

COURT OF APPEAL FOR ONTARIO

O'CONNOR A.C.J.O., LASKIN and FELDMAN JJ.A.

B E T W E E N : )  
)  
H ENCO INDUSTRIES LIMITED ) Dennis Brown, Q.C., Malliha Wilson,  
) and Ria Tzimas for Attorney General  
) of Ontario  
Applicant )  
) Mark J. Sandler and Denise Dwyer  
) for the Ontario Provincial Police  
- and - )  
)  
HAUDENOSAUNEE SIX NATIONS ) W. McKaig for Haldimand County  
CONFEDERACY COUNCIL, JANIE )  
JAMIESON, DAWN SMITH, OR ANY ) M.C. Bruder for Henco Industries  
AGENT OR PERSON acting under ) Limited  
their instructions, JOHN DOE, JANE )  
DOE and other Persons unknown, and ) Kenneth R. Peel for Railink Canada  
THE COROPRATION OF ) Ltd.  
HALDIMAND COUNTY )  
) Darrell Doxtdator for the Six Nations  
) Council  
)  
) David Brown and Manizeh Fancy  
Respondents ) *amicus curiae* for the perspectives of  
) the Town of Caledonia and  
) Haldimand County  
)  
AND BETWEEN: ) James A. O'Reilly *amicus curiae* for  
) the Aboriginal perspectives  
)  
)  
RAILINK CANADA LTD. Carrying on )  
business as the SOUTHERN ONTARIO ) Heard: August 22, 2006  
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 )

)

**On appeal from the order of Justice T.D. Marshall of the Superior Court of Justice, dated August 8, 2006 with reasons reported at [2006] O.J. No. 3285 (Q.L.).**

**BY THE COURT:**

[1] The Attorney General of Ontario brought this motion to stay the order of Marshall J. dated August 8, 2006 until hearing of the appeal.

[2] The motion judge’s order was made during a lengthy dispute over the ownership of Douglas Creek Estates in Caledonia. Members of the Haudenosaunee Six Nations community, asserting Aboriginal title, occupied land owned by a private developer, Henco. Henco obtained an injunction to stop the occupation. Some of those protestors who did not vacate the land were found in criminal contempt of court. The Province of Ontario purchased the Henco lands on July 5, 2006 and continued its negotiations with the Six Nations community.

[3] In his order, the motion judge refused to dissolve an injunction prohibiting protestors from occupying land owned by the Province of Ontario until criminal contempt proceedings against individuals violating the injunction had been disposed of. Further, he required the Attorney General to apprise the court of the progress of the contempt proceedings.

[4] At the hearing of the motion on August 22, 2006, this Court had the benefit of the submissions or perspectives of the various constituencies that are directly affected by the underlying dispute. Before the hearing, the Court appointed an *amicus curiae* to present the perspectives of the residents of the Town of Caledonia and Haldimand County, and another *amicus curiae* to present the Aboriginal perspectives.

[5] We turn then to the Attorney General's request to stay the two provisions that are contained in the formal order. In order to make these reasons easier to understand, we deal with the second provision first.

**1. Should paragraph 2 of the order of August 8, 2006 be stayed pending the appeal?**

[6] The Attorney General of Ontario requests a stay of paragraph 2 of the order. Paragraph 2 states:

This court orders that the injunction issued in favour of Henco Industries Limited binds the (new) property owner, Her Majesty the Queen in right of Ontario, and is hereby dissolved, but that dissolution is not to take place until the criminal contempt has been disposed of.

[7] A stay would suspend, until the hearing of the appeal, the motion judge's order that the injunction obtained by Henco binds the Province as the new owner of Douglas Creek Estates. In other words, once the order is stayed, no steps may be taken under it or for its enforcement. In practical terms a stay of paragraph 2 would mean that the mere occupation of Douglas Creek Estates would not be a breach of any court order.

[8] Rule 63.02(1)(b) of the *Rules of Civil Procedure* gives this court the authority to grant a stay pending an appeal. The test for obtaining a stay is now well established. The party seeking a stay – in this case, the Attorney General – must meet three criteria. It must show:

- Its appeal raises serious issues;
- It will suffer irreparable harm if a stay is not granted; and
- The balance of convenience favours a stay.

See *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 332-3.

[9] In our view, the Attorney General has satisfied these three criteria, and is entitled to a stay of paragraph 2 of the order until the appeal is heard.

**a) Serious is sue**

[10] The question whether the motion judge was entitled to order that the Henco injunction binds the Province, and therefore continues in force after July 5, 2006, raises, at the very least, a serious issue. Indeed, it seems to us that the validity of this order is doubtful.

[11] At the hearing before the motion judge, Henco, which had obtained the injunction, asked that it be dissolved. The Province supported Henco's request. The motion judge succinctly captured the Province's position in these words: "The government says we have bought the land and we are allowing the protesters to remain."

[12] Although neither the previous owner (Henco) nor the current owner (the Province) sought a continuation of the injunction, the motion judge ordered that it would remain in force and would bind the Province until “the criminal contempt has been disposed of.”

[13] The motion judge gave these reasons for his order:

[T]he sale of the property to the crown or the Government of Ontario ... should have no effect on the court continuing with the criminal contempt. Surely the injunction continues with the property till the court dissolves it – if the law were otherwise – an injunction could be defeated by transferring ownership. In my view, the injunction here will bind the new owner with notice – as here until it is finally dissolved.

[14] We doubt that this reasoning is correct in law for at least three related reasons. First, Henco obtained the injunction for its own benefit. Having bought the property, the Province now stands in Henco’s shoes. As a landowner the Province has the right to say whether it wishes the benefit of that injunction to continue. It does not. It owns the land. It has the same right as any other landowner: to permit the peaceful occupation of its property.

[15] Second, the motion judge’s reasons assume that an injunction runs with the land – in his words: “surely the injunction continues with the property.” However, that principle is not well settled, and there is a body of case law stating that injunctions are personal orders that do not run with the land. See, for example, *A.G. Birmingham, Tame, and Rea Drainage Board* (1881), 17 Ch. D. 685 (C.A.) 17 Ch. D. 685 at 692 and *Iveson v. Harris* (1802), 7 Ves. 252 at 257. At the very least, whether the Crown, or any subsequent purchaser, is bound by an injunction sought by a previous landowner is a serious question to be tried.

[16] Third, the motion judge’s reasons seem to assume that the Province is somehow bound as if it were a defendant in this litigation. The motion judge says “...if the law were otherwise – an injunction could be defeated by transferring ownership...” However, the injunction did not require Henco to evict the protestors or do anything else. Henco was the beneficiary, not the target, of the injunction. Therefore, nothing was defeated by the transfer of ownership to the Province. As Henco was not required to remove the protestors, the Province, on buying the property, could not be required to do so either.

[17] The Province has two roles in this dispute: prosecutor (through the Attorney General), and landowner. As landowner, it seems to us that, subject to local municipal requirements and matters of nuisance and public safety, it should be free to use its property as it sees fit.

[18] Throughout his reasons, the motion judge stressed the importance of the rule of law. No one can deny its importance. The preamble to our Constitution states that Canada is founded on principles that recognize the rule of law. The Supreme Court of

Canada has repeatedly affirmed its importance. (See for example, *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, and *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753.) The rule of law, however, has many components.

[19] The Province owns Douglas Creek Estates. It does not claim that the protesters are on its property unlawfully. It does not seek a court order removing them. It is content to let them remain. We see no reason why it should not be permitted to do so. If the protesters cause a nuisance or other disturbance affecting neighbouring lands or residents of Caledonia, then action may be required. But no evidence was presented to us of any current incident requiring the intervention of the Attorney General, the Ontario Provincial Police (O.P.P.) or the courts.

[20] Thus, there is a serious question about the validity of paragraph 2 of the order of the motion judge.

**b) Irreparable harm**

[21] In general terms, irreparable harm is harm that cannot be quantified by a monetary award. A public authority can almost always show irreparable harm if the stay is not granted by demonstrating that its actions have been taken to promote the public interest. The Supreme Court explained this principle in *RJR MacDonald* at para. 71:

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.

