

COURT FILE NO.: C.U.S.-07-0395-00

DATE: 2007/08/27

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

FRONTENAC VENTURES CORPORATION

Plaintiff

- and -

ARDOCH ALGONQUIN FIRST NATION, SHABOT OBAADJWAN FIRST NATION, ROBERT LOVELACE, PAULA SHERMAN, DOREEN DAVIS, RANDY COTA, HAROLD PERRY, JANE DOE, JOHN DOE AND PERSONS UNKNOWN

Defendants

SHABOT FIRST NATION and CHIEF DOREEN DAVIS Interested Party No. 1

ALGONQUINS OF ONTARIO Interested Party No. 2

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO Interested Party No. 3

ONTARIO PROVINCIAL POLICE Interested Party No. 4

N. Smitheman, and Ms. T. Pratt for the Plaintiff

C. Reid for the Defendants

Mr. Dolgin for Interested Party No. 1

Mr. Potts for Interested Party No. 2

O. Young and R. Tzimas for Interested Party No. 3

C. Diana for Interested Party No. 4

HEARD: August 23, 2007

27 Aug 2007 18:40

HP LASERJET FAX

613-548-6209

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G. I. Thomson J.

[1] Subsequent to counsel receiving the interim judgment setting out the terms of adjournment on August 15, 2007, the plaintiff moved to reappear seeking instructions on how to proceed as a result of new information received from the defendants and to settle the order made August 15, 2007 as amended by comments of counsel.

[2] Appearing were the plaintiff, the Province, the O.P.P., A.A.F.N., the Shabor and the A.O.O. The Attorney General of Canada has indicated that Canada will not be participating in the injunction motion.

[3] Counsel for the defendants A.A.F.N., the named defendants and Shabor had indicated to the plaintiff and the court that they would not participate further in this motion and were not going to serve or file any more documents. They would not make any submissions in any way at the injunction hearing commencing on September 20, 2007. However, they then asked to make representations and were allowed to do so.

[4] Mr. Ports appeared for the A.O.O. and requested permission to make submissions and to participate in the next phase of this matter set to commence on September 20, 2007. After discussion permission was granted and a new time table for serving and filing documents was worked out; a new time table was agreed upon and is attached as schedule "B" and is to be read in conjunction with and in addition and as modifying the original case management schedule.

[5] The tenor of the defendants' comments was to the effect that they would collectively be willing to consult and negotiate on mineral rights aspects and would be amenable to archeological studies being done in certain circumstances and would discuss that with the parties in the future. Counsel for the A.A.F.N. ended by stating that the occupation and denial of access would continue and if there was "an assault on the property by the O.P.P. or anyone else, there were thousands of volunteers who would come to the site from all over on short notice...and if that happens there will be violence, but it will not be started by our people."

[6] The defendant First Nations have not commenced an action to determine who owns the lands in question nor have they sought an injunction to delay or stop any activity on the land until the ownership issue has been decided. Counsel indicated that an action concerning ownership would be commenced in the future.

[7] Because the defendants are no longer participating, the form of the order regarding the terms of the adjournment need not be approved by the defendants but should be circulated among the other participants that requested status of some sort at the beginning of the motion and if approval is not forthcoming the matter may be forwarded to me for approval.

[8] Further, because the defendants are no longer participating in the injunction motion and the A.O.O. are seeking to participate, the terms of adjournment on conditions need to be

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modified. These new dynamics require a review of the original facts and the fresh affidavit material filed by the plaintiff indicating the defendants' reaction to the terms of adjournment order. The tests for granting an injunction also need to be considered again.

[9] The fresh affidavit material indicated that the defendants were not going to follow the terms of the interim order, were denying access to the plaintiff in any form, would continue to deny access and basically would flaunt the terms of the order.

[10] The test for the granting of an injunction is set out in *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at para. 432. Interlocutory injunctive relief may be granted when the moving party establishes that;

- a. there is a serious issue to be tried with respect to an infringement of the moving party's rights;
- b. the moving party will suffer irreparable harm if an injunction is not granted; and
- c. the balance of convenience favours granting the relief sought; that is, the irreparable harm to be suffered by the moving party is not outweighed by the irreparable harm to the respondent if the injunction is granted

[11] In appropriate circumstances, the traditional test is modified so that the first criterion [serious question to be tried] is emphasized to the exclusion of the second and third criteria. Factors that justify a modification of the traditional test include interference with property rights, breach of statutes or bylaws and engaging in behaviour that is characterized as civil disobedience. [See Sharpe, Robert J., *Injunctions and Specific Performance*, 2nd Ed. (Canada Law Book, Toronto, Ont.; 1992) at 4.590]

[12] This aspect of the test is necessary to consider at this time and may well be important at the actual hearing of this injunction motion after all of the material has been filed. It appears that the two named First Nation defendants are not patent holders [on title]. They are presently occupying the subject property and denying access to legal patent holders, be they landowners of the surface rights only, surface and mineral rights or legal holders sheltering under patent holders rights. I make no finding as to the legality of the defendants' title claims.

[13] The statement noted above from counsel for the defendants causes me concern and I find as a fact at this time that representatives of one or both of the defendants are interfering with the property rights of patent holders, persons or corporations sheltering under the patent holders or grantees of mineral staking rights or mining leases from the Province. By denying access and making comments through counsel, the representatives of the defendants are engaging in behaviour that is clearly threatening and amounts to civil disobedience of a court order.

