

Court File No.: 48/2006

ONTARIO
COURT OF APPEAL FOR ONTARIO

BETWEEN:

HENCO INDUSTRIES LIMITED

Applicant

- and -

**HAUDENOSAUNEE SIX NATIONS CONFEDERACY COUNCIL,
JAMIE JAMIESON, DAWN SMITH, OR ANY AGENT OR PERSON
acting under their instructions, JOHN DOE, JANE DOE and other
Persons unknown, and THE CORPORATION OF HALDIMAND COUNTY**

Respondents

Court File No.: 93/06

BETWEEN:

**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 BANKD OF INDIANS, CLYDE POWLESS, JAQUELINE
HOUSE, HAZEL HILL, DAWN SMITH, SEAN MT. PLEASANT, WES HILL,
JANE DOE, JOHN DOE and PERSONS UNKNOWN**

Respondents

**FACTUM OF THE ATTORNEY GENERAL OF ONTARIO
IN SUPPORT OF A MOTION FOR A STAY PENDING APPEAL**

ATTORNEY GENERAL OF ONTARIO
Crown Law Office – Civil
720 Bay Street, 8th Floor
Toronto, Ontario M5G 2K1

Dennis Brown Q.C.
LSUC # 104680
Tel: (416) 326-4156
Fax: (416) 326-4181

Malliha Wilson
Director, Crown Law Office - Civil
LSUC # 23308I
Tel: (416) 326-4953
Fax: (416) 326-4181

Sandra DiCiano
LSUC # 401220
Tel: (416) 326-9806
Fax:(416) 326-4181

**Counsel for the Attorney General of
Ontario**

<u>Tab</u>	<u>Document and Date</u>
A.	Factum
B.	Schedule B
C.	Draft Order dated August 8, 2006 Final Order issued August 18, 2006
D.	Map – Caledonia Parcels of Interest Map – Douglas Creek Estates, Caledonia, Ontario

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**FACTUM OF THE ATTORNEY GENERAL OF ONTARIO
IN SUPPORT OF A MOTION FOR A STAY PENDING APPEAL**

PART I - THE NATURE OF THIS HEARING

1. This is a motion by the Attorney General of Ontario to stay the Order of the Honourable Justice Marshall dated August 08, 2006 (the "Order") pending appeal. The Order is unprecedented, was made without notice or due process and was made in the absence of evidence or trial of the issues.

2. The issues raised on appeal include whether the learned Judge erred by: finding that he had jurisdiction to order a cessation of negotiations and so ordering, or ordering that the negotiations “should” cease; binding the Provincial Crown to an injunction it did not seek; ordering the Attorney General to report back to him so he can review and supervise the exercise of the prosecutorial function, thereby ceasing to be an independent tribunal; and denying procedural fairness. These issues exceed the standard of a serious question to be tried.
3. The decision jeopardizes public safety, restricts the Provincial Crown’s exercise of statutory and common law powers, oversteps the separation of powers of the judicial and executive branches, interferes with effective public governance, causes irreversible setbacks in the land dispute negotiations, intrudes into the Attorney General’s prosecutorial discretion, may give rise to criminal prosecutions and convictions, and has the potential to compromise criminal investigations and Crown work product. Unless the Order is stayed, both the Provincial Crown and the public interest will suffer irreparable harm.
4. Finally, the decision offends fundamental tenets of: Crown prerogative; constitutional law; aboriginal law; administrative law; due process; and the rule of law itself. The Order also interferes with the ability of government to uphold the rule of law by means other than coercive force. The irreparable harm that will ensue if a stay is not granted amounts to a greater harm than a continuation of the state of affairs prior to the issuance of the order. Therefore, the balance of convenience, taking into account the public interest, favours a stay.

PART II - THE FACTS

A. The Henco Application

5. The Haldimand Tract refers to a strip of land lying six miles on either side of the Grand River, which was originally allotted by the British Crown to the Haudenosaunee/Six Nations in 1784 (“Halidmand Tract”).

Affidavit of Jane Stewart, Motion Record, Tab 4 at para 8

6. Henco Industries Limited (“Henco”) brought an application and motion, without notice, on March 3, 2006, for an injunction to restrain the representatives of the Haudenosaunee/Six Nations Confederacy and their supporters. (“Haudenosaunee/Haudenosaunee/Six Nations”) from occupying land known as Douglas Creek Estates in Caledonia, a site which lies within the original boundaries of the Haldimand Tract. An interim injunction was granted to permit Henco to carry on its development activities unencumbered by these protest activities. The matter was set to come back before the Court on March 9, 2006.

Affidavit of James Kendik, Supplementary Motion Record, Tab 1, para 3-4

7. On March 7, 2006, a group identifying itself as the trustees of the Mohawk Nation Grand River served a Notice of Constitutional Question pursuant to section 109 of the *Courts of Justice Act*. Counsel for the Attorney General of Ontario on March 9, 2006 appeared before Justice Marshall in response to the Notice of Constitutional Question. The Notice has not been addressed in any Order, Judgment or endorsement of the Court.

Affidavit of James Kendik, Supplementary Motion Record, Tab 1, para 5

8. On March 9, 2006, Dawn Smith, one of the respondents to the application, moved before Justice Marshall to have His Honour recuse himself because of an alleged conflict of interest arising out of His Honour’s status as a landowner and developer of lands within the Haldimand Tract. His Honour dismissed the motion.

Affidavit of James Kendik, Supplementary Motion Record, Tab 1, para 6

9. Also on March 9th, Henco’s Notice of Application requesting an injunction and motion requesting an order for contempt were heard. Justice Marshall ordered that the motion record be posted at the barricades and adjourned the proceeding to March 16, 2006. The Court also ordered that the injunction Order of Justice Matheson dated March 3, 2006 be

made permanent (the “Injunction Order”). There was no trial on the issue of the permanent injunction.

Affidavit of James Kendik, Supplementary Motion Record, Tab 1, paras 7, 8, 9

10. The contempt application before Justice Marshall was heard on March 16 and March 17, 2006. Without a trial, on March 17, 2006, Justice Marshall ordered that the respondents to the application be found in contempt and convicted and sentenced them to 30 days imprisonment suspended for a term of six months.

Affidavit of James Kendik, Supplementary Motion Record, Tab 1, para 10

Affidavit of Superintendent John Cain, Motion Record, Tab 7 at para 19

11. On March 28, 2006, the formal contempt Order was amended to explicitly hold the respondents in “civil and criminal” contempt, and warrants of arrest were issued.

Affidavit of Superintendent John Cain, Motion Record, Tab 7, para 22, Ex. H & I

B. The Railink Application

12. On May 2, 2006 Railink Canada Ltd. (“Railink”) issued a Notice of Action and served a Notice of Motion for an injunction returnable May 4, 2006. Justice Marshall ordered that an interim injunction be issued against the defendants restraining them from obstructing Railink’s railway operations.

Affidavit of James Kendik, Supplementary Motion Record, Tab 1, para 12

C. Proceedings Initiated by the Court

13. On May 29, 2006 Justice Marshall ordered, on his own warrant, and in the Court’s own proceeding, the following participants to appear either by counsel or in person before His Honour on June 1, 2006:

- (a) The Commissioner of the Ontario Provincial Police;
- (b) The Attorney General for Ontario;

- (c) Counsel for the Henning brothers, who initiated the first injunction in these matters;
- (d) The law firm of “Borden Ladner” in Ottawa, duly appointed *amicus curiae* in these matters;
- (e) Haudenosaunee/Six Nations elected Council and the Confederacy or their counsel;
- (f) Railink Canada Ltd., carrying on business as Southern Ontario Railway; and
- (g) The County of Haldimand or its representative.

Justice Marshall further ordered that notice should also be given to the Haldimand Law Association of the proceeding.

Affidavit of James Kendik, Supplementary Motion Record, Tab 1, para 13

- 14. None of the parties involved in the proceedings to that point had asked for intervention by the Court.

