

Court File No. 114/2006/CP
Court File No. 172/2006
Court File No. 07-CV-328469PD1
Small Claims Court File No. 39/2007

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

KRP ENTERPRISES INC. and 1643078 ONTARIO INC.

Plaintiffs

- and -

**CORPORATION OF HALDIMAND COUNTY, ONTARIO PROVINCIAL
POLICE COMMISSIONER GWEN M. BONIFACE, ONTARIO PROVINCIAL
POLICE INSPECTOR BRIAN HAGGITH and HER MAJESTY THE QUEEN IN
RIGHT OF ONTARIO**

Defendants

Proceeding under the Class Proceedings Act, 1992

B E T W E E N:

DAVID BROWN AND DANA CHATWELL

Plaintiffs

- and -

**HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE
OF ONTARIO and ONTARIO PROVINCIAL POLICE, A CROWN
CORPORATION**

Defendants

B E T W E E N:

**RAILINK CANADA LTD. carrying on business as
THE SOUTHERN ONTARIO RAILWAY**

Plaintiff

- and -

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Defendant

B E T W E E N:

FRANK PAUL FASANO

Plaintiff

- and -

THE PROVINCIAL GOVERNMENT OF ONTARIO

Defendant

**FACTUM OF THE DEFENDANT (MOVING PARTY), HER MAJESTY THE
QUEEN IN RIGHT OF ONTARIO**

(Motion returnable April 18, 2007)

April 13, 2007

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Self-represented Plaintiff

Court File No. 114/2006/CP
Court File No. 172/2006
Court File No. 07-CV-328469PD1
Small Claims Court File No. 39/2007

ONTARIO
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- and -

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B E T W E E N:

FRANK PAUL FASANO

Plaintiff

- and -

THE PROVINCIAL GOVERNMENT OF ONTARIO

Defendant

**FACTUM OF THE DEFENDANT (MOVING PARTY), HER MAJESTY THE
QUEEN IN RIGHT OF ONTARIO**

(Motion returnable April 18, 2007 at 10:00 a.m.)

PART I – OVERVIEW

- 1) Her Majesty the Queen in Right of Ontario (the “Crown”) has been named as a defendant in four similar actions, including a proposed class action and a Small Claims Court proceeding, arising from what has become known as the Caledonia land dispute (collectively known as the “Caledonia Actions”). In order to avoid unnecessary duplication and inconsistent findings and to secure greater judicial economy, the Crown has brought this motion for the following relief:
- a) an order that all Caledonia Actions be case managed by the Honourable Justice Crane in Hamilton;
 - b) an order transferring the Fasano Action from the Small Claims Court to the Superior Court of Justice, or, in the alternative, an order staying the Fasano action pending the final determination of the Proposed Class Action.
- 2) Each of the Caledonia Actions share striking similarities in the statements of claim, which will result in similar legal analysis and duplicative procedural steps. Each of the Caledonia Actions will call for extensive documentary discovery, lengthy cross examination and considerable *vive voce* evidence. As a result of the similarities and resource-intensive nature of the Caledonia Actions, a form of case management is required to ensure the just and expeditious determination of these claims.
- 3) Absent some form of case management, questions of law and fact underpinning all of the Caledonia Actions could be answered differently in different courts, motions

could be decided differently resulting in conflicting orders, many steps in the litigation would be duplicated, and the Caledonia Actions would proceed slowly.

4) For the same reasons, with respect to the Fasano Action the Small Claims Court is inappropriate and not properly equipped to address such a complex, resource intensive and document driven action.

PART II - FACTS

The Caledonia Land Dispute

5) On February 28, 2006, a group of protestors belonging to or associated with the Haudenosaunee/Six Nations Confederacy (the "occupiers") blockaded and have occupied the Douglas Creek Estates, a residential subdivision under development in Caledonia (the "DCE Lands") as an act of reclaiming the land. This blockade escalated into barricades of Highway 6, Argyle Street and the local rail line. It also led to reports of civil disobedience, vandalism, thefts and assaults within the vicinity of the DCE Lands.

Affidavit of C. Perruzza, Motion Record of the Moving Party, Tab 2, para. 2

6) Throughout the occupation of the DCE lands, negotiations to resolve the dispute between Canada, Ontario and Six Nations Authorities have been ongoing (the "Main Table Negotiations"). Although tensions have reportedly ceased, and most of the blockades removed, a resolution has not yet been achieved.

Perruzza Aff., Motion Record, Tab 2, para. 2

Litigation arising from the Caledonia land dispute

7) A number of legal proceedings have been commenced in relation to the occupation of the DCE Lands. Presently, there are four similar and overlapping actions in Hamilton, Cayuga and Toronto with common defendants and multiple plaintiffs:

- a) *KRP Enterprises Inc. et al. v. Her Majesty the Queen in Right of Ontario et al.* bearing Court File No. 114/2006/CP was commenced in Hamilton pursuant to the *Class Proceedings Act* (the “Proposed Class Action”).
- b) *Chatwell et al. v. Her Majesty the Queen in Right of Ontario et al.*, was commenced in Cayuga bearing Court File No. 172/2006 (the “Chatwell Action”).
- c) *RaiLink Canada Ltd. c.o.b. Southern Ontario Railway v. Her Majesty the Queen in Right of Ontario* was commenced in Toronto bearing Court File No. 07-CV-328469PD1 (the “RaiLink Action”).
- d) *Fasano v. The Provincial Government of Ontario* was commenced in Cayuga bearing Court File No. 39.2007 (the “Fasano Action”).

Perruzza Aff., Motion Record, Tab 2, para. 3

a) The Proposed Class Action

- 8) The plaintiffs in the Proposed Class Action make claims in negligence, misfeasance in public office and nuisance in connection with the Crown defendants’ response to and failure to prevent the occupation of the DCE lands (and events incidental thereto).

Perruzza Aff., Motion Record, Tab 2, para. 7

b) The Chatwell Action

- 9) In the Chatwell Action, the plaintiffs claim that the occupation of the DCE lands and related road and rail blockades have adversely affected the enjoyment of their property and life. The plaintiffs claim they have suffered damage for the OPP’s alleged failure to provide police services in Caledonia.

Perruzza Aff., Motion Record, Tab 2, para. 9

c) The RaiLink Action

- 10) The plaintiff in the RaiLink Action operates a rail service over a railway near the border of the DCE Lands. The plaintiff claims damages allegedly arising from the

blockade of the plaintiff's railway right of way, which was blