

**ONTARIO
SUPERIOR COURT OF JUSTICE**

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

Defendants

NOTICE OF MOTION

THE PLAINTIFF, RaiLink Canada Ltd. carrying on business as Southern Ontario Railway (hereinafter the "Railway") will make a motion to a Judge on Thursday, May 4, 2006 at 2:00 p.m. or as soon after that time as the motion can be heard, at the courthouse at Cayuga, 55 Munsee Street, Cayuga, Ontario, or as the Court may direct.

PROPOSED METHOD OF HEARING: Motion is to be heard orally.

THE MOTION is for:

1. An Order requiring the defendants and any persons having notice of this Order to forthwith cause removal of any and all obstructions placed or created or imposed by them or by persons under their direction influence or control in relation to the plaintiff

Railway's otherwise full and safe use of its railway right of way lands, premises, facilities and equipment on its Hagersville Subdivision in or about the Town of Caledonia, County of Haldimand, or in or adjacent to the lands of the Six Nations.;

2. An Order issuing an interim injunction against the defendants and all others with notice thereof, restraining and enjoining them from directly or indirectly, by any means:

(a) Obstructing, delaying or otherwise interfering with or threatening to interfere with any of the plaintiff Railway's operations along the railway right of way described by the Railway as the Hagersville Subdivision, and more particularly any rail works, repair, re-construction, testing, inspection, patrol and all railway operations along that portion of the railway line works and right of way in or about the Town of Caledonia in the County of Haldimand or through, adjacent to, or in the vicinity of the lands of the defendants described as the Six Nations of the Grand River Band of Indians and Haudenosaunee Confederacy (hereinafter together referred to as the "Six Nations");

(b) Making unauthorized entry upon the plaintiff's railway right of way, and more particularly in or about the said railway lands and premises in or about the Town of Caledonia;

(c) Physically preventing, impeding, restricting or in any way physically interfering with, or counselling others to impede, restrict or in any way physically interfere with, the plaintiffs carrying on of its railway business and associated repair, construction or reconstruction, inspection, patrol and operations, and further in particular any interference with the plaintiff's right to operate its trains

safely on and over the existing line of railway and associated line works and structures known as the Hagersville Subdivision;

(d) Physically preventing, impeding, restricting or in any way physically interfering with, or counselling others to prevent, impede, restrict or any way physically interfere with, the removal of any objects or materials from the subject railway line and right of way (including, without restriction, any materials in the nature of debris or remains associated with the former overhead Stirling Street bridge at the Town of Caledonia and other materials at or about mile 17.72 of the plaintiff's Hagersville Subdivision, accumulated materials or barricade at or about mile 17.1 of the plaintiff's Hagersville Subdivision, or other obstructions to safe railway movement);

(e) Endangering or in any way counselling, encouraging, or failing where possible to issue directions to others under their direct influence or control in relation to any actions endangering safe railway operations and related community safety;

(f) Threatening or intimidating the plaintiff's employees, servants, contractors, agents or other persons having business with the plaintiff, whether through obstruction, gesture, word or otherwise;

(g) Physically interfering with or counselling others to physically interfere with the performance by the plaintiffs of its contractual relations with its employees and contractors and with other persons having lawful business with the plaintiff railway;

(h) Physically obstructing or otherwise impeding or imperilling, or counselling others to physically obstruct or impede or imperil, the safe movement or operation of the plaintiff's trains on the subject Hagersville Subdivision line of railway or anything reasonably connected with such railway operations; and

(i) Creating a nuisance, whether by physically obstructing the plaintiff from carrying on its railway operations or otherwise.

3. An Order requiring that each of the defendants, or in the alternative the defendants described jointly for purposes of this matter as the Six Nations, forthwith take such steps to communicate the terms of this Order by such internet posting, physical posting at the site, distribution and other communication as may be available to them, so as to promote the objects of this Order of the safe and orderly restoration and resumption of the plaintiff's lawful rail operations through, in or about the Town of Caledonia and in or about the lands of the Six Nations;

4. An Order directing the Sheriff of the County of Haldimand to do all things reasonably able to be done, with such force and such assistance as is required in the circumstances, to prevent or stop breaches of this Order and to enable it to be carried out, including removal of persons, objects and materials or vehicles as necessary and, for this purpose, this Court Orders that there shall be made available to the Sheriff police officers from the Six Nations Police of the Six Nations of the Grand River Band of Indians and from the Ontario Provincial Police for the Sheriff's accompaniment and assistance to enforce the Order;

