

Court File No. 48/06

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

HENCO INDUSTRIES LIMITED

Applicant

and

**HAUDENOSAUNEE SIX NATIONS CONFEDERACY COUNCIL, JANIE
JAMIESON, DAWN SMITH, TOM DEER, OR ANY AGENT OR PERSON
ACTING UNDER THEIR INSTRUCTIONS, JOHN DOE, JANE DOE AND
OTHER PERSONS UNKNOWN AND THE CORPORATION OF HALDIMAND
COUNTY**

Respondents

AND BETWEEN:

Court File No. 93/06

**RAILINK CANADA LTD. CARRYING ON BUSINESS AS THE SOUTHERN
ONTARIO RAILWAY**

Plaintiff

and

**HAUDENOSAUNEE CONFEDERACY OF MOHAWK, SENECA, CAYUGA,
ONONDAGA, ONEIDA, TUSCARORA NATIONS; SIX NATIONS OF THE
GRAND RIVER BAND OF INDIANS; CLYDE POWLESS; JAQUELINE
HOUSE; HAZEL HILL; DAWN SMITH; SEAN MT. PLEASANT; WES HILL;
JANE DOE; JOHN DOE; AND PERSONS UNKNOWN**

Defendants

**WRITTEN REPRESENTATIONS OF THE ATTORNEY GENERAL OF
CANADA**

OVERVIEW

1. At the invitation of Mr. Justice Marshall pursuant to Rule 13.02 of the *Rules of Civil Procedure*, the Attorney General of Canada is participating in this special proceeding as a friend of the Court, without becoming a party, for the limited purpose of rendering assistance to the Court.
2. On July 5, 2006, Mr. Justice Marshall requested that the Attorney General of Canada make submissions on the possible effect of the enforcement of his orders of March 17 and 28, 2006 in the *Henco Industries* proceeding on the current negotiations being conducted by Canada, Ontario and the Six Nation/Haudenosaunee relating to the Caledonia dispute.
3. The Attorney General of Canada maintains his position that this matter is best resolved through negotiations.

PART I – STATEMENT OF FACTS

4. On February 28, 2006, a group occupied a residential building site to the south-west of Caledonia bounded by Argyle Street and Thistlemoor Drive (hereinafter “Douglas Creek Estates”).
5. On March 3, 2006, the registered owners of the Douglas Creek Estates, Henco Industries Limited, obtained an *ex parte* interim interlocutory injunction from the Ontario Superior Court of Justice in the *Henco Industries* proceeding requiring the occupiers to vacate the site and remove all obstacles from the site by 10:00 am on March 9, 2006.

6. On March 9, 2006, Mr. Justice Marshall issued an order making the March 3, 2006 interim interlocutory injunction permanent.

7. On March 17, 2006 and on March 28, 2006, Mr. Justice Marshall issued orders in the *Henco Industries* proceeding finding the respondents in contempt and directing certain penalties for that contempt.

8. As a result of Justice Marshall's concerns surrounding the enforcement of his orders, by order dated May 29, 2006, initiated by Mr. Justice Marshall (*ex mero motu*), Justice Marshall directed that the parties to the *Henco Industries* proceedings, and the parties to a related injunction proceeding brought by *RailLink (Southern Ontario Railway)*, and other non-parties, attend in person or by counsel, before him to make submissions on June 1, 2006.

9. The May 29th order observed that "The Superior Court of Justice has the ultimate responsibility to ensure that peace in the community is maintained under the Rule of Law".

10. The May 29th order also provided that the following attend the proceedings (hereinafter "the special proceedings");

1. The Commissioner of the Ontario Provincial Police
2. The Attorney General for Ontario
3. Counsel for the Henning brothers who initiated the first injunction in this matter.
4. Lawrence Elliot duly appointed *amicus curiae* in these matters
5. The Six Nations elected Council and the Confederacy or their counsel

7. RailLink Canada Ltd. carrying on business as the Southern Ontario Railway
8. The County of Haldimand or its representative
9. The Haldimand Law Society.

11. On June 1, 2006, Mr. Justice Marshall heard submissions from the participants and ordered that the special proceedings be adjourned to June 16, 2006.

12. By his June 1st order, Mr. Justice Marshall also invited the Attorney General of Canada to attend the special proceedings, without becoming a party, as a friend of the court in order to become a participant and make submissions, pursuant to Rule 13.02 of the *Rules of Civil Procedure*.

13. By letter dated June 12, 2006, the Attorney General of Canada accepted the invitation to participate as a friend of the Court, without becoming a party, in the special proceedings.

14. On June 16, 2006 the participants made submissions and the matter was adjourned to no fixed date.

15. On June 21, 2006, Mr. Justice Marshall issued an order requesting the attendance of all participants to again appear before him on June 29, 2006 (subsequently adjourned to July 5, 2006).

16. On July 5, 2006, Mr. Justice Marshall heard submissions, and then adjourned the special proceedings to July 24, 2006. He further asked that, on July 24, 2006, counsel for participants make submissions on the following questions:

- (a) What is the Court's jurisdiction to deal with the enforcement of the contempt orders:
 - (i) Against the individuals named in the orders
 - (ii) Against the occupiers at large;
- (b) What is the procedure the Court can use to enforce the contempt orders.
 - (i) Criminal
 - (ii) Civil;
- (c) What is the process the Court should use in deciding on the enforcement of the contempt orders:
 - (i) Timing
 - (ii) Parties; and
- (d) What will be the effect of enforcing the contempt orders:
 - (i) On the negotiations
 - (ii) On the community.

17. Mr. Justice Marshall requested that the Attorney General of Canada make submissions to the Court, without filing affidavit or other evidence, in relation to issue d(i). "the effect of enforcing the contempt orders on the negotiations".

PART II – SUBMISSIONS

1) Court Approval of Negotiations over Litigation

18. The Supreme Court of Canada has identified the fundamental objective of the modern law of aboriginal rights.

The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-

aboriginal peoples and their respective claims, interests and ambitions.

Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), [2005] 3 S.C.R. 388 at p. 393.

19. In a wide ranging number of decisions in the aboriginal law sphere, the Supreme Court of Canada has placed negotiations at the heart of this fundamental objective, and thereby has guided courts to support and encourage negotiated solutions to aboriginal claims.

20. The Supreme Court of Canada has also held that it is by means of negotiated settlements that the constitutional objective of the modern law of aboriginal rights will be achieved:

Finally, this litigation has been both long and expensive, not only in economic but in human terms as well. ... Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we achieve what I stated in *Van der Peet*, supra, at para. 31, to be a basic purpose of s. 35(1) – “the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.” Let us face it, we are all here to stay.

Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010 at paragraph 186.

21. The Supreme Court of Canada, in *Haida Nation*, wrote that, even pending the ultimate resolution of aboriginal title claims, accommodation and negotiation are essential to achieve the reconciliation demanded by the constitution of Canada.

I conclude that consultation and accommodation before final claims resolution, while challenging, is not impossible, and indeed, is an essential corollary to the honourable process of reconciliation that s. 35 demands. It preserves the Aboriginal interest pending claims resolution and fosters a relationship between the parties that

makes possible negotiations, the preferred process for achieving ultimate reconciliation

Haida Nation v. British Columbia (Minister of Forests), [2004] 3 S.C.R. 511 at paragraph 38 (see also paragraph 14).

22. Superior Courts have recognized the impact of the Supreme Court of Canada's support for negotiations as a solution to aboriginal claims. For example, in a case that challenged the negotiated treaty that resolved the claim of the Nisga'a people in British Columbia, the Supreme Court of British Columbia, in rejecting the challenge, wrote this:

Section 35(1), then, provides the solid constitutional framework within which aboriginal rights in British Columbia may be defined by the negotiation of treaties in a manner compatible with the sovereignty of the Canadian state. I conclude that what Canada, British Columbia and the Nisga'a have achieved in the Nisga'a Final Agreement is consistent both with what the Supreme Court of Canada has encouraged, and consistent with the purpose of s. 35 of the Constitution Act, 1982.

Campbell v. British Columbia (Attorney General), (2000), 189 D.L.R. (4th) 333 at pgs. 373-374.

23. The Supreme Court of Canada's holdings with respect to the negotiated solutions to aboriginal claims has also been recognized by the Federal Court as being the preferred way of resolving aboriginal claims.

The federal government through its Comprehensive Land Claims Policy, the courts, including the Supreme Court of Canada, and the Royal Commission on Aboriginal Peoples, have all acknowledged that judicial determination is not the sole and unique way in which to have Aboriginal and treaty rights recognized and affirmed; indeed it may not be the preferred manner of doing so.

Mukivik Corp. v. Canada (Minister of Canadian Heritage), [1999] 1 F.C. 38 (T.D.) at paragraph 40.

2) Court Approval of Negotiations over Enforcement

24. The Ontario Superior Court of Justice has recognized the need for discretion on the part of the court in ordering the enforcement of orders issued in an aboriginal case in the context of the erection of a barricade. In declining to include specific language directing the police to enforce the order, the court noted that a new mediation process was in place.

Mr. Justice Stach held:

The exercise of discretion is an essential component throughout all levels of the administration of justice, no less so for police officers. The orders which courts make ought not to circumscribe unnecessarily the exercise of that discretion.

Ochiicheagew 'babigo'ining v. Beardy, [1996] O.J. No. 2229 (Gen. Div.) at paragraph 22 (see also paragraphs 17 to 22 and 23 to 27).

3) Effect of Enforcement of Contempt Orders on the Negotiations

25. Officials representing Canada at the ongoing negotiations about the dispute at Caledonia have advised the representative of the Attorney General of Canada that they can not anticipate what effect an order in these proceedings will have on future negotiations. However, they were able to advise of the effect of past sittings of these special proceedings on the negotiations. They have had an unsettling effect on the negotiations, in that they inject an element of uncertainty and concern which takes the focus away from the negotiations that are otherwise proceeding well.

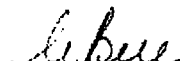
26. The Attorney General of Canada maintains his position that this matter is best resolved through negotiations.

PART III – ORDER SOUGHT

27. Canada takes no position on any order in these special proceedings.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto this 20th day of July, 2006.



Charlotte A. Bell, Q.C.



Michael M. Culloch

Of Counsel for the Attorney General of
Canada

TO: Lawrence Elliot
Amicus Curiae

AND TO: Michael C. Bruder
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Kenneth R. Peel
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Court File Number 48/06

HENCO INDUSTRIES LIMITED (APPLICANT)

AND HAUDENOSAUNEE SIX NATIONS CONFEDERACY COUNCIL,
ET AL. (RESPONDENTS)

Court File No. 93/06

RAILINK CANADA LTD. CARRYING ON BUSINESS AS
THE SOUTHERN ONTARIO RAILWAY (PLAINTIFF)

AND HAUDENOSAUNEE CONFEDERACY OF MOHAWK, SENECA,
CAYUGA, ONONDAGA, ONEIDA, TUSCARORA NATIONS ET
AL. (DEFENDANTS)

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding Commenced at Cayuga

WRITTEN REPRESENTATIONS

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