Affidavit of Superintendent John Cain, Motion Record, Tab 7, para 37

- 15. On June 1, 2006, after hearing submissions in response to questions put to the parties by the Court, Justice Marshall ordered that: (1) the Attorney General for Canada be invited to intervene pursuant to Rule 13.02 of the *Rules of Civil Procedure*; and (2) that the Henco and RaiLink proceedings and related enforcement of their respective injunction Orders be case managed by His Honour by hearing, case conference or conference at the Court’s direction; and (3) that all of the participants return on June 16, 2006.

Affidavit of James Kendik, Supplementary Motion Record, Tab 1, para 14

- 16. At the hearing on June 16, 2006, the participants provided further status reports and updates to the Court. At the hearing, counsel for the Ontario Provincial Police raised an objection regarding the participation of the Haldimand Law Association. The Court ruled that the Haldimand Law Association could continue to make submissions as *amicus curiae*.

Affidavit of James Kendik, Supplementary Motion Record, Tab 1, para 15

Affidavit of Superintendent John Cain, Motion Record, Tab 7

17. The Court indicated on June 16th that it would continue to monitor the situation. It also agreed to adjourn the proceedings *sine die* on the urging and with the consent of counsel for the participants. Within a few days, however, Justice Marshall reconsidered this decision and ordered the participants to appear before him on June 29, 2006 (which was later adjourned to July 5, 2006) to, once again, update His Honour.

Affidavit of James Kendik, Supplementary Motion Record, Tab 1, para 16

18. On June 21, 2006, Justice Marshall, again acting on the Court's own motion, ordered all parties to attend before him on June 29, 2006 so that the parties:

may apprize [sic] the Court of the progress or lack thereof, being made in this matter – so that the Court will be in a position to properly monitor the matter and to make any appropriate order in the face of the ongoing contempt, outstanding injunctions and outstanding warrants of arrests of the Superior Court of Justice.

There were no obvious events or circumstances that appear to have prompted this Order.

Affidavit of Superintendent John Cain, Motion Record, Tab 7, para 45

19. On or about July 5, 2006, Henco brought a motion to set aside the *Ex parte* Order and the Injunction Order. There were no objections raised by any of the participants. However, Justice Marshall did not set aside the Order and reserved his decision.

Affidavit of James Kendik, Supplementary Motion Record, Tab 1, para 17

Reasons for Decision, Motion Record, Tab 2 at pages 8 and 9

20. Subsequently, the participants were again ordered to appear before Justice Marshall on July 24, 2006 to make submissions with respect to the Court's jurisdiction, process, and timing for addressing the outstanding contempt orders. Ontario received no notice of motion seeking any relief or remedy as against the Crown. Of the participants attending on July 24th, only the Attorney General of Ontario and the Attorney General of Canada

filed written submissions. Further, no affidavit or viva voce evidence was presented to the Court. Rather, the Court heard oral submissions from the participants in attendance.

Affidavit of James Kendik, Supplementary Motion Record, Tab 1, para 18

Affidavit of Superintendent John Cain, Motion Record, Tab 7, para

D. Joint Offer for a New Understanding Among Haudenosaunee/Six Nations, Canada and Ontario

21. In mid-April, 2006, a series of tripartite discussions among Canada, Ontario, the elected Council of the Haudenosaunee/Six Nations of the Grand River Band of Indians and the traditional Haudenosaunee/Six Nations Confederacy Council resulted in a Joint Offer for a New Understanding Among Haudenosaunee/Six Nations, Canada and Ontario (“the Offer”).

Affidavit of Jane Stewart, Motion Record, Tab 4 at para 13

22. The agreement of the elected Council of Six Nations of the Grand River Band of Indians, the Haudenosaunee/Six Nations Confederacy Council, Ontario and Canada to participate in the negotiations represented a significant step toward achieving a peaceful and ultimate reconciliation of a broader dispute which is factually complex and attended by fragile and tense circumstances.

Affidavit of Ronald Doering, Motion Record, Tab 5 at para 5

Affidavit of Jane Stewart, Motion Record, Tab 4 at para 6

23. The negotiations were unprecedented and historic because, for the first time, representatives of the Haudenosaunee/Six Nations elected and traditional Councils agreed to work together with representatives of Ontario and Canada.

Affidavit of Jane Stewart, Motion Record, Tab 4 at para 28

Affidavit of Ronald Doering, Motion Record, Tab 5 at para 5

24. The inaugural meeting of the Main Table occurred on May 10, 2006. A second meeting of the Main Table occurred on May 16, 2006, at which point the parties to the

negotiations began to discuss a draft Work Plan. That meeting laid the foundations for the development of a sense of mutual trust and respect among the negotiating parties.

Affidavit of Jane Stewart, Motion Record, Tab 4 at para 20-21

25. The launching of the Main Table was a central factor in the protestors' decisions to remove the barricades on Argyle Street on May 23, 2006.

Affidavit of Jane Stewart, Motion Record, Tab 4 at para 22

E. Effect of Executing Mr. Justice Marshall's Orders

26. On April 20, 2006, the execution of the warrants of arrests issued by Justice Marshall resulted in nineteen arrests. Shortly thereafter, the number of protestors on the site grew from approximately under thirty to over 100. Some of those protestors carried weapons. A police officer was hit in the head with a bag of rocks and suffered injuries to his face and head. To ensure officer and public safety, and to avoid possible serious injury or death, the OPP was forced to withdraw its officers from the site.

Affidavit of Superintendent John Cain, Motion Record, Tab 7 at paras 26-27, 29

27. By noon of April 20, 2006, approximately 400 protestors occupied the site and areas of occupation were expanded. Barricades were erected at various locations around Caledonia. Argyle Street and nearby 6th Line was blockaded by burning tires. Highway #6 By-Pass Bridge itself was blockaded with metal bars and guard railings. The Highway # 6 By-Pass was blockaded with a burnt vehicle and tires. Argyle Street was blockaded by a gravel truck and dumped gravel. The Sterling Street Bridge was burnt to the ground. Fires were observed near railway tracks at 6th Line. Sympathy protests were held in Montreal and Vancouver and CN rail tracks were blockaded for approximately 24 hours at Marysville, Ontario.

Affidavit of Superintendent John Cain, Motion Record, Tab 7 at paras 25-28

F. Effects of Ongoing Hearings Before Mr. Justice Marshall

28. The tensions between the protestors at Douglas Creek and the surrounding community, were generally higher before and after attendances before Justice Marshall. Violent incidents were more frequent. This required the deployment of more officers including an additional specialized public order unit more frequently to deal with the fallout from the court orders.

Affidavit of Superintendent John Cain, Motion Record, Tab 7, para 58

29. The series of hearings held by Justice Marshall subsequent to the establishment of a negotiating framework had an unsettling effect on the negotiations that were otherwise proceeding well. Beyond the general disquiet that Justice Marshall's hearings have had on the negotiations, meetings have been disrupted midstream, as representatives of the parties have been called away from the table to consider what their response and/or positions will be in relation to the Marshall hearings. This has had the effect of deflecting attention away from the subject matter of the negotiations, as well as undermining the trust built up through the negotiation process.

Affidavit of Ronald Doering, Motion Record, Tab 5 at paras 9-10

G. Justice Marshall's Decision of August 8, 2006

30. On the afternoon of Friday, August 4, 2006, just before the Civic Day long weekend, Justice Marshall announced that he would be reading his decision on August 8, 2006. The mood in Caledonia over that long weekend was more tense than usual and residents and protestors threw rocks and golf balls at one another and were armed with sticks, golf clubs and baseball bats.

Affidavit of Superintended John Cain, Motion Record, Tab 7 at para 53

31. August 8, 2006 Justice Marshall read his Reasons for Judgment in open Court. The Court found:

Because of the legitimate interest of both communities in this matter, there is authority that the designated prosecutor would report in open court as to the progress of the investigation and the carriage of the matter. In that way both the court and the wider communities would be apprised of the progress and assured that the rule of law was being adhered to in the matter with integrity and diligence.

This Court has jurisdiction to order that all negotiations be suspended in regard to the land claims involved until the barricades are removed from Douglas Creek Estates and the Rule of Law restored to that property.

For that important reason, the government agents involved in these negotiations, should, in deference to the Court Orders, withdraw from these negotiations until the Court Orders are respected and the Rule of Law returned and the barricades removed.

