COURT FILE NO.:CV-08-82
DATE: 2008-06-10

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 1536412 Ontario Ltd v. Haudenosaunee Confederacy Chiefs Council, Haudenosaunee Development Institute, Hazel Hill, Ruby Montour, Floyd Montour, John Doe, Jane Doe

BEFORE: J.A. Ramsay J.

COUNSEL: M. Bordin and S. Van Engen for the plaintiff; L. Strezos for Haudenosaunee Development Institute; K. Hensel for Hazel Hill; no one for the remaining defendants

ENDORSEMENT

[1] The plaintiff is a numbered corporation that seeks an interlocutory injunction on notice, to restrain the defendants from obstructing the construction of a subdivision called Parkway Place. The plaintiff's principal deposes that the lands in question are located at the corner of Thorburn Street and Joseph Street in the village of Cayuga, across from J.L. Michener Public School. They were sold by the Dominion of Canada, in trust for the peoples of the Six Nations, to Thomas Wigg in 1891. The plaintiffs bought the land from a subsequent owner in 2005, before the troubles in Caledonia[1].

[2] The plaintiff complied with the county's requirements for permission to build the development. The Six Nations Band Council and the public at large were notified of the

[1] See *Henco Industries Ltd v. Haudenosaunee Six Nations Confederacy Council et al.*, Ontario Court of Appeal C45859, Dec. 14, 2006.

proposed development. No objections were received. The plaintiff is obliged to develop Parkway Place under a subdivision agreement between it and the county.

[3] The Six Nations has not commenced any legal proceedings in support of a claim to the land in question. Nor does the land appear to be the subject of any claim listed in the Six Nations Land & Resources website.

[4] On February 8, 2008, the defendant Hazel Hill wrote to the plaintiff on behalf of the Haudenosaunee Development Institute (HDI). She said that the Institute required the plaintiff to apply to it for permission to build, and to meet its requirements, which include the payment of an application fee. The provincial government has stated for the record that it stands by its land titles system, and that no one should pay any development fees other than those mandated by the municipality.

[5] The plaintiff has excavated for the pouring of the concrete foundations of the 44 residential townhouses that are planned. The major sewer and water lines have been installed. Including the cost of the land, the plaintiff had spent about $1,060,000 on the project by May 21, 2008.

[6] On April 10, 2008, Ruby Montour attended at Parkway Place with four others. She demanded that the plaintiff pay the application fee within one week, or else she would return with more supporters and shut down the project. The plaintiff declined to pay. On April 10, 2008, Ms Montour and about ten others returned to the property. She demanded that work cease. The O.P.P. declined to remove the trespassers and suggested to the plaintiff's principal that he

should negotiate. The plaintiff agreed to consult with HDI and in return, Ms Montour allowed work to resume on April 23.

[7] The consultation took place on May 2, 2008. The plaintiff met with representatives of HDI and officials of the provincial government as well as the Mayor and Deputy Mayor. HDI demanded $3,000, and suggested that the plaintiff would have to direct a portion of the property taxes from the project to HDI in perpetuity or pay ongoing development charges. It was said that these charges were non-negotiable. Ruby Montour has also told the plaintiff that it would have to transfer title to Parkway Place to the Haudenosaunee Council in return for a long-term lease. The plaintiff declined to comply with these demands.

[8] On May 12, 2008, Ruby Montour and others blocked the entrance to Parkway Place. She told the plaintiff's principal that the plaintiff would lose the property permanently if it did not comply within two weeks, and that Six Nations people would be at the site every day to ensure that no work was done. The O.P.P. refused the plaintiff's requests to remove the protestors.

[9] The O.P.P. told the plaintiff that protestors would only be removed if there was fighting, in which case the people they were fighting with would also be removed. Apart from the repair of a water line that was completed after negotiations by O.P.P., no work has been done on the site since. The closing dates of agreements of purchase and sale of some of the individual units are July 31 and August 29, 2008. The plaintiff seeks an injunction and has undertaken to comply with any damage awards made against it.

[10] On May 21, 2008 I awarded an *ex parte* injunction prohibiting interference with the plaintiff's construction site. The injunction expired on its return 10 days later. On that date the

motion for an interlocutory injunction on notice was adjourned at the request of HDI and Hazel Hill to June 10, 2008, at which time it was heard. The other defendants, who did not appear on June 2, were notified of the adjournment. They did not appear on June 10.

[11] *Prima facie*, the plaintiff is the lawful owner of the lands in question. The defendants assert various aboriginal rights, although not with any clarity. There is no clarity as to the relationship between the various defendants and the Six Nations community as a whole, apart from the fact that they are all members of this community.