[22] Here the Province's actions have obviously been taken to promote the public interest. In discharging its public duty to address the conflict in Caledonia, the Province has been required to make some difficult decisions. These decisions included purchasing the disputed property, allowing the protesters to remain on the property, and trying to resolve the ongoing dispute through peaceful negotiations. These decisions were taken in the public interest. Some may disagree with the Province's stance. We do not think, however, that it is the court's role to question the wisdom of the Government's actions. The motion judge's order continuing the injunction by making it binding on the Province, thus leaving the protesters to face the spectre of ongoing contempt proceedings if they do not vacate the property, threatens to undermine the Government's attempts to resolve this dispute.

[23] If not stayed, paragraph 2 might invite a finding of ongoing contempt of court against the protesters who remain on Douglas Creek Estates. The unchallenged evidence before us is that a court order that makes the current limited occupation of Douglas Creek Estates a contempt of court, will only escalate tensions in the community, put public safety at increased risk, and adversely affect the land claim negotiations. The Province has demonstrated that the order will cause irreparable harm.

**c) The balance of convenience**

[24] In our view, the balance of convenience favours staying paragraph 2 of the motion judge's order until the appeal is heard. The public interest considerations relevant to the question of irreparable harm are also relevant to the question of the balance of convenience.

[25] The uncontradicted evidence of the O.P.P. is that a stay of the injunction order will reduce the risk of harm to the community. The Province should be permitted to determine what level of occupation and what use of its own property best promote the public interest in these difficult circumstances.

[26] On the other hand, no substantial inconvenience will result from a stay of paragraph 2. A stay will mean simply that the protesters may remain on the property until the appeal is heard without fear of contempt proceedings being brought against them.

[27] We understand that this dispute has been difficult and frustrating for the residents of Caledonia. It has been disruptive and has profoundly affected the relationship between the residents and the Aboriginal community. However, the current occupation of Douglas Creek Estates does not obstruct public road access. Importantly, the hearing of the appeal has been expedited and set for September 25, 2006.

[28] Moreover, in our view, the maintenance of the rule of law favours a stay. Because of the dubious validity of paragraph 2, it is not appropriate to expose individuals to the threat of contempt proceedings for breach of that paragraph. Finally we note that no party to the motion – even those opposed to the Province's position – argued that the balance of convenience weighed against a stay of paragraph 2 of the order.

[29] The Attorney General has satisfied the three criteria for a stay. Paragraph 2 of the order is stayed until the hearing of the appeal.

**2. Should paragraph 1 of the motion judge's order of August 8, 2006 be stayed pending the appeal?**

[30] The Attorney General also seeks a stay of paragraph 1 of the order of August 8, 2006, which provides:

1. This court orders that the matter of contempt is referred to the Attorney General of Ontario for carriage and 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. The Court will remain seized of this matter until it is resolved.

[31] As paragraph 2 of the order has been stayed by these reasons, it would make sense that the only matters of contempt that should now be included within paragraph 1 are those that may have occurred prior to July 5, 2006, the date the Henco lands were transferred to the Crown.

[32] The Attorney General agrees that he is responsible for taking and maintaining carriage of contempt matters. In appropriate circumstances, where it appears that there may have been contempt of a court order that occurred out of the face of the court, a judge may refer the matter to the Attorney General for carriage. See, for example, *Poje v. B.C.(A.G.)*, [1953] 1 S.C.R. 516, *Canada Post Corp. v. Canadian Union of Postal Workers (CUPW)*, [1991] O.J. No. 2472 (Sup. Ct. Jus.), *R. v. Peel Regional Police* (2000), 149 C.C.C. (3d) 356 (Sup Ct. Jus.).

[33] However, the Attorney General objects to paragraph 1 of the order because he says it contemplates ongoing supervision of the process by the motion judge. His concern is that the intent and effect of this paragraph is not only to require the Attorney General to report on his Ministry's progress in any contempt proceedings, but also to allow the motion judge to interfere with the Ministry's investigative and prosecutorial discretion by directing the steps to be taken.

[34] We do not read paragraph 1 in that way. In our view, that paragraph contemplates only that the motion judge will remain seized of the contempt proceedings so that there will be a public forum where the Attorney General may report on what steps, if any, have been taken in respect of the contempt of court orders regarding the Henco lands. In the light of our stay of paragraph 2, that report will be limited to contempt of the court order up to July 5, 2006. As paragraph 1 states, the purpose of the report is to apprise the court and the public of the status of any such proceedings. There is no language that extends the role of the motion judge beyond maintaining ongoing proceedings for the purpose of receiving status reports.