5. An Order that any police service or peace officer be and hereby is authorized to remove, and if necessary to arrest and remove, any person who has knowledge of this Order and who the police service or peace officer has reasonable and probable grounds to believe is contravening or has contravened the provisions of this Order, or has contravened or is contravening the trespass provisions of the *Railway Safety Act* as to unauthorized entry upon or interference with line works of railway, and for greater certainty, such a police service officer or peace officer retains her or his discretion to decide whether to arrest or remove any person pursuant to this Order;

6. An Order that the terms of this Order shall remain in force, notwithstanding that this Order may have been granted without notice to the defendants or any of them, until varied or discharged by a further Order of the Court;

7. An Order that the defendant and anyone with notice of this Order may apply to the Court at any time to vary or discharge this Order or so much of it as affects such person, on grounds to be fully set out, but anyone wishing to do so shall provide the plaintiff's solicitors with at least 24 hours notice thereof, and no such motion shall in any way excuse that person or entity from compliance with the terms of this Order;

8. An Order dispensing with the requirement of the undertaking that may otherwise be required under Rule 40.03 of the *Rules of Civil Procedure* of this Court;

9. An Order for the moving party's costs of this proceeding, to be fixed in the discretion of the Judge hearing this matter, or in the alternative reserved to the trial Judge or until further Order of the Court;

10. An Order for leave to examine witnesses and to prevent photographic or xerographic evidence at the hearing of the motion;
11. An Order abridging the time for any service and filing of this Notice of Motion and supporting materials;
12. An Order permitting and validating "nunc pro tunc" substitution of service on the defendants by electronic (email), facsimile and/or personal abridged service of this motion and supporting materials on counsel for the Six Nations of the Grand River Band of Indians, Paul Williams and Kathleen Lickers, or otherwise as this Honourable Court may consider just and convenient; and
13. Such further and other relief as to this Honourable Court may seem just.

THE GROUNDS FOR THIS MOTION ARE:

1. Rule 3.02 of the *Rules of Civil Procedure* (respecting abridgement of the time for service and filing of this Notice of Motion);
2. Section 101 of the *Courts of Justice Act*, and Rule 40 of the *Rules of Civil Procedure* (regarding the granting of interlocutory injunctions);
3. It is just and convenient that the requested injunction relief be granted;
4. There is a serious issue to tried;
5. The plaintiff Railway is suffering and will continue to suffer irreparable harm from the actions of the defendants or of any of them, or of those persons unknown engaged in the conduct herein described;

6. The balance of convenience favours granting the relief claimed;

7. The plaintiff, RaiLink Canada Inc. carrying on business as the Southern Ontario Railway, (the "Southern Ontario Railway" or the "Railway"), owns and operates a "shortline" rail service in Southern Ontario, with two principal sets of related operations, one in and about Hamilton, Ontario, and the other, the subject operation, principally connecting Brantford and Nanticoke, Ontario over a line of railway known by the railway as the Hagersville Subdivision, including in particular that portion of the Hagersville Subdivision passing adjacent to or in the vicinity of districts 5 and 6 of the electoral districts of the Six Nations of the Grand River Band of Indians through or in the vicinity of the Town of Caledonia south of the Grand River, as well as a further portion of the Hagersville Subdivision passing through the 4th district of the electoral districts of the Six Nations of the Grand River Band of Indians, in or about the vicinity of that portion of the Six Nations lands north of the Grand River and north of Ohsweken, Six Nations.

8. From or about February 28, 2006 Six Nations people and supporters have occupied lands in or about the Town of Caledonia including premises being developed for residential housing by Henco Industries Ltd., in an area described as the Douglas Creek Estates (herein the "Douglas Creek Estates lands"), saying that they would stay until jurisdiction and title over the lands are restored to the Haudenosaunee Confederacy, a traditional Confederacy of Six Nations, the Mohawk, Cayuga, Oneida, Onondaga, Seneca and Tuscarora Nations.

9. On March 3, 2006 Six Nations people set up camp on lands said to form part of the original 1794 Haldimand Tract granted to the Six Nations, at the entrance to the said Douglas Creek Estates lands.