[12] The test for granting an interim injunction is set out in the Supreme Court of Canada's judgement in the *RJR Macdonald* case[2]. The Court of Appeal considered it appropriate to apply this test in the context of aboriginal rights in the *Henco Industries* case, M34121, Aug. 25/06, ¶8. I must look at the seriousness of the claim, the prospect of irreparable harm, and the balance of convenience. In addition to submitting that the facts do not meet that test, the defendants HDI and Hazel Hill submitted that the plaintiffs are not entitled to ask for equitable relief in the form of an interlocutory injunction because they failed to disclose material facts on the *ex parte* application.

[13] I turn first to this argument. The defendants complained of lack of disclosure to the court on the initial application in three main areas:

1. The plaintiffs omitted to mention the existence of the *Nanfan* treaty of 1701, and its recognition by this court in *R. v. Ireland* (1990) 1 O.R. (3d) 577;

[2] [1994] 1 S.C.R. 311

2. The plaintiffs failed to cite any source for its contention that the Haudenosaunee Confederation of Chiefs Council is "a group of protestors"; and

3. The plaintiffs claimed that the protestors who interfered with construction were agents of the HDI. But at a meeting with HDI representatives on May 2, 2008, the plaintiff's principal was told that these people "are not our representatives". In her affidavit before me, Hazel Hill, from contemporaneous notes, quotes Aaron Detler of the HDI as saying at the meeting, "we don't direct individuals to any particular place or do anything; if we did, there would be a lot of stuff going on, likewise we don't ask them to stop. Not our role, not our function, simply an administrative arm legislated by confederacy to process development issues."

[14] I do not consider any of these omissions to be blameworthy. First, the *Nanfan* treaty and the *Ireland* case have to do with hunting rights. There is nothing to hunt in Parkway Place. Nobody wants to hunt in Parkway Place. The *Ireland* case does not purport to extend hunting rights to private property in any event.

[15] Second, the characterization of the Haudenosaunee Confederacy Chiefs Council as "a group of protestors" in the plaintiff's affidavit material is simply a descriptive summary of what the affiant claims to have seen. It does not give the impression of being any more than that, and is in no way misleading.

[16] Third, the omission to mention Mr Detlor's remarks is not misleading. The plaintiff received communications from HDI, was warned by Ruby Montour, and observed protestors.

That is really all it knows and all it has claimed to know. The connection must have seemed obvious to the plaintiff. Mr Detlor's remarks were one aspect of a long meeting. They would not necessarily have seemed significant to the plaintiff.

[17] I turn to the *RJR Macdonald* test. The plaintiff has a serious claim. It is the lawful owner of the lands in question according to the ordinary law of property. It can show clear title going back to the grant from the Crown. The defendant's claim to the right to sanction development on the basis of an aboriginal right is doubtful.

[18] Aboriginal rights at common law and under treaty are constitutional rights. Section 35 of the *Constitution Act*, 1982:

> **35.** (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

[19] Aboriginal rights arise from the occupation of the land by aboriginal peoples before the assertion of British sovereignty.[3] The principles governing the settlement of aboriginal rights claims since 1982 have been set out by the Supreme Court of Canada in a number of important cases, including R. v. Sparrow, [1990] 1 S.C.R. 1075, *R. v. Van der Peet*, [1996] 2 S.C.R. 507 and *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010. The constitution affirms and recognizes various types of aboriginal rights that already existed in 1982. Aboriginal title to land, a *sui generis* right distinct from ordinary property rights, is one them. Before 1982, aboriginal

[3] The history of the tract in question in the present case is a matter of judicial fact: see *Isaac et al. v. Davey et al.* (1974), 5 O.R. (2d) 610 (C.A.), aff'd [1977] 2 S.C.R. 897. It was not occupied by the Six Nations until after British sovereignty, but the grant by Governor Haldimand in 1794 was held to have had the effect of granting the same sort of title that the Six Nations would have had if they had had prior occupation.

rights could be extinguished by the Crown. Since 1982, aboriginal rights can only be infringed by the Crown, and then only if the courts consider such an infringement to be justified.

[20] The parcel of land in question was surrendered to the Crown in 1844. It was sold by the Crown in 1891, for the benefit of the Six Nations people. The Six Nations people may have a right to an accounting from the federal government with respect to the proceeds of the sale, but it will be difficult for the defendants to maintain at trial that they have an interest in the land. Aboriginal land rights can be alienated by surrender to the Crown: *Delgamuukw*, ¶113. Even if the defendants have evidence to challenge the validity of the surrender, they will not necessarily succeed in an action against subsequent purchasers for value without notice: *Chippewas of Sarnia Band v. Canada (Attorney General)*, 2000 CarswellOnt 4836 (C.A.).

[21] I am unable to identify any other type of aboriginal right that could arise from any distinctive prior use of the land. Moreover, regulating development of residences for non-aboriginals would seem to be irreconcilable with any prior use that could reasonably be alleged to give rise to aboriginal rights: *Delgamuukw*, ¶128.

