

Court of Appeal File No. _____

Court File No.: 48/06

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

HENCO INDUSTRIES LIMITED

Applicant

- and -

HAUDENOSAUNEE SIX NATIONS CONFEDERACY COUNCIL,
JANIE 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

B E T W E E N:

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

Respondents

NOTICE OF APPEAL

THE ATTORNEY GENERAL OF ONTARIO APPEALS to the Court of Appeal from the
order of the Honourable Mr. Justice Marshall made in these proceedings August 8, 2006.

THE APPELLANT ASKS that the order be set aside.

THE GROUNDS OF APPEAL are as follows:

- A. The learned judge erred in finding that the court has jurisdiction to order a suspension of negotiations and exceeded his jurisdiction in ordering that negotiations should cease
- B. The learned judge exceeded his jurisdiction or otherwise erred in law by binding Her Majesty the Queen in right of Ontario (the “Provincial Crown”) to the orders obtained by and for the benefit of Henco Industries Limited
- C. The learned judge exceeded his jurisdiction or otherwise erred in law by requiring the Attorney General of Ontario to report back to the court so that the learned judge can supervise the exercise of the prosecution function. By doing so the learned judge compromised his judicial independence.
- D. The learned judge erred in issuing the order in the context of procedural deficiencies

A. The learned judge erred in finding that the court has jurisdiction to order a suspension of negotiations and exceeded his jurisdiction in ordering that negotiations should cease

- 1. The learned judge erred in finding or concluding that the court has jurisdiction to order a suspension or cessation of negotiations regarding a land claims dispute between the Provincial Crown, the Attorney General of Canada, being the representative of Her Majesty the Queen in right of Canada (the “Federal Crown”), and aboriginal peoples.
- 2. The learned judge exceeded his jurisdiction in ordering that these negotiations should cease, thereby enjoining the Provincial and Federal Crowns from conducting land claims or other negotiations with the Six Nations, including the Haudenosaunee Six Nations Confederacy Council, and related parties (hereinafter collectively referred to as the “Six Nations”), until specific, or any, conditions imposed by the court are met.
- 3. In enjoining the Provincial and Federal Crowns from conducting negotiations the learned judge exceeded his jurisdiction and that of the court by:
 - a) granting injunctive relief against the Provincial Crown contrary to the *Proceedings Against the Crown Act* R.S.O. 1990, c. P.27, and against the Federal Crown contrary to the *Crown Liability and Proceedings Act* R.S., 1985. c. C-50;

- b) overstepping the institutional division of powers between the judicial branch of government and the executive branch of government;
 - c) unconstitutionally impairing and otherwise intruding into the prerogative of the Provincial and Federal Crown to engage in the negotiation of treaties and similar arrangements with aboriginal people;
4. The learned judge erred in enjoining negotiations that were contributing indirectly to the maintenance of the rule of law through the resolution of the underlying Six Nations land claims and to the resolution of other issues that have contributed to the events at Caledonia by:
- a) depriving the Provincial Crown of a peaceful means of resolving the Six Nations occupation of the Douglas Creek Estates lands and of a peaceful means of maintaining the rule of law in Caledonia and on the Douglas Creek Estates lands;
 - b) misinterpreting the rule of law and its application, in that the learned judge failed to consider that the rule of law includes all aspects of the law: common law, statute law, the prosecutorial and operational discretion of the Provincial Crown, the Attorney General of Ontario, and the Ontario Provincial Police, and constitutional law, including the institutional division of powers between the judicial, executive and legislative branches of government, and the *sui generis* relationship between the Crown and aboriginal peoples together with the aboriginal and treaty rights recognized and affirmed by section 35 of the *Constitution Act*, 1982;

B. The learned judge exceeded his jurisdiction or otherwise erred in law by binding the Provincial Crown to the orders obtained by and for the benefit of Henco Industries Limited

1. The learned judge erred in holding that the order of Justice Matheson dated March 3, 2006 and the order of Justice Marshall dated March 9, 2006 (hereinafter collectively referred to as the “Injunction Orders”), which were granted at the request of Henco Industries Limited (and

for its benefit), “binds” subsequent owners of the Douglas Creek Estates lands, including the Provincial Crown, because:

- a) the Injunction Orders were made *in personam* and do not, therefore, run with the land irrespective of the land owner’s wishes;
- b) the Injunction Orders unjustifiably interfere with the use and enjoyment of the Douglas Creek Estates lands by subsequent owners;
- c) the court is without jurisdiction to grant injunctions against the Provincial Crown as a result of the operation of section 14 of the *Proceedings Against the Crown Act* R.S.O. 1990, c. P.27; and
- d) there is no authority for refusing to dissolve the Injunction Orders until the contempt orders dated March 17 and March 28, 2006 (hereinafter the “Contempt Orders”) are finally disposed of, and no authority for applying the Contempt Orders after the transfer of legal title, subject to the outstanding warrants of committal.

C. The learned judge exceeded his jurisdiction or otherwise erred in law by requiring the Attorney General of Ontario to report back to the court so that the learned judge can supervise the exercise of the prosecution function. By doing so the learned judge compromised his judicial independence.

1. The learned judge erred in reserving for the court a role in overseeing and supervising the Attorney General of Ontario’s carriage and prosecution, if any, of alleged contemnors by requiring the Attorney General of Ontario to report to the court on “the progress or lack thereof in regard to the criminal contempt” thereby improperly limiting and otherwise intruding into the prosecutorial discretion of the Attorney General of Ontario and compromising his judicial independence.

D. The learned judge erred in issuing the order in the context of procedural deficiencies

1. The learned judge erred by finding, without evidence, the following “facts”:
 - a) that “the law has not been enforced” in Caledonia;
 - b) that “the rule of law is not functioning in Caledonia”;
 - c) that the community of Caledonia is currently “blockaded”;
 - d) that the people of Caledonia have endured “5 months of occupation” and “have seen security [...] replaced by lawlessness”;
 - e) that the people who live within the Grand River valley are *bona fide* purchasers for value without notice;
 - f) that there is and continues to be a blatant contempt of the court’s lawful order;
 - g) that, in effect, all members of the Six Nations who are “protestors”, *per se*, have engaged in a blatant contempt of court amounting to criminal conduct;
 - h) that the Provincial and Federal Crown entered into negotiations with “protestors” without evidence as to whether the specific negotiators representing Six Nations, although they may be considered “protestors”, are innocent of any contumacious conduct; and
 - i) that 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”.
2. The learned judge erred in making the findings of fact referred to in paragraph D.1, above, without any affidavit or *viva voce* evidence.

3. The learned judge erred in issuing the order following mere “status hearings” involving non-parties without imposing a definable process, without adhering to the rules of evidence, or advising the parties that adverse findings of fact may be made against them 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.
4. The learned judge erred in concluding that he had jurisdiction to directly grant remedies against or bind non-parties to the proceedings, including the Provincial and Federal Crowns, to injunctive or other orders.
5. The learned judge erred in commencing and continuing these proceedings, *ex mero motu*, without appointing counsel to represent the interests of Six Nations or, otherwise, considering the perspectives, defences, and submissions of Six Nations.
6. The learned judge exceeded his jurisdiction and erred by granting a permanent injunction as requested by Henco Industries Limited on March 9, 2006.
7. The learned judge erred in directing the Attorney General of Ontario to take carriage of criminal contempt proceedings against alleged contemnors without clarifying whether the impugned conduct requiring prosecution relates to past breaches of the Injunction Orders, protestors who fall within the parameters of the Contempt Orders, the current occupation of the Douglas Creek Estates lands, or future contumacious conduct.

THE BASIS OF THE APPELLATE COURT’S JURISDICTION IS:

1. The order is a final order within the meaning of 6(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, Chap. C.43.

2. Rule 61 of the *Rules of Civil Procedure*.

August 17, 2006

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Respondents

**-and-
Applicant**

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CAYUGA, ONONDAGA, ONEIDA, TUSCARORA NATIONS, et al.**
Respondents

**-and-
Applicant**
**RAILINK CANADA LTD. carrying on business as
the SOUTHERN ONTARIO RAILWAY**
Plaintiff

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Cayuga

NOTICE OF APPEAL

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