

Men's Fire loses court case, injunction stays on McClung site

By Donna Durie and Lynda Powless, Writers

CAYUGA- A failure to provide evidence necessary to quash an injunction against Six Nations people at a proposed McClung Road subdivision may actually end up being the saving grace for Haudenosaunee land rights.

The Six Nations Men's Fire lost an attempt to have a Cayuga court judge overturn an interim injunction granted to McClung Properties Ltd. who are building a 3,500 home subdivision east of Caledonia.

Justice J Turnbull upheld an injunction prohibiting Six Nations people from setting foot on the proposed subdivision and awarded costs against the Six Nations Men's Fire group. The costs have yet to be determined.

But there may be light at the end of the decision.

Haudenosaunee Confederacy Chiefs Council (HCCC) legal adviser Aaron Detlor said the lack of evidence presented in the case, on behalf of the Haudenosaunee, may end up salvaging Haudenosaunee land rights.

"There is limited precedential value associated with the ruling, because of the inability of his honour to consider a full evidentiary record."

He said "it is difficult in the Canadian court context to advance evidence necessary where there is a presumptive onus that does not favour indigenous people. It would have been of assistance if the proper evidence had been marshalled before his honour."

The ruling, he said will have little impact.

"In my personal opinion, it will have limited impact upon Haudenosaunee land rights."

The decision came after the Six Nations Men's Fire, a group of about 50 Six Nations men, filed an objection to the developer, McClung Properties Ltd.,'s injunction.

McClung Properties had an initial injunction against the Haudenosaunee Confederacy Chiefs Council, the Haudenosaunee Development Institute, Wayne Hill, Jane Doe and John Doe.

In his decision Justice J. Turnbull, found the Six Nations Mens' Fire had failed to provide any evidence of land right infringement or that an actual land claim on the parcel existed.

In his ruling he said their representative, Sue Draper, a paralegal, had maintained the parcel was part of a land claim and the developer had failed to consult with Six Nations Band Council or the Haudenosaunee.

Justice Turnbull said Draper's assertion was incorrect and she later acknowledged it was an "unfounded assertion" and a land claim did not exist.

In his judgement he said both the Six Nations Elected Band Council and New Credit councils did not file any objections at any stage of the development, after receiving notice of the plan through the Grand River Notification Agreement.

He said the Six Nations

Band Council does have a lawsuit seeking an accounting for revenues Six Nations people should have received from the land, but not a land claim.

He said Six Nations Band Council "do not make a legal claim for possession of, or return of the land."

In his 15-page decision, Turnbull upheld the injunction and rejected any argu-



ments pertaining to Haudenosaunee land and treaty rights citing largely a lack of evidence saying he had to rely heavily upon the evidence presented by McClung Properties Ltd.

McClung Properties lawyer Paul DeMello said if the defendants tried to appeal the decision, "There would be no grounds for an appeal."

Legal costs for McClung Properties are not yet known and DeMello said that would be up to the court.

Paralegal Sue Draper represented the Six Nations' Mens' Fire in objecting to the injunction and development claiming a lack of consultation with Six Nations.

Draper also told the court that pre-existing land and treaty rights in the area were being ignored.

The Men's Fire also ob-

jected to how archaeological activities on the site were carried out.

But Justice Turnbull noted archaeological monitors - representing Six Nations and New Credit band councils - were on site during an archaeological assessment of the subject property last summer.

No monitors from the HCCC were contacted or

included in the digs.

The judgement says Wayne Hill, who said he represented the HCCC did attend the site in May of 2015 demanding all work cease and to hire the HCCC monitors and refused to leave the property saying they would be calling in more members. The move spurred McClung Property to call in the OPP and seek the initial injunction in October 2015.

HCCC legal Advisor Aaron Detlor appeared on behalf of the HCCC telling the court the HCCC advised they would not be objecting to the injunction.

Draper had argued in January the lands lie within the Haldimand Tract, a parcel of land six miles on either side of the Grand River that was never surrendered by Six Nations.

In his judgement Justice Turnbull found "There is no

challenge to the validity of the plaintiff's title to the property."

Turnbull said the "...Men's Fire has provided no evidentiary basis upon which any rights to the lands could arise in favour of the defendants or Men's Fire..." Justice Turnbull rejected the Six Nations' Men's Fire submission involving earlier Supreme Court rulings. The Men's Fire had cited the 2004 Haida Supreme Court decision as the basis for arguing that the developers and Haldimand County have the duty to uphold the honour of the Crown by consulting with Six Nations.

Justice Turnbull disagreed, arguing that Haida specifies that it's the duty of the Crown, not third-party landowners, to consult.

He further argued that the only duty of the Crown is to "give notice" when the "claim to title is weak."

He said, "That is the very situation at hand. The aboriginal right is very limited in this case as there is no land claim against the property in question."

Turnbull also said there is no constitutional duty for the Corporation of Haldimand County to consult with the Men's Fire, either.

"Clearly, consultation has taken place with the elected band councils of the Six Nations of the Grand River and the Mississaugas of the New Credit."

Turnbull said, "The plaintiff is entitled as a registered landowner to develop his land lawfully."

The Men's Fire had also ar-

gued the injunction is an attempt to restrain them from using or accessing their lands pursuant to section 35 of the Constitution Act.

"There is no support provided for this assertion," Turnbull said, adding that the act governs the relationship between the Crown and individuals, not between private parties (such as developers) and Onkwehonwe people.

Turnbull said based on the evidence presented he was not prepared to vary the order.

He said McClung Properties owns the property "There is no outstanding registered land claim against the property by First Nations people."

Instead he said there is a damages claim "with respect to the Haldimand Tract in which the property is located but any interest can be compensated with damages."

He said the Men's Fire did not file affidavit evidence that if the order was varied, "they would not then block access to the property and otherwise obstruct access to the property."

Turnbull found in favour of McClung Properties and ordered the Mens' Fire to pay legal costs for McClung Properties and Haldimand County.

Costs from McClung and Haldimand county were to be given to the Judge by April 1 with the Mens' Fire replying to the cost submissions by April 20th.

Mens' Fire representative Bill Monture did not return Turtle Island News calls for comment.