[22] The defendants are, in effect, asserting that they have the right to give or refuse permission to develop a subdivision in the middle of the village of Cayuga, on land that the Six Nations surrendered to the Crown 160 years ago, and the right to charge fees, to tax the land and to have ownership of the property transferred to them in consideration for allowing such development. Looking at it realistically, it is tantamount to a claim of sovereignty. The special rights enjoyed by the aboriginal communities under our constitution do not include sovereignty.

[23] Delay in building the project will cause the plaintiff serious and irreparable harm. In the case of a building project, even intermittent interference can cause serious harm. Subcontractors who are prevented from working will start other projects and may not be available to return for some time. The plaintiff faces the prospect of being sued by the purchasers of the townhouses and being unable to continue financing the project. It cannot do the business of development by standing by an idle project indefinitely. I find plausible the contention in the affidavit of the plaintiff's principal that bankruptcy is on the cards. In any event, in cases involving interference with property rights, injunctive relief is strongly favoured, whether there is the prospect of irreparable harm or not: Sharpe, *Injunctions and Specific Performance*, (2001) ¶4.10.

[24] The balance of convenience favours the plaintiffs. The plaintiff now wishes to discontinue its action against the Haudenosaunee Confederacy Chiefs Counsel. The Haudenosaunee Development Institute and Hazel Hill say that they have not interfered with the project and that persons who have done so or have threatened to do so have not acted on their behalf. The plaintiff now only seeks injunctive relief against the other defendants. These remaining defendants cannot claim inconvenience. There can be no inconvenience in being required to refrain from interfering with the lawful use and enjoyment of property: *City of Brantford v. Haudenosaunee Development Institute et al.*, Ont. S.C., Taylor J., CV-08-334, 2 June 2008, ¶7.

[25] Building this project will not hinder anyone in the pursuit of his rights. The streets and the sewers are already in place. The land has been excavated in preparation for pouring concrete foundations. This is not untouched land. The plaintiff's continuing work on the land will only

improve it. Moreover, as I have noted, the defendants in their conduct have asserted a right to payment of money for development, not a stop to development.

[26] I am aware that building has continued since June 2, 2008 in the absence of an injunction. I consider the prospect of future interference to be sufficient to warrant a further injunction pending trial.

[27] There is a public interest in protecting the rights of an ordinary corporate citizen like the plaintiff when it has complied with the rigorous demands of the municipal and provincial governments. There is also a public interest in lawful property development. The citizens of Ontario have a right to choose such housing as can be made available to them if it complies with government regulation.

[28] The remaining defendants' resort to self-help, taken with the authorities' refusal to defend the plaintiff's property rights, has put the plaintiff in a most unfair position. The same government that advises the plaintiff not to pay extra-governmental development fees refuses to enforce its property rights and threatens to arrest its agents if they try to enforce these rights on their own.

[29] I would be the last person to interfere with the proper exercise of discretion by the authorities.[4] I do think that it might be helpful to clear up some misapprehensions that they appear to have.

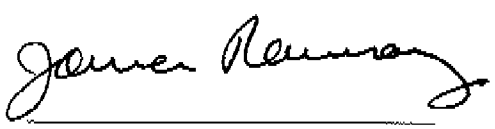
1. The police have the right to remove unwanted persons from private property at the request of the owner with or without an injunction.

2. The police have the right to use their discretion in the enforcement of the law and private property rights. A blanket refusal to assist a property owner or a class of property owners, however, would be an abuse of that right.

3. The police have no right to prevent the plaintiffs from acting within their rights under s.41 of the *Criminal Code*. Their warning to the plaintiff that they would arrest anyone who is involved in a physical confrontation, regardless of the circumstances, is an abuse of the power conferred on them by s.31 of the *Criminal Code*.

[30] On consent, no injunction will issue against HDI, Hazel Hill or the Haudenosaunee Confederacy Chiefs Council. The Council is removed as a party defendant at the request of the plaintiff, without costs. An interlocutory injunction will issue against the remaining defendants, as asked, with provision for enforcement by the O.P.P., subject to its discretion as to timing and means. The injunction will also provide for notice to as-yet-unknown persons. I have made amendments to a draft order submitted this date and endorsed my approval thereon.

[31] On consent, the question of costs to Hazel Hill and HDI will be argued in writing on an agreed schedule. The question of costs for or against the plaintiff with respect to the other defendants is reserved to the trial judge.



Ramsay J.

[4] See *R. v. Power* (1994), 89 C.C.C. (3d) 1 (S.C.C.) ¶35, cited in *Henco Industries* (Dec. 14/2006), Ont. C.A. C45859 and C45933, ¶113.

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