes per day of quarried material before it would exceed its estimated extraction of 240,000 tonnes per year.

15. This low production rate seems unlikely given the size and mineable reserves of the Proposed Texada South Quarry and the infrastructure and equipment that Lehigh intends to build and use.

16. Lehigh's Mine Plan indicates that the mining disturbance of the Proposed Texada South Quarry will be 75.6 hectares. Additionally, the estimated total mineable reserves are greater than 100 million metric tones.

17. The overland conveyor that will transfer the quarried product to the marine loadout terminal will have a belt width of 1.8 metres and be capable of a loading rate of up to 2500 tonnes per hour. Given the intended production of the mine, the conveyor system loading at 2,500 tonnes per hour would operate for just 96 hours per year. Based on a 48 week year this

would be a utilization rate of only 5%. Production of one million tonnes per year would be achieved with a utilization rate of 21% and would provide for a quarry life of 100 years.

18. Additionally, Lehigh intends to utilize the following equipment:

- (a) Portable Crusher Spread with a capacity of 200 tonnes per hour;
- (b) Barge Loader with a capacity of 1200 tonnes per hour;
- (c) Three Haul trucks with capacities of 50 to 100 tonnes;
- (d) Excavator with a capacity of 2 cubic metres;
- (e) Two Wheel loaders with capacities of 9 cubic metres; and
- (f) Drill rig with a capacity of 6 inch diameter.

19. Given the size and mineable reserves of the Proposed Texada South Quarry and Lehigh's intended equipment and mode of operation the production capacity of the Proposed Texada South Quarry clearly exceeds the 250,000 tonnes necessary to trigger an environmental assessment under the *RPR*. This environmental assessment is triggered despite Lehigh's statement as the proponent that their estimated extraction is only 240,000 tonnes per year.

Part 3: LEGAL BASIS

The Petitioner will rely on:

- 1. Rules 2, 14 and 16 of the *Supreme Court Civil Rules, B.C. Reg. 168/2009*;
- 2. *Judicial Review Procedure Act, R.S.B.C. 1996, c. 241*;
- 3. *Environmental Assessment Act, S.B.C. 2002 c. 43*; and
- 4. *Reviewable Project Regulation, B.C. Reg. 370/2002*.
- 5. *Crown Proceedings Act, R.S.B.C. 1998 c. 89*.

6. The provision of the *RPR* that triggers an environmental assessment for new construction stone and industrial mineral quarries is found at s. 8, table 6 of Part 3 of the regulation and reads:

“A new quarry facility or other operation that:

(c) during operations, will have a production capacity of $\geq 250,000$ tonnes per year of quarried product”

7. The Environmental Assessment Office has incorrectly interpreted this provision by interpreting “production capacity” as the estimated extraction rate in the Mines Act Permit or the proponent’s Notice of Work.

Part 4: MATERIAL TO BE RELIED ON

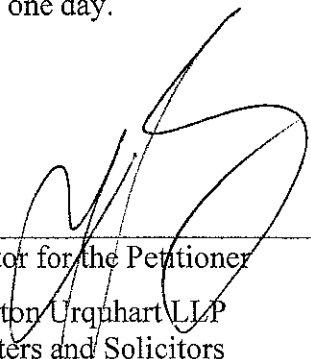
1. Affidavit of Kenneth John Dove, sworn July 21, 2010.

Copies of which are served herewith, and such other materials as counsel may advise.

The petitioner estimates that the application will take one day.

Dated

July 26/10


Solicitor for the Petitioner
Singleton Urquhart LLP
Barristers and Solicitors
1200 – 925 West Georgia Street
Vancouver, BC V6C 3L2

Attn: David G. Perry

To be completed by the court only:

Order made

[] in the terms requested in paragraphs of Part 1 of this petition

[] with the following variations and additional terms:

.....
.....
.....

Date:

.....
Signature of [] Judge [] Master