[14] I am satisfied on the material filed by the plaintiff, that there is a serious issue to be tried with respect to the plaintiff's rights in the subject property that have been granted by patent holders and the Government of Ontario. The plaintiff may well suffer irreparable harm if a temporary interim injunction is not granted as I am satisfied that it may lose its financial backing

if some progress is not made. I have considered the balance of convenience and whether the irreparable harm to be suffered by the plaintiff outweighs the irreparable harm to the defendants if an interim injunction is granted. The balance of convenience weighs in favour of the plaintiff as financing is in jeopardy according to the affidavits filed. Any attendance on the site by the plaintiff will be in accordance with a carefully itemized list that is designed to create as little negative impact or irreparable harm as is possible in the circumstances and deals with a topic that will have to be addressed in any event.

[15] Therefore, after listening to all counsel present, reading the material filed and the law, I am satisfied that an interim injunction issue as it is just and convenient to do so in the circumstances as they now exist. There will be terms and conditions as follows, namely;

- a. An interim injunction will issue and a copy of the injunction order will be posted at the entrance to the subject property.
- b. Any representative of the A.A.F.N., Shabot or any one supporting their position or associated with them in any way shall forthwith immediately leave the subject property except as otherwise allowed in this order.
- c. Frontenac shall have immediate, unfettered and unobstructed access to the subject property including the field office, access road and all of the identified exploration property and the "Clarendon site".
- d. Any representative of the A.A.F.N., Shabot or any one supporting their position or associated with them in any way is hereby restrained from interfering with, disrupting or hindering in any way, directly or indirectly, the attendance of Frontenac and its officers, employees, consultants or agents at or on the private property to which title in fee simple is owned by Peter Jorgensen and Peter Kriens and exclusive possession is leased to Frontenac, said property being described as the Clarendon site and part of the subject property.
- e. Further, any representative of the A.A.F.N., Shabot or any one supporting their position or associated with them in any way is restrained from impeding, obstructing or interfering with, directly or indirectly, Frontenac's access to the land upon which Frontenac holds mining claims, a mining lease, agreements to explore private property, options to purchase private property including the mineral rights or leasehold interest in private property, the "exploration property" and their movements to or on the exploration property or access to secondary highways including Highway 509 in Frontenac County, County/Regional roads including Ardoch Road or Route 36, tertiary highways, local access roads or semi-permanent roads and trails leading to the exploration property.
- f. Further, any representative of the A.A.F.N., Shabot or any one supporting their position or associated with them in any way is restrained from

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disrupting or hindering any archaeological work by Frontenac, its officers, employees or consultants on either the Clarendon site or exploration property and are restrained from coming within 200 m. of any Frontenac officer, employee or consultant undertaking archaeological work on either the Clarendon site or the exploration property, with the exception of *bona fide* hunting, trapping or fishing activities during the applicable season in groups of four people or less.

- g. Any representative of the A.A.F.N., Shabot or any one supporting their position or associated with them in any way are enjoined from removing, converting, detaining or otherwise interfering with any personal property of Frontenac, its officers, employees or consultants employed at the Clarendon site or the exploration property. None of the above named persons will intimidate or threaten in any way Frontenac, its officers, employees or consultants.
- h. All signs, vehicles, buildings and other paraphernalia erected by any representative of the A.A.F.N., Shabot or any one supporting their position or associated with them in any way after July 1, 2007 shall be removed forthwith within 2 working days of this order.
- i. Frontenac may employ Nick Adams, a duly licensed archaeologist [consultant] who shall attend the property at any time during the time interval between this order and the injunction hearing on September 20, 2007 in order to determine aboriginal burial sites, significant trapping lines and any other significant archaeological aspect deemed important by the consultant.
- j. There will be an order that any police service or peace officer be and hereby is authorized 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 any court order concerning the above described lands, and for greater certainty, such a police service or peace officer retains his or her discretion to decide whether to arrest or remove any person pursuant to any court order concerning this file.
- k. In the event of non compliance with this order in any way, I may be spoken to on short notice to any other identified party to these proceedings.

THIS IS AN
AUTHORITY NOT
A DIRECTION

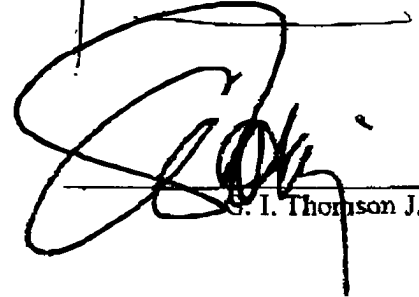
[16] It is important for all concerned to recall that I said in the order concerning the adjournment that there be continued consultation and negotiation in good faith between all

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concerned, all as set out in the 1994 statement of shared objectives and that confrontation in any form simply should not happen.



S. I. Thomson J.

Released: August 27, 2007

SCHEDULE 'B'

The parties have agreed to a revised timetable as follows:

1. A.O.O. to serve all materials by 10:00 a.m., August 29, 2007;
2. Frontenac to serve all responding material by 6:00 p.m., August 31, 2007;
3. Cross-examinations to take place in Toronto on September 4 and 5, 2007 (except cross-examination of S. White if necessary on September 7, 2007);
4. Frontenac factum due 6:00 p.m., September 11, 2007;
5. Ontario and A.O.O. facta due 10:00 a.m., September 14, 2007;
6. Frontenac reply factum due 2:00 p.m., September 19, 2007.

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SUPERIOR COURT OF JUSTICE

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plaintiff

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DOREEN DAVIS, RANDY COTA, HAROLD
PERRY, JANE DOE, JOHN DOE and PERSONS
UNKNOWN

defendants

REASONS FOR JUDGMENT

G. I. Thomson J.

Released: August 27, 2007