[35] Even if there is a serious question whether paragraph 1 reaches beyond the proper role of the court in enforcing its orders, in our view, there will be no irreparable harm if this paragraph is not stayed. We have set an early date of September 25, 2006 for the argument of the appeal. It seems most unlikely that there will be a need for any further attendances before the court prior to the hearing.

[36] Indeed, the Attorney General submits that the court has already been fully advised about all contempt proceedings arising out of the injunction orders during the several hearings that were convened by the motion judge to inquire into the status of enforcement activity by the Crown. For example, in the hearing held on June 1, 2006, counsel for the O.P.P. outlined in open court and in some detail the history of the O.P.P. enforcement activity since the first incident began in February 2006. The Attorney General contends that there is nothing further to report. That may be so. However, if it becomes necessary to call upon the Crown to provide a more formal report to the court summarizing its enforcement efforts, such a report may well assist the public in understanding how the authorities are attempting to ensure that the rule of law is upheld in a complex inter-community situation.

[37] The balance of convenience does not favour a stay, as it is unlikely that there will be any attendances before the appeal is argued and thus likely no inconvenience will be caused if a stay is not granted. However, if there is a further attendance, any reporting that is done should not be particularly burdensome for the Crown.

[38] For these reasons, we are not prepared to issue a stay of paragraph 1 of the order pending the hearing of the appeal.

### **3. Does the order prohibit further negotiation by the parties?**

[39] As part of the government response to the occupation of the Henco lands, the governments of Canada and Ontario, affected First Nations interests, and others began a process of negotiations to address the claims of the Haudenosaunee Six Nations Confederacy Council to the Haldimand land tract. This process was ongoing on August 8, 2006.

[40] When this stay motion was first brought, the formal order arising out of the August 8, 2006 decision of the motion judge had not yet been signed by him. In his judgment delivered orally on August 8, the motion judge stated that government agents should withdraw from the negotiations until the court orders are respected and concluded that “[I]n the Court’s view, after much deliberation, there should be no further negotiations till the blockades are lifted and the occupation is ended.” However, the formal order that the motion judge signed on August 18, 2006 did not include any order restraining the negotiations.

[41] In the submissions made to us, the parties involved in the negotiations described them as very productive, and in fact, precedent setting in the progress that has been made toward the potential resolution of a previously intractable, centuries-old dispute. In that context, counsel representing many of the affected constituencies urged the court to allow those negotiations, scheduled to resume the following day, to proceed.

[42] The *amicus curiae* for the residents' perspectives informed us that many of the residents believed that it would be more appropriate that the occupation end before the negotiations continued. The Court was also informed that a volunteer group of local business owners, professional persons and residents known as the Caledonia Citizens Alliance supported the position that the negotiations should proceed and advised that the Alliance would like a role in those negotiations.

[43] Because the formal order that is the subject of the appeal does not prohibit the immediate resumption of negotiations, we were satisfied that there was no order to be stayed. However, several counsel informed the Court that although the formal order does not prohibit negotiations, many of the parties felt constrained by the oral judgment from proceeding with the negotiations. Because in our view it was important that these negotiations be allowed to proceed as previously scheduled, we issued the following endorsement at the end of the oral hearing:

Despite what Justice Marshall said in his reasons of August 8, 2006, he did not include in his final order a direction that the parties cease negotiations. Thus in our view the parties should be free to continue to negotiate if they choose to do so without fear of being in breach or contempt of a court order. To be clear the order of Justice Marshall does not preclude continued negotiations.

[44] This endorsement left all parties free to continue with the negotiations. We reserved our decision on the balance of the motion to today in order to give these reasons.

#### **4. Conclusion**

[45] For the reasons above, paragraph 2 of the August 8, 2006 order is stayed pending hearing of the appeal. Paragraph 1 will remain in force. The costs of the motion are reserved to the panel hearing the appeal.

**RELEASED:** August 25, 2006

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“Dennis O’Connor A.C.J.O.”

“John Laskin J.A.”

“K. Feldman J.A.”