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RECENT ONTARIO SUPERIOR COURT OF JUSTICE DECISION AND ORDER REGARDING INTERLOCUTORY INJUNCTIONS: *John Voortman & Associates Limited v. Haudenosaunee Confederacy Chiefs Council*, 2009 CanLII 14797 (ON S.C.)

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On Friday, April 3, 2009, Justice Henderson of the Ontario Superior Court of Justice issued a strongly worded interlocutory injunction ruling and accompanying Order against First Nation protestors. In his decision, *John Voortman & Associates Limited v. Haudenosaunee Confederacy Chiefs Council, 2009* CanLII 14797 (ON S.C.), Justice Henderson adopted a markedly different approach to interlocutory injunction applications brought in the context of disputes between Aboriginal groups and private land owners than did the same Court in the recent decision of *Frontenac Ventures Corp. v. Ardoch Algonquin First Nation* (2008), 91 O.R. (3d) 1.

Background

The Plaintiff corporation, John Voortman & Associates Limited ("Voortman"), purchased six acres of raw property in Hagersville, Ontario in November 2001. Voortman intended to build 46 townhouses on this property, of which it was the registered owner under the land titles system.

Initial construction activities began in early October 2008. Soon after, on October 9, 2008, a small group of Aboriginal persons attended the property to protest the construction. The protests continued and, although they attended the scene, the Ontario Provincial Police declined to remove any protesters without a court injunction. Because of the protests, no work was done on the property between approximately October 10, 2008 and December 7, 2008, or between December 18, 2008 and March 4, 2009.

The protestors included members of a Haudenosaunee group known as the Haudenosaunee Men's Fire (the "HMF"), one of the named Defendants. The Haudenosaunee Confederacy Chiefs, (the "HCC"), the traditional Haudenosaunee leaders and a named Defendant, did not appear. The Haudenosaunee are the Aboriginal people who belong to the Six Nations, and whose ancestors were members of the five original nations of the Iroquois Confederacy.

Several members of the HMF spoke against Voortman's motion, explaining that they had obstructed the construction on the basis that they have an interest in the property and are bound by Aboriginal laws to protect the land.

Application of Tripartite Test

The motion was heard by the Court on March 26 and 27, 2009.

To decide the motion, Justice Henderson applied the standard three-step *RJR – MacDonald* test, namely whether there was a serious issue to be tried, whether the Plaintiff would suffer irreparable

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harm if the injunction was not granted, and which party the balance of convenience favoured. Following the case law, he modified the test to emphasize the serious issue criteria because property rights were being interfered with.

Serious Issue

Voortman claimed a proprietary right to the property, and an associated right to exclude others from the property. The HMF challenged Voortman's claim on the basis that the Six Nations people have a legal claim to the property, that Voortman does not have legal title to the property, and that the Court does not have the necessary jurisdiction because the Crown failed to consult with the Aboriginal people about the property.

The Court rejected all three arguments. First, it did not accept HMF's argument that the Six Nations people have a legal claim to the property. Justice Henderson cited a 1974 Ontario Court of Appeal decision which found that there had been a no conveyance of title to the Six Nations people, and further observed that neither the HMF nor the relevant Six Nations governing bodies had submitted any claims for title to or possession of the property.

The Court also rejected the HMF's argument that Voortman did not have title to the property. Voortman could trace its title back to the Crown patents. As a result, citing *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 5I O.R. (3d) 641 (C.A.), the Court concluded that Voortman's title is properly presumed to be valid and that, even if it was not, it was unlikely that a Court would set it aside.

Finally, the Court rejected that HMF's argument that the Crown had failed to fulfill its duty to consult. Citing the decision in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, the Court decided that the Crown's duty to consult was at the lower end of the spectrum and that the Crown had satisfied this duty by providing the Six Nations Council with the draft plan of the subdivision for their comments. Justice Henderson added that there were also ongoing consultation efforts regarding the property, and that the Crown was not required to consult with the HMF given that its authority to speak for Six Nations peoples was unclear.