In summary then for all these reasons I have given, there will be an Order that the finding of contempt of court issued by this Court will be referred to the Attorney General of Ontario for carriage. The injunction issued in favour of Henco Ltd. is hereby dissolved at the request of Henco. However, that Order to dissolve will not take effect till [sic] this Court's Order for criminal contempt has been disposed of. Negotiations should cease till [sic] the Rule of Law returns and the barricades come down.

Those still blockading the property and those who advise them should take note of the *Criminal Code*, s.127(1). It provides: "*Everyone who without lawful excuse disobeys a lawful Order made by a Court is guilty of an indictable offence and is liable for imprisonment...*".

This Court has no intention to abandon this matter. This Court will remain patient but seized of the matter until it is resolved for the Reasons I have given.

At a time to be fixed in the course of a case management meeting, a time will be set so that the Court and the public may be apprised of the crown's progress or lack thereof in regard to the criminal contempt.

Reasons for Judgment, Motion Record, Tab 2 at pages 18-20

32. No endorsement was ever made on the Record.

33. Instead of dissolving the permanent injunction granted to Henco, His Honour: 1) found that he has jurisdiction to order a cessation of negotiations and so orders, or orders that the negotiations “should cease”; 2) directed the Attorney General to report back to the Court on the progress or lack of progress with respect to the prosecutions; 3) issued a permanent injunction over Provincial Crown lands, which injunction the Provincial Crown has never sought and for which no trial has been held; and 4) declared that the Court will remain seized of the proceedings until the matters are “resolved”.

Reasons for Judgment, Motion Record, Tab 2

H. Effect of the Release of the Judgment and Effect of the Order

34. The day of the Release of Judgment was a tension filled day in Caledonia. Residents and protestors armed themselves with baseball bats and threw rocks at one another. The situation remains tense and volatile.

Affidavit of Superintendent John Cain, Motion Record, Tab 7, para 54

35. Prior to the release of Justice Marshall’s decision, the Ontario Provincial Police was actively negotiating the removal of a Bobcat construction tractor belonging to a contractor that was on the Douglas Creek Estates site. The police were close to a deal but it was cancelled by the protestors following the decision of Justice Marshall.

Affidavit of Superintendent John Cain, Motion Record, Tab 7, para 56

36. With the release of Justice Marshall’s Judgment of August 8, 2006, the negotiations that all parties have acknowledged as unique and historic have effectively come to a complete standstill.

Affidavit of Ronald Doering, Motion Record, Tab 5 at para 14

37. The breadth of the decision is such that it has effectively restrained the avenues of communication aimed at finding a peaceful resolution with the leadership and

representatives of the Haudenosaunee/Six Nations who are positioned to engage the protestors on Douglas Creek Estates. It has also eliminated the ability to address the underlying concerns and issues that led to the said occupation.

Affidavit of Jane Stewart, Motion Record, Tab 4 at para 30

38. It is the view of the Senior negotiator for Canada and Ontario's Principal Representative that the Order is unlikely to positively contribute to a resolution of Justice Marshall's concerns with respect to the continuing occupation of the Douglas Creek Estates property.

Affidavit of Ronald Doering, Motion Record, Tab 5 at para 17

39. The decision represents an incontrovertible obstacle to achieving a settlement of the underlying and longstanding grievances of the Haudenosaunee/Six Nations Community, the majority of whose members are not involved with the protest or occupation at all.

Affidavit of Jane Stewart, Motion Record, Tab 4 at para 7

40. The imposition of an injunction over Crown lands frustrates the intent of the decisions made by the Provincial Crown to acquire the lands and not seek an injunction over the land. The decisions were made in consideration of, among other things, public safety concerns and a commitment on the part of the government to effect a peaceful resolution of the issues between the local community and Haudenosaunee/Six Nations interests.

Affidavit of Doug Carr, Motion Record, Tab 6 at paras 3 and 5

I. Absence of an Issued and Entered Order

41. On August 14, 2006, Counsel for the Attorney General of Ontario attended before Justice Marshall at his request to finalise the Order. Justice Marshall dictated the terms of the Order, which included the term: "This Court Orders that negotiations should cease" (emphasis in the Order, as dictated).

Order Dictated by Justice Marshall on August 14, 2006, Tab “C” Factum

42. On August 17, 2006, Justice Marshall arranged a teleconference with all Counsel. His Honour directed Counsel for the Attorney General of Ontario to provide a draft Order with no reference to the cessation or suspension of negotiations. This direction was given after hearing submissions from the participating Counsel at a teleconference arranged by His Honour on August 17, 2006.

Order Dictated by Justice Marshall on August 17, 2006, Tab “C” Factum

43. As of the date and time of filing this factum, a formal Order has not been signed, issued and entered and the status of the term of the Order with respect to negotiations is not certain.

Factum, Tab “C”

PART III - THE ISSUES

44. The Attorney General of Ontario identifies the following issue to be addressed:
45. Issue 1: Should a stay of the Honourable Justice Marshall’s Order of August 8, 2006 be issued pending appeal?

Test for granting a stay pending appeal:

- 1a: There are serious issues to be determined on appeal
- 1b: The order results in irreparable harm
- 1c: The balance of convenience and public interest favour a stay

Issue 2: In addition, should an expedited hearing be granted?

PART IV- THE LAW

Test for Granting a Stay Pending Appeal

46. The Court of Appeal has jurisdiction to issue a stay of a final Order pending appeal. The Orders: 1) to cease negotiations with First Nations, or that such negotiations “should”

cease; 2) granting an injunction on Provincial Crown lands; 3) requiring the Attorney General to report back to the Court on the status of prosecutions so that the Court can supervise the progress of the prosecutions; and 4) that the learned Judge remains seized of these proceedings are, within the context of the proceedings initiated on the Judge's own motion, final Orders.

Rule 63.02(1)(b), Rules of Civil Procedure

Rule 6(1)(b) Courts of Justice Act, R.S.O. 1990, Ch. C. 43

***OPSEU v. Attorney General of Ontario*, (2002) 58 O.R. (3d) 577, Tab 1**

47. The test to be applied in determining whether a stay should be issued is: 1) are there serious issues to be determined on appeal; 2) will irreparable harm be suffered if a stay is not issued; and 3) does the balance of convenience, taking into account the public interest, favour retaining the status quo until this court has disposed of the legal issues.

***RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 R.C.S. 311, Tab 2 at para 43**

ISSUE 1: Should a Stay be Granted Pending Appeal?

1A: There are Serious Issues to be Determined on Appeal

48. In determining whether to grant a stay, a preliminary assessment must be made of the merits of the appeal to ensure that there is an issue to be determined on appeal. The threshold for this arm of the test is low. The moving party must satisfy the Court that the claim is not frivolous and vexatious and that there is a serious issue to be determined on appeal. A prolonged examination of the merits is generally neither necessary nor desirable.

***RJR, supra*, Tab 2**

49. The importance of the issues on appeal in this case is clear. The learned trial judge noted:

I am reading this judgment in open court because it is a matter of such importance to the communities and to this court. This case deals with an issue [the Rule of Law]

that is arguably the pre-eminent condition of freedom and peace in a democratic society.

Reasons for Judgment, Motion Record, Tab 2

50. There are four broad issues on appeal that exceed the standard of a serious issue to be determined on appeal: a) excess of jurisdiction in prohibiting negotiations or ordering that negotiations “should” cease; b) excess of jurisdiction in binding the Crown to orders tailored to the needs of Henco; c) excess of jurisdiction in ordering the Attorney General to report back to the Court so the Court can review and supervise the exercise of the prosecutorial function; and d) lack of due process resulting in errors of law.

a) Excess of Jurisdiction in Prohibiting Negotiations

51. The learned judge erred in finding that the Court has jurisdiction to order a suspension or cessation of negotiations between the Provincial Crown, the Attorney General of Canada and aboriginal peoples.

A Division of Powers and Crown Prerogative

52. First, the Order oversteps the institutional division of powers between the judicial and executive branches of government and unconstitutionally impairs and otherwise intrudes into the prerogative of the Provincial and Federal Crown to engage in the negotiation of treaties and similar arrangements with aboriginal people.

***Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. No. 63, Tab 3**

53. Similarly, the decision of whether to negotiate with a constituent group is a prototypically political decision that is not within the jurisdiction of the Courts to decide in the course of a private injunction application, a tort action, by way of judicial review, or otherwise. These decisions are simply not matters that can be adjudicated.

***Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, Tab 4 at paras 88 and 100-101**

***Doucet Boudreau*, supra at Tab 3**

Re Metropolitan General Hospital and Minister of Health (1979), 25 O.R. (2d) 699, Tab 5 at 702, 704-705

Canadian Taxpayers Federation v. Ontario (Minister of Finance), (2004) 73 O.R. (3d) 621, Tab 6 at para 70

54. In *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, the Supreme Court emphasized that in fashioning remedies, courts must “be sensitive to the separation of function among the legislative, judicial and executive branches.” The majority indicated that a court must “not fashion remedies which usurp the role of the other branches of governance by taking on tasks to which other persons or bodies are better suited.”

Doucet Boudreau, supra, Tab 3 at paras. 33-34.

ii) Negotiating Aboriginal Issues

55. Second, the decision or declaration prohibiting further negotiations with the Haudenosaunee/Six Nations is unprecedented. The Supreme Court of Canada has identified the fundamental objective of the modern law of aboriginal and treaty rights to be reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions. Negotiations lie at the heart of reconciliation even when certainty over the nature and extent of a claim is unresolved. The Federal Court has gone so far as to suggest that the judicial determination of aboriginal claims may not be the preferred manner of doing so.

Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), [2005] 3 S.C.R. 388 at 393, Tab 7

Haida Nation v. British Columbia (Minister of Forests), [2004] S.C.J. 70, Tab 8

Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, Tab 9

Makivik Corp v. Canada (Minister of Canadian Heritage), [1999] 1 F.C. 38 [T.D.], Tab 10

iii) Injunction and Prohibition against the Crown

56. Third, the decision is in the nature of an injunction against the Crown, or, in the alternative, prohibition against the Crown, in the nature of judicial review. Either would constitute an error of law.

57. An injunction against the Crown is prohibited by law. *The Proceedings Against the Crown Act* is legislation that is read strictly in favour of the Crown.

Proceedings Against the Crown Act, R.S.O. 1990, C. p. 27, Section 14

Crown Liability and Proceedings Act, R.S. 1985 c. C-50, s. 22. (Canada)

Loomis v. Her Majesty in Right of Ontario, [1993] O.J. No. 2788 (Div. Ct.), Tab 11

Alberta Shuffleboards (1986) Ltd. v. Alberta (1992), 132 A.R. 126 (Alta.Q.B.), Tab 12

Yule v. Mamakwa, [1998] O.J. No. 4900 (Gen. Div.), Tab 13 at paras 17, 18, 20

58. Alternatively, if the decision is in the nature of prohibition, prohibiting the Crown from engaging in negotiations, or in the nature of mandamus, directing whether and how discretion conferred by statute is to be exercised, the following errors have been made: 1) these issues must at first instance be determined by the Divisional Court; 2) prohibition and mandamus cannot be ordered against the Crown *per se* and must be directed toward a specific Crown servant; and 3) prohibition is an extraordinary remedy that prohibits a body from undertaking an illegal act. The level of Court in this case was the Superior Court, the remedy was not sought or ordered against any particular decision-maker, and no concern with respect to the legality of the negotiations exists.

Judicial Review Procedure Act, s. 2 and 7

Rex v. Hamlink, (1910) 26 O.L.R. 381 (Div. Ct.), Tab 14 at paras 392 and 399

Halpern v. Toronto (City) Clerk (2000), O.J. 3213, Tab 15 at paras 13 and 23

Canada Post Corp v. C.U.P.W., (1989) 70 O.R. (2d) 394, Tab 16, at para 398

iv.) Procedural errors

59. Although procedural concerns are raised more fully below, it is of significance that the unprecedented finding that the Court had jurisdiction to halt governmental talks was made without notice. The only named party directly affected by the decision, namely, the Haudenosaunee/Six Nations, was not represented by Counsel in the proceeding. The issue of whether negotiations between the government and the Haudenosaunee/Six Nations should be terminated was not raised in the Notice of Application and was not addressed by any of the participants in either written or oral submissions. In particular, no submissions were received on the issues of the effect of such an Order upon the

Haudenosaunee/Six Nations' rights to freedom of expression and freedom of association and whether the limits on these freedoms imposed by the Order meet the Oakes test.

R. v. Oakes, [1986] 1 S.C.R. 103, Tab 17

Affidavit of James Kendik, Supplementary Motion Record, Tab 1

v). **Misapprehension and Interference with the Rule of Law**

60. Finally, the learned judge erred in enjoining negotiations that were contributing to the maintenance of the rule of law through the resolution of the underlying Haudenosaunee/Six Nations land claims and resolution of other issues that have contributed to the events at Caledonia. The Order deprives the Provincial Crown of a peaceful means of resolving the Haudenosaunee/Six Nations occupation. It also misinterprets the rule of law and its application, in that the Order fails to consider that the rule of law includes all aspects of the law including common law, statute law, the prosecutorial and operational discretion of the Provincial Crown, the Attorney General of Ontario and the Ontario Provincial Police, and the *sui generis* relationship between the Crown and aboriginal people.

Reference re Secession of Quebec, *supra*, Tab 4 at para. 95.

Haida Nation, *supra*, Tab 8

Delgamuukw, *supra*, Tab 9

P.W. Hogg and C.F. Zwibel "The Rule of Law in the Supreme Court of Canada" (2005), 55 *U.T.L.J.* 715, at 717-718

R. v. Beare (1988), 45 C.C.C. (3d) 57 (S.C.C.), Tab 18 at 76

Affidavit of Jane Stewart, Motion Record, Tab 4

Affidavit of Ronald Doering, Motion Record, Tab 5

61. It is therefore respectfully submitted that the finding that the court has jurisdiction to order a cessation of negotiations raises a serious issue to be tried.

B. **Excess of Jurisdiction in Issuing an Injunction over Crown Lands**

62. The Court has granted an injunction over the Provincial Crown's use of its own lands. The Provincial Crown has not sought such an injunction and takes the position that a

simple conversion of Henco's injunction into an injunction over Provincial Crown lands constitutes an error of law.

63. First, the Court is without jurisdiction to grant injunctions against the Provincial Crown by operation of the *Proceedings Against the Crown Act*.

Proceedings Against the Crown Act, s. 14

64. Second, the injunction orders were made *in personam* and do not run with the land. It is unprecedented to order an injunction restraining protest on lands over the objections of the landowner.

A.G. Birmingham, Tame, and Rea Drainage Board (1881), 17 Ch. D. 685 (C.A.) 17 Ch. D. 685, Tab 19

Iveson v. Harris (1802), 7 Ves. 252, Tab 20

65. In particular, it is submitted that the transfer of land from Henco Industries Ltd. to the Provincial Crown changes the nature of the dispute, and has the effect of varying an injunctive order. The Court of Appeal has held that "the terms of injunctions should be closely tailored to the issues raised on the evidence". With respect, Justice Marshall's decision to apply an injunctive order applicable to a dispute between private parties, to a dispute that now involves the Provincial Crown, which has not sought the injunction, is erroneous.

OPSEU, supra, Tab 1

Affidavit of Doug Carr, Motion Record, Tab 6

66. Further, with respect, the Court failed to consider the potential *Charter* implications of a decision restraining freedoms of expression and association. In *BCGEU v. British Columbia (Att. Gen.)*, the Supreme Court of Canada held that the *Charter of Rights and Freedoms* is applicable to the actions of a court, so long as the motivation for the court's action is "public" in nature:

The court is acting on its own motion and not at the instance of any private party. The motivation for the court's action is entirely "public" in nature, rather than "private". The

criminal law is being applied to vindicate the rule of law and the fundamental freedoms protected by the *Charter*. At the same time, however, this branch of the criminal law, like any other, must comply with the fundamental standards established by the *Charter*.
[...]