10. Notwithstanding injunction Orders granted in favour of Henco Industries Ltd. in March 2006, those occupying the development site did not cease their occupation nor vacate the lands in question. On or about April 20, 2006 police, in an apparent effort to enforce the said injunction Orders granted in favour of Henco Industries Ltd., moved on the Six Nations people and supporters, but following confrontation and despite certain arrests the Douglas Creek Estates lands were re-occupied (or "reclaimed") by protestors, apparently including the personal defendants named herein and supported by the Council representatives of the defendant Haudenosaunee Confederacy.

11. As a consequence of this particular manner of use of force and resistance, and in the circumstances thereof, the situation in or about the Town of Caledonia, south of the Grand River and in the vicinity of the Douglas Creek Estates lands, was exacerbated.

12. The plaintiff Railway company was then forced to cease the provision of its customary rail service, *inter alia*, between Nanticoke and Brantford via its Hagersville Subdivision line of railway passing by the Douglas Creek Estates lands and the Six Nations lands. The Ontario Provincial Police directed or instructed the Railway to stop rail operations past the development site and in or about the Town of Caledonia, supported by direction from the rail safety officials of Transport Canada.

13. The Stirling Street overhead roadway bridge at Caledonia, then in disuse, was on or about April 21, 2006 burned and destroyed by persons unknown, and its timbers and other debris fell to and in part burned upon the Railway's right of way, damaging the Railway's track and track materials (ties and so forth) at that point described as mile 17.72 of the Hagersville Subdivision, located south of the Grand River and south of Forfar Street West in the Town of Caledonia. Subsequently persons unknown associated

with the occupation and protest augmented the debris and have since maintained a barricade of the track.

14. Additionally, another track blockade was erected by persons unknown, associated with the occupation and protest, at or about mileage 17.1 of the Railway's Hagersville Subdivision southerly of the blockage of the track at the former Stirling Street overhead bridge crossing of the Railway's line, and closer to the Sixth Line Road level crossing at grade, in the direction of Nanticoke.

15. The maintenance of the blockades of the plaintiff's railway line by the defendants, or with their encouragement or support, or in the alternative the absence of any action by the defendants or any of them as persons or entities in authority in relation to the occupiers and protestors, has prevented the plaintiff Railway's operations on its Hagersville Subdivision, and prevented the Railway from meeting its common carrier and statutory obligations of rail service to customers seeking to ship traffic by rail.

16. There is no alternative rail access to the premises of the plaintiff's customers at Nanticoke and Hagersville, south of the blockade and point of occupation and protest, nor means of the plaintiff alternatively serving such customers. Where possible, such customers have resorted to movement over the roads, and such traffic has been lost altogether to the railway.

17. The Railway company has had to lay off certain of its employees, and has and is continuing to suffer other irreparable harm from the actions of the defendants or of other related persons unknown, who are continuing to blockade or interfere with the plaintiff's

railway line in or about the Town of Caledonia and over whom the defendants, or some of them, have or may reasonably be believed to have influence or control.

18. The plaintiff Railway has since April 20, 2006 deferred action, has complied with direction of police and governmental authority, and has deferred to the defendants, the Six Nations authorities, and has used all reasonable means to facilitate a peaceful, safety-focused resolution insofar as restoration of safe railway operations has been sought by the Railway.

19. The Railway now seeks the aid and assistance of this Honourable Court, through an Order which may both empower and direct the defendants to withdraw from the railway right of way lands, and which may tend to facilitate the resumption of safe rail operations and promote a disengagement between the occupiers and protestors and others in the community, of which this could be a step.

20. Such further and other grounds as counsel may advise and this Honourable Court may consider.

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

1. The affidavit of Stuart Thomas, sworn May 2, 2006, and the materials as may be annexed thereto.
2. Such further and other materials as counsel may advise and this Court permit.

Dated May 2, 2006.

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John Doe, unknown

RAILINK CANADA LTD., CARRYING ON BUSINESS AS SOUTHERN ONTARIO RAILWAY and -

HAUDENOSAUNEE CONFEDERACY, ET AL

Plaintiff

Defendants

Court File No:

**ONTARIO
SUPERIOR COURT OF JUSTICE**

**PROCEEDING COMMENCED AT THE TOWN
OF**

CAYUGA

NOTICE OF MOTION

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