Ultimately, the Court concluded that Voortman had established a strong *prima facie* case that there is a serious question to be tried. It found that Voortman is entitled to exercise it right as the registered property owner, that the Six Nations' claim to the land is for damages, that Six Nations governing bodies (and not the HMF) are involved in negotiations regarding the property, and that the actions of the HMF amounted to criminal and civil misconduct.

Irreparable Harm and Balance of Convenience

Justice Henderson dealt with these factors in relatively short order, finding that both favoured the Plaintiff. He emphasized the Plaintiff's anticipated financial, contractual, and reputational losses if the injunction was not granted, and contrasted Voortman's "strong" case with the HMF's more "limited" case.

Narrowing *Frontenac?*

This decision is notable for several reasons, not the least of which is how strongly it contrasts with the earlier Ontario Court of Appeal Frontenac injunction decision. The Court made a particular effort to narrow the interpretation of Frontenac. At paragraphs 63 and 64, Justice Henderson stated:

> [63] The Ontario Court of Appeal appeared to push this duty further in the case of *Frontenac Ventures Corp. v. Ardoch Algonquin First Nation* (2008), 91 O.R. (3d) 1, at para. 48 where the court wrote:
>
> > "Where a requested injunction is intended to create 'a protest-free zone' for contentious private activity that affects asserted aboriginal or treaty rights, the court must be very careful to ensure that, in the context of the dispute before it, the Crown has fully and faithfully discharged its duty to consult with the affected First Nations … The court must further be satisfied that every effort has been exhausted to obtain a negotiated or legislated solution to the dispute before it..."
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> [64] I agree with Voortman's counsel that the Frontenac case cannot be interpreted to mean that in every dispute between a private land owner and an aboriginal group the Crown must engage in exhaustive consultations. The Ontario Court of Appeal could not have meant that every private land owner in the Haldimand Tract could be subjected to an aboriginal occupation of his/her lands, and if so, then the Crown must consult about every parcel of private land in the Haldimand Tract.

The Court also saw it as important to emphasize rule of law principles. It suggested that the HMF "…clearly have a choice…" and "…are not compelled, as was suggested, to disobey the injunction and engage in further criminal and civil misconduct". Asserting an Aboriginal right, according to the Court, "…does not permit any person, aboriginal or otherwise, to break the law".

Order

The extremely broad accompanying Order issued by Justice Henderson is significant separate and apart from the judgment. The six page Order includes the following terms:

1. An interim and interlocutory injunction restraining the Defendants from entering the property, from obstructing or interfering with use of the roadways and access routes to the property, and from interfering in any way with the Plaintiff's construction work on the property until the trial of the action or until such further Order of the Court;
2. A declaration that the Plaintiff has title to the Property; is sole owner of the property; has the right to exclusive possession, use and enjoyment of the property; and that no other person may claim an interest in, assert any right over, or claim ownership of, the Property. The Court explained in its reasons that it included this term "…so that no other group can come forward to occupy the property as the putative land owner";
3. An Order the complete Order be directed to the Sheriff for enforcement, and directing the Ontario Provincial Police and its officers to assist the Sheriff in enforcement;
4. An Order that the Plaintiff and its contractors may use reasonable force to prevent any person from trespassing on the property or to remove any trespasser from the property; to prevent any person from obstructing the entry or egress of the Plaintiff and its contractors onto or from the property or access road; and to remove any barricade, vehicle or other property from the property, or from the points of entry and egress onto or from the property on the access road. Any force used is to be no more "than is necessary in the circumstances";
5. An Order that the Plaintiff and its contractors shall be held liable for any damage arising from any use of reasonable force to remove property pursuant to an Order by the Court; and
6. An Order that, notwithstanding any municipal by-law, the Plaintiff and its contractors may build and erect a 12 foot high temporary fence with barbed wire around or on the property; retain and employ private security forces; take any other reasonable steps to prevent any person from entering on the property without the Plaintiff's permission.

Concluding Remarks

It remains to be seen whether this decision will be adopted widely as a precedent. There is no question, though, that its forceful conclusions are attracting attention in legal circles in Ontario and across the country.

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