The issue here is whether the law of criminal contempt and the injunction to enforce the law pass scrutiny under the *Charter*, and it follows from *Dolphin Delivery* that this issue must be dealt with pursuant to s. 1.

BCGEU v. British Columbia (Att. Gen.), [1988] 2 S.C.R. 214, Tab 21 at paras. 56 and 58.
R. v. Oakes, *supra*, Tab 17 at 138-139.

67. Finally, there is no basis in law for refusing to dissolve the injunction orders until the contempt orders dated March 17 and March 28, 2006 are finally disposed.
68. It is therefore respectfully submitted that the issuance of the injunction over Crown lands raises serious issues to be tried.

C. Excess of Jurisdiction in Relation To The Prosecution Function

69. In the absence of any evidence of abuse of process, Justice Marshall exceeded his jurisdiction and ceased to be an independent tribunal by directing the Attorney General to report back to the Court concerning the exercise of the prosecution function. It is clear that the Judgment imposes a reporting requirement in order to supervise and make public progress not only of the prosecutor's carriage but also the investigation, in order to allow both the Court and the public to weigh the "integrity and diligence" with which those duties are being discharged:

Because of the legitimate interest of both communities in this matter, there is authority that the designated prosecutor would report in open court as to the progress of the investigation and the carriage of the matter. In that way both the court and the wider communities would be apprised of the progress and assured that the rule of law was being adhered to in the matter with integrity and diligence.

Judgment, Motion Record, Tab 2, page 16, para 1

R. v. Valente, [1985] 2 S.C.R. 673, Tab 22

Bell v Canada (Canadian Human Rights Commission), [1996] 3 S.C.R. 854, Tab 23

70. With respect, His Honour has no jurisdiction to review and supervise the exercise of prosecutorial discretion. As Justice L'Heureux-Dube stated in *R. v. Power*:

It is manifest that, as a matter of principle and policy, courts should not interfere with prosecutorial discretion. This appears clearly to stem from the respect of separation of powers and the rule of law. Under the doctrine of separation of powers, criminal law is the domain of the executive, as Jean-Claude Hebert explains in "Le controle judiciaire de certain pouvoirs de la couronne", in *Droit penal – Orientations nouvelles* (1987), p. 129 at pp. 136-7 (translation):

In Canada, it is the executive which assumes primary responsibility for administering the criminal law, as was held by the majority of the Supreme Court in *Skogman v. The Queen*. This stems from the fact that there must be an authority which decides whether the judicial process should be set in motion and what form the prosecution will take. *Decisions concerning the operation of criminal justice involve important considerations relating to the public interest.* From this perspective, the actions of the Attorney General are hybrid in that there is a perpetual moving to and fro between his legal and political functions. That is why the Attorney General must answer politically to Parliament for the manner in which the Crown exercises its powers.

....

It is fundamental to our system of justice that criminal proceedings be conducted in public before an independent and impartial tribunal. *If the court is to review the prosecutor's exercise of his discretion the court becomes a supervising prosecutor. It ceases to be an independent tribunal.*

Quoting from "Prosecutorial Discretion: A Reply to David Vanek" (1987-1988), 30 *Crim L.Q.*

R. v. Power (1994), 89 C.C.C. (3d) 1 (S.C.C.) Tab 24 at p. 15

71. The Attorney General's independence from supervision in the sphere of prosecutorial discretion is grounded in the fundamental principle of the rule of law under the Constitution. This discretion encompasses whether a prosecution should be brought, continued or ceased, and what the prosecution ought to be for.

R. v. Regan, [2002] 1 S.C.R. 297, Tab 25

R. v. O'Connor, [1995] 4 S.C.R. 411, Tab 26

R. v. Power, *supra*, Tab 24 at p. 15

R. v. T. (V.) (1992), 71 C.C.C. (3d) 32 (S.C.C.), Tab 27 at 38-41

Nelles v Ontario, [1989] 2 S.C.R. 170, Tab 28

Krieger v. Law Society (Alberta) (2002), 217 D.L.R. (4th) 513, Tab 29 at para. 46

72. The Supreme Court of Canada has warned of the dangers in interfering with the Attorney General's role in the administration of justice:

If a judge should attempt to review the actions or conduct of the Attorney General- barring flagrant impropriety- he could fall into a field which is not his and interfering with the administrative and accusatorial function of the Attorney General or his officers. That a judge must not do.

R. v. Balderstone, (1983), 8 C.C.C. (3d) 532 as quoted by Justice L'Heureux-Dube in *Power*, Tab 30

73. Ordering the Attorney General to report back to the Court so that the Attorney General's exercise of the prosecution function can be reviewed and supervised, including providing explanations as to why prosecutions may not have been proceeded with, does not accord with the proper role of the Court. The jurisprudence is clear that the Court cannot substitute its own views as to what charges ought to be laid or when they should be laid, establish a timetable for the investigation of offences or supplant prosecutorial discretion with judicial discretion.

R. v. Regan, *supra*, Tab 25

R. v O'Connor, *supra*, Tab 26

R. v. Power, *supra*, Tab 24 at p. 15

R. v. T. (V.), *supra*, Tab 27 at 38-41

Nelles v Ontario, *supra*, Tab 28

Krieger v. Law Society (Alberta), *supra*, Tab 29 at para. 46

74. As a general proposition, these principles apply equally in the context of criminal contempt proceedings. In *McCallen*, the trial judge requested the assistance of the Crown in determining whether a lawyer's failure to attend for a scheduled trial date should attract contempt proceedings. Although the prosecutor subsequently reported to the court that counsel's conduct should not attract contempt proceedings, the trial judge nevertheless left open the possibility of such proceedings, which had the effect of forcing

counsel to be removed from the record. On appeal, this Court held that the Crown's submissions "should have ended [the trial judge's] initiative to consider whether to institute a contempt proceeding". As well, implicit in the judgment of *Hayes Forest Services* is the recognition that once involved in the proceedings, the Attorney General discharges his or her prosecutorial responsibilities in the same manner as any other criminal proceeding. Finally, in *Peel Regional Police*, the court recognized the importance of "ceding" the prosecutorial role to the Crown.

R. v. McCallen, [1999] O.J. No. 202, Tab 31

Hayes Forest Services Ltd. v. Forest Action Network, [2006] B.C.J. No. .672, Tab 32, at para. 53

R. v. Peel Regional Police Service (2000), 149 C.C.C. (3d) 356, Tab 33 at para. 73

75. In any event, the Order ought not have been made on the record before the Court. Criminal contempt proceedings, as important as they are to maintain a court's legitimacy, should nevertheless "be used sparingly, with great restraint and only in the most serious cases when necessary to protect the rule of law". Without minimizing the seriousness of the alleged contumacious conduct, it is submitted that, on the record before the court, it could not be said that the rule of law demanded the court's intervention at this time.

R. v. McCallen, *supra*, Tab 31 at p. 73

Balogh v. St Alban's Crown Court [1975], 1 Q.B. 73, Tab 34 at pp. 85, 87, 90 & 91

76. In particular, unlike in *Poje*, there was no evidence before the court as to the nature of the alleged contumacious conduct. The only information available to the court was by way of submissions by counsel to the effect that the police have taken the matter very seriously, that the situation is fragile, that 53 charges have been laid against 28 individuals, and that these charges will proceed through the justice system in the normal course. In short, the police and the Attorney General were discharging their duties to maintain the rule of law and should have been left to do so free of the constraints imposed by the court.

R. v. Poje, [1953] S.C.J. 216, Tab 35

D. Lack of Due Process Resulting in Errors of Law

77. There are serious issues to be determined on appeal with respect to the process undertaken by the learned judge to make findings of fact.
78. First, the trial judge made the following findings of fact without any affidavit or *viva voce* evidence. The findings appear to have been made based only on the submissions of stakeholders, media reports, and the personal perception of the learned judge on events taking place in and around Caledonia.
- (a) “the law has not been enforced” in Caledonia (Judgment, page 6);
 - (b) “the rule of law is not functioning in Caledonia” (Judgment, page 6);
 - (c) the community of Caledonia is “blockaded” (Judgment, page 7);
 - (d) the people of Caledonia have endured “5 months of occupation” and have seen security [...] replaced by lawlessness” (Judgment, page 17);
 - (e) there is and continues to be a blatant contempt of the court’s lawful order (Judgment, page 8);
 - (f) the Crown entered into negotiations with “protestors” without evidence as to whether the specific negotiators representing Haudenosaunee/Six Nations, although they may be considered “protestors”, are innocent of any contumacious conduct (Judgment, page 15); and
 - (g) the Crown has exercised its discretion to “advance a particular policy” and to “oust the rightful jurisdiction of the court or to defeat the court’s orders” (Judgment, page 11).
79. The findings of fact have significant implications not only for the proceeding itself but also the land claims advanced by the Haudenosaunee/Six Nations, and the numerous civil proceedings that have been commenced against the Crown in relation to the events at Caledonia. It is submitted that these circumstances highlight the importance of making findings based on recognizable evidentiary standards, the importance of the requirement

to afford notice that such findings might be made, and the importance of the requirement to afford an opportunity to anyone who could be affected by such findings to make submissions on the issues.

Supermarches Jean Labrecque Inc. v. Flamand, [1987] 2 S.C.R. 219 , Tab 36 at para 46

Affidavit of Jane Stewart, Motion Record, Tab 4

Affidavit of Ronald Doering, Motion Record, Tab 5

80. Second, the Judgment was issued following mere “status hearings” involving non-parties without imposing a definable process, adhering to the rules of evidence, or advising the parties that adverse findings of fact may be made against them.

Affidavit of James Kendik, Supplementary Motion Record, Tab 1

81. Third, the proceedings were commenced without appointing counsel to represent the legal interests of Haudenosaunee/Six Nations.

Affidavit of James Kendik, Supplementary Motion Record, Tab 1

82. Finally, the Court appears to retain jurisdiction to continue to hear issues relating to the permanent injunction over Crown lands and the negotiations. The Judgment clearly contemplates that the Henco injunction will be dissolved once the Court’s Orders for criminal contempt have been addressed. Further, the negotiations are permitted to resume when the Court is satisfied that the blockades are lifted and the occupation is ended. The Court also sees a role for itself in monitoring the progress of the prosecutions. Ontario takes the position that the Court is *functus* and that no further hearings can be scheduled in the Superior Court.

R. v. Lessard (1976), 30 C.C.C. (2d) 70 (Ont. C.A.), Tab 37

Dell Chemical and Marketing Ltd. v. Aquasol International Inc. [2001] A.J. No. 1548 (Q.B.), Tab 38 at p 4 paras 16-17, *aff’d* without discussion on this point [2003] A.J. No.1157 (C.A.)

Anchem Products Inc. v. British Columbia (Worker’s Compensation Board) (1993), 102 D.L.R. (4th), Tab 39 at 118 (S.C.C.)

Caraquet (Town) v. New Brunswick (Minister of Health and Wellness) (2005), 294 N.B.R. (2d) 202; 765A.P.R.202), Tab 40

83. The issues identified above concerning the sufficiency of the record before the Court and the apparent jurisdictional and legal errors made involve complex issues of public law, constitutional law, separation of powers, and prosecutorial discretion. It is clear that the vast majority of the issues raised are not given due consideration in the Reasons for Judgment. Ontario therefore submits that the issues to be determined on appeal clearly meet or exceed the standard of a serious issue to be tried.

1B: The Order Results in Irreparable Harm

84. Ontario respectfully submits that it will suffer irreparable harm if a stay is not issued pending a determination of the appeal.
85. In cases where a public authority is the applicant in a motion for a stay, the issue of public interest will be considered at the second stage of the test, when the issue of irreparable harm to the interests of the government are considered, and will be considered again at the third stage of the test, when harm to the applicant is balanced with harm to the respondent including the public interest.

RJR, supra, Tab 2 at para 81

86. The Supreme Court of Canada in *RJR MacDonald* issued specific guidance in applying the three-part test in circumstances where a public authority is a party to the application:

Further, in the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting and protecting the public interest and upon some indication that the impugned legislation, regulation or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the

court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

A Court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. The Charter does not give the courts a licence to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights. (emphasis added)

RJR, supra, Tab 2 at para 71 - 72

87. *RJR MacDonald* adopts the reasoning of the Federal Court of Appeal in overturning a trial judge's issuance of an injunction restraining Fisheries Officers from implementing a fishing plan adopted under the *Fisheries Act*:

When a public authority is prevented from exercising its statutory powers, it can be said, in a case like the present one, that the public interest, of which that authority is guardian, suffers irreparable harm. (emphasis added)

Attorney General of Canada v. Fishing Vessel Owners' Association of B.C., [1985] 1 F.C. 79, Tab 41 at 795

88. The public duty to make difficult decisions on how best to address the conflict in Caledonia rests with the Crown. In these circumstances, Ontario respectfully submits that in accordance with the decision in *RJR*, Ontario benefits from a presumption of irreparable harm in instances in which the Order prevents the Crown from exercising its statutory powers.

Affidavit of Jane Stewart, Motion Record, Tab 4

Affidavit of Ronald Doering, Motion Record, Tab 5

Ministry of the Attorney General Act

RJR, supra, Tab 2 at 21

Attorney General of Canada v. Fishing Vessel Owners' Association of B.C., supra, Tab 41

Harper v. Canada (Attorney General), [2000] 2 S.C.R 764, Tab 42 at paras 9-11
OPSEU, supra, Tab 1 at para 35 37

89. In addition to benefiting from a presumption of harm, Ontario is able to demonstrate actual harm to the public interest on the basis of the record before the Court.

A Irreparable Harm Resulting from Cessation of Negotiations and the Chill on Negotiations

90. On four separate occasions in the decision, Mr. Justice Marshall recognises the importance of the negotiations:

- The Court is alert to the importance of those negotiations and alert to the importance of those negotiations to the protestors. (Page 7)
- The negotiations are important – unquestionably, but the Rule of Law is pre-eminent. (Page 8)
- There is considerable public interest that the negotiations be encouraged to a rapid and satisfactory conclusion (page 16)
- The negotiations are important to the native people and everyone else and I appreciate that reality, (page 19)

Reasons for Judgment, Motion Record, Tab 2

91. However, the Order requires, a cessation in negotiations and thereby impedes their progress toward resolution. Even if the Order is viewed as not overtly enjoining negotiations or is otherwise uncertain the combination of His Honour's conclusions leaves a cloud over and imposes a chill on the whole process to the detriment of any resolution.

i) Impedes Progress

92. With the release of Justice Marshall's Judgment of August 8, 2006, the negotiations that all parties have acknowledged as unique and historic have effectively come to a complete standstill.

Affidavit of Ronald Doering, Motion Record, Tab 5, at para 14

93. Meetings among the Provincial Crown, the Federal Crown and the Haudenosaunee/Six Nations may result in a finding of contempt of Court, or be perceived as defiance of declarations of the Court by elected officials. In either event, it is untenable for the negotiating parties to meet.

Affidavit of Ronald Doering, Motion Record, Tab 5, at para 16

94. Therefore, the negotiations that all parties have acknowledged as unique and historic have effectively come to a complete standstill. Meetings of the Side Table were scheduled to take place between August 8 and 23, 2006 but were stopped. The Main Table was to resume on August 24, 2006 but this is now suspended.

Affidavit of Ronald Doering, Motion Record, Tab 5, at para 14

Affidavit of Jane Stewart, Motion Record, Tab 4, at para 27

95. There is a risk that it will be difficult, if not impossible, to regain momentum in negotiations if the parties remain inhibited from attending such meetings.

Affidavit of Jane Stewart, Motion Record, Tab 4, at para 27

Affidavit of Ronald Doering, Motion Record, Tab 5, at para 17-18

96. Justice Marshall: 1) finds that he has jurisdiction to Order a cessation in negotiations; 2) directs that negotiations should cease; 3) issues a reminder about the contempt provisions in the *Criminal Code*; and 4) orders that he shall remain seized of the matter. In that context, regardless of the terms of the Order, negotiations cannot continue.

ii) Peaceful Dispute Resolution in Jeopardy

97. The evidence before the Court is that derailing the negotiations creates public safety risks and deprives the Crown of the only means of resolving the conflict without coercive force:

- The progress made to date through negotiations has had a stabilising effect on the fragile situation in Caledonia;

Affidavit of Jane Stewart, Motion Record, Tab 4

Affidavit of Ronald Doering, Motion Record, Tab 5

- A peaceful resolution of the occupation at Douglas Creek Estates is best achieved through negotiations;

Affidavit of Jane Stewart, Motion Record, Tab 4 at paras 32 and 33.

Affidavit of Superintendent of John Cain, Motion Record, Tab 7

Affidavit of Ronald Doering, Motion Record, Tab 5

- The breadth of the Order is such that it has effectively restrained the avenues of communication aimed at finding a peaceful resolution with the leadership and representatives of the Haudenosaunee/Six Nations who are positioned to engage the protestors on Douglas Creek Estates;

Affidavit of Jane Stewart, Motion Record, Tab 4 at para 30

- The decision to suspend negotiations was immediately met with heated protests and the re-erection of a road blockade;

Affidavit of Superintendent of John Cain, Motion Record, Tab 7

- The process of peaceful dispute resolution is now in jeopardy;

Affidavit of Ronald Doering, Motion Record, Tab 5 at para 15

- To date, the availability of peaceful negotiation and engaging in continuing dialogue with the protestors and other members of the community have enabled the OPP, to the extent possible, to minimize the quantity and severity of injuries. The protests at Douglas Creek Estate, while lengthy, have resulted in no serious injuries or deaths; and

Affidavit of Superintendent John Cain, Motion Record, Tab 7, para 59.

- It is in the public interest and in the interest of public safety to continue with the negotiations that have been underway.

Affidavit of Jane Stewart, Motion Record, Tab 4 at paras 32 and 33.

98. Courts have found that if even a potential risk to public safety is demonstrated on the record, irreparable harm has been made out. In this case, the public safety risks are not speculative and prospective. The evidence before the Court indicates that ordering Ordering an immediate cessation of negotiations has already brought about instability and was met with heated protests and the re-erection of a road blockade.

Affidavit of Jane Stewart Motion Record, Tab 4

Affidavit of Superintendent John Cain, Motion Record, Tab 7

Ottawa (City) v. Ottawa (City) (Chief Building Official), (2003) 67 O.R. (3d) 490, Tab 43

OPG v Kolumpar [2005] O.J. No. 3157, Tab 44 at para 31

iii) Protraction of Occupation of Douglas Creek Estates

99. The Order is unlikely to positively contribute to a resolution of the continuing occupation of the Douglas Creek Estates property.

Affidavit of Ronald Doering, Motion Record, Tab 5 at para 17

Affidavit of Jane Stewart, Motion Record, Tab 4

100. As demonstrated by the events of April 20, 2006, arresting and removing protestors from the disputed site will likely lead to a reoccupation of the site and new blockades of highway and rail lines.

Affidavit of Superintendent John Cain, Motion Record, Tab 7 at para 39

iv) Interferes with Proper Working of Government

101. This order interferes with the ability of either government to address the underlying concerns and issues that led to the occupation and to come to a resolution of longstanding aboriginal rights claims.

Affidavit of Jane Stewart, Motion Record, Tab 4 at para 30

102. The cessation of negotiations also impacts upon Ontario Provincial Police operations.

Affidavit of Superintendent John Cain, Motion Record, Tab 7

B. Irreparable Harm Caused by Injunction Over Crown Lands

103. The Crown has made a decision, within its statutory authority, to purchase the lands from Henco and has made a decision not to seek an injunction. These are decisions that were made pursuant to statutory authority and made in furtherance of the public interest.

Affidavit of Doug Carr, Motion Record, Tab 6 at paras 3, 4 and 5

104. The imposition of an injunction over Crown lands frustrates the intent of the decisions made by the Provincial Crown to acquire the lands and not seek an injunction over the land. In these circumstances, the assumption that irreparable harm to the public interest will be suffered as a result of the restraint on the exercise of statutory powers is triggered.

Affidavit of Doug Carr, Motion Record, Tab 6 at para 6

RJR, supra, Tab 2

Attorney General of Canada v. Fishing Vessel Owners' Association of B.C, supra, Tab 41

105. Furthermore, the interests taken into account in deciding not to seek a permanent injunction included the concern that an injunction would impede the negotiations of the Main Table and extend the occupation. Interference with the achievement of these objectives, made in the public interest, constitutes irreparable harm.

Affidavit of Doug Carr, Motion Record, Tab 6 at para 4

RJR, supra, Tab 2

106. Finally, if the permanent injunction against Crown lands is not immediately stayed, there is a risk that persons will be charged with contempt of the injunction in circumstances where there is a palpable risk that the injunction will not withstand appeal. This risk to fundamental rights and freedoms meets the threshold for irreparable harm.
107. As demonstrated by the events of April 20, 2006, arresting and removing protestors from the disputed site would likely lead to a reoccupation of the site and new blockades of highway and rail lines.

Affidavit of Superintendent John Cain, Motion Record, Tab 7 at para 39

C. Irreparable Harm Caused by Supervision of Prosecutions

108. It is clear that the Order that the Court supervise the prosecutions of the contempt orders is intended to provide a mechanism by which to assure the Court and the public that the exercise of prosecutorial discretion is being made with “integrity and diligence”.

Reasons for Judgment, Motion Record, Tab 2

109. Interference with the discretion of Crown prosecutors constitutes irreparable harm. If, before an appeal can be heard, a Crown prosecutor is required to account in open Court

for the reasons why she did or did not exercise discretion to prosecute a case, and the Court of Appeal subsequently determines that the Order requiring ongoing reporting is unlawful, irreparable harm will have been suffered. The potential damage to the administration of justice, and the possibility that ongoing investigations could be compromised or that Crown work product might be disclosed has already been noted.

Suresh v. Canada (Minister of Citizenship and Immigration) (1999), 176 D.L.R. (4th) 296 (Fed. C.A. Chambers), Tab 45 at 35-307

Gaudet v. Ontario Securities Commission (1990), 38 O.A.C. 216 (Div. Ct.), Tab 46

Re Hayles and Sproule (1980), 29 O.R. (2d) 500 (Ont. Div. Ct.), Tab 47

110. The separation of the executive, legislative and judicial branches of governance is a long-standing convention. The Supreme Court of Canada has found that it is fundamental to the working of government as a whole that all of these parts play their proper role. It is equally fundamental that no one of them overstep its bounds and that each show proper deference for the legitimate sphere of activity of the other. It is respectfully submitted that the supervision of Crown discretion in open Court offends these principles.

Secession Reference, supra, Tab 4

Doucet-Boudreau, supra, Tab 3 at para 33

New Brunswick Broadcasting Co. v Nova Scotia (Speaker of the House of Assembly) [1993], 1 S.C.R. 319, Tab 48

D. Irreparable Harm Due to Procedural Deficiencies

111. It is submitted that the procedural deficiencies manifest on the record offend due process and impact on *Charter*-protected rights.
112. In the absence of a stay, given Justice Marshall's conclusion that he remains seized of the proceedings, even though his decision is being appealed, he will remain in a position to have further hearings that in turn will continue to feed into the overall instability. By the time the appeal is heard, the destabilising effects of such repeated hearings may make a successful outcome on the appeal a little too late.

113. Ontario therefore respectfully submits that clear and demonstrable irreparable harm will be suffered if the Order is not stayed.

1C: THE BALANCE OF CONVENIENCE AND PUBLIC INTEREST FAVOUR A STAY

114. Ontario submits that the balance of convenience favours a stay of the Judgment.

115. In determining the balance of convenience in a given case, the Court must undertake an assessment as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. In a case such as this, the public interest must be weighed when determining the balance of convenience and must include both the concerns of society generally and the particular interests of identifiable groups.

RJR, supra, Tab 2

116. In cases where a public authority is the applicant in a motion for a stay, the issue of public interest will be considered at the second stage of the test, when the issue of irreparable harm to the interests of the government are considered, and will be considered again at the third stage of the test, when harm to the applicant is balanced with harm to the respondent, including the public interest. Therefore, on the issue of public interest, Ontario reiterates the submissions contained at Part 2 of the test above.

RJR, supra, Tab 2

117. In addition, the public interest to be considered when weighing the balance of convenience includes the public interest in the legitimacy of public institutions:

Such relief should not be granted without a consideration of the public interest, including the public interest in the legitimacy of public institutions. The public interest includes, in my view, a high level of respect for the decisions of the legislative and executive branches of government; the jurisdiction of the courts to enjoin government action which may or may not, in the end, be found to be unconstitutional must recognise the Court's own limited institutional competence and the

public interest in having publicly elected bodies and officials enacting legislation and determining public policy.

Snuneymuxw First Nation v. British Columbia, [2004] B.C.J. No. 262, Tab 49 at para 71

118. The reasons for Judgment raise significant concerns about the preservation and restoration of the rule of law. However, it is submitted that the approach to the rule of law as reflected in the Judgment is overly narrow and does not take into consideration the true breadth of the meaning of the rule of law. It also bears noting that many institutions working together are required to uphold the rule of law. The responsibility is not borne by the Courts alone, and the office of the Attorney General, the legislature, the executive, Crown Attorneys and the police all have legitimate roles to play. Their tasks are to ensure that law and order prevail, including that law and order are maintained within the context of legal and procedural safeguards, with due consideration for fundamental rights. Indeed, the second principle comprising the rule of law is that the rule of law requires the creation and maintenance of a system of positive laws and normative standards.

See Judgment on Appeal at pp. 2,3,6,7,8,14,18,19,20.

Reference re Secession of Quebec, *supra*, Tab 4 at para 71

P.W. Hogg and C.F. Zwibel “The Rule of Law in the Supreme Court of Canada” (2005), 55 *U.T.L.J.* 715, at 717-718

R. v. Beare, *supra*, Tab 18 at 76

119. Due process and institutional competencies cannot be sacrificed in the name of the rule of law; they form part and parcel of what the rule of law encompasses. As they are compromised, so to is the rule of law. In considering the balance of convenience, concern for the maintenance of the rule of law would militate in favour of staying decisions rendered further to faulty processes, or without due regard to procedural safeguards.

Reference re Secession of Quebec, [1998], *supra*, Tab 4, at para 71 and 95

P.W. Hogg and C.F. Zwibel “The Rule of Law in the Supreme Court of Canada” (2005), 55 *U.T.L.J.* 715, at 717-718

R. v. Beare (1988), *supra*, Tab 18 at 76

R. v Gladue, [1999] 1 S.C.R. 688, Tab 50

120. In order for law and order to exist, democratically elected officials must be able to carry out the important public policy-making decisions with which they are charged. In this case, those decision-makers have determined that a combination of coercive and non-coercive measures are required to maintain the rule of law at this time. It has never been the position of Ontario that the negotiations are a substitute for individual responsibility for criminal acts. Instead, it is Ontario's position that criminal activity has been and will continue to be investigated and prosecuted.

Affidavit of Jane Stewart, Motion Record, Tab 4

Affidavit of Ronald Doering, Motion Record, Tab 5

Affidavit of Superintendent John Cain, Motion Record, Tab 7

121. Indeed, in unanimous decision, the Supreme Court of Canada in the *Secession Reference* held that the rule of law is an unwritten constitutional principle and emphasized that negotiation can be an effective means of supporting the rule of law:

Refusal of a party to conduct negotiations in a manner consistent with constitutional principles and values would seriously put at risk the legitimacy of that party's assertion of its rights, and perhaps the negotiation process as a whole. *Those who quite legitimately insist upon the importance of upholding the rule of law cannot at the same time be oblivious to the need to act in conformity with constitutional principles and values, and so do their part to contribute to the maintenance and promotion of an environment in which the rule of law may flourish.*

Reference re Secession of Quebec, [1998], *supra*, Tab 4 at para. 95.

122. It is the executive that has the mandate, expertise and resources to respond to the complex and fragile situation in Caledonia. The Court has a role to play in enforcing its orders, but it cannot oust the decision-making role of the executive by enjoining it in proceedings to which it is not a party in an effort to do so.

Doucet Boudreau, *supra*, Tab 3

Affidavit of Superintendent John Cain, Motion Record, Tab 7

Affidavit of Jane Stewart, Motion Record, Tab 4

Affidavit of Ronald Doering, Motion Record, Tab 5

123. Further, in determining the balance of convenience, the Court will consider public safety and some Courts have gone so far as to determine that public safety is a paramount consideration. In this case, the executive has determined that public safety is best preserved through negotiations and it is the executive that has the mandate and expertise to determine such matters. The evidence before the Court indicates that the negotiations have a stabilising effect on the fragile circumstances in Caledonia and that a cessation of the talks may very well result in preventable violence. As a result, the balance of convenience favours a resumption of the talks.

Ontario (Alcohol and Gaming Commission) v. Metro Bar Inc. , [2006] O.J. No. 2091, Tab 51 at para 6

Affidavit of Jane Stewart, Motion Record, Tab 4

Affidavit of Ronald Doering, Motion Record, Tab 5

Affidavit of Superintendent John Cain, Motion Record, Tab 7

124. The public interest also favours staying the Order that Justice Marshall remains seized of the proceedings. The evidence is that ongoing hearings before Justice Marshall are associated with increased tensions. The balance of convenience favours an avoidance of any further hearings on the judge's own motion before the issues on appeal have been determined.

Affidavit of Jane Stewart, Motion Record, Tab 4

Affidavit of Ronald Doering, Motion Record, Tab 5

Affidavit of Superintendent John Cain, Motion Record, Tab 7

125. The balance of convenience in this case favours allowing the contempt proceedings to proceed through the criminal justice system in the normal course. It is anticipated that any reporting hearing will be accompanied by the same increase in tensions in Caledonia as have been experienced at the previous hearings before Justice Marshall. Furthermore, the rule of law will not be compromised if the criminal justice system follows its normal

course, whereas there are substantial risks associated with the Court's supervision of prosecutorial discretion.

Affidavit of Jane Stewart, Motion Record, Tab 4

Affidavit of Superintendent John Cain, Motion Record, Tab 7

126. It is therefore respectfully submitted that the balance of convenience favours the granting of a stay to permit the executive to fulfill its mandate within a complex and fragile set of circumstances.

ISSUE 2: Should an Expedited Appeal be Granted?

127. Even if a stay is granted, it is submitted that an expedited hearing of the appeal is essential. The stay will result in immediate resumption of negotiations and will, in part, restore the ability of the Province to make executive decisions about the circumstances in Caledonia.
128. However, the lower Court's refusal to dissolve the injunction over the lands prejudices the Province's ability to exercise its rights over its own property. Of significance, protestors on the lands will remain subject to civil and criminal contempt proceedings arising out of Orders that are in serious doubt.
129. There is also significant uncertainty as to the proceedings over which the Attorney General is to take carriage. The learned Judge did not give any indication as to whether the impugned conduct: 1) relates to charges already laid under the Henco Injunction Orders; 2) applies to protestors who have already been found in contempt by the Court; 3) applies to protestors who are currently occupying the Douglas Creek; 4) applies to future protests on Douglas Creek, or 5) some or all of the above.
130. The attendant urgency of the overall situation in Caledonia is such that there is no room for uncertainty and, in fact, some direction from the Court of Appeal may contribute to an overall resolution and reconciliation.

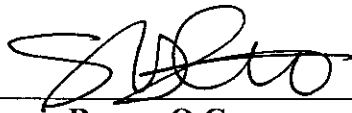
131. It is respectfully submitted that these factors meet the requirements for an expedited appeal.

ORDER REQUESTED

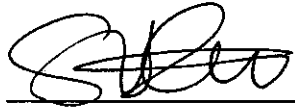
132. The Attorney General respectfully requests that the Order of the learned trial judge be stayed pending a determination of the issues on appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED


Dated: August 18, 2006

per 

Dennis Brown Q.C.

per 

Malliha Wilson



Sandra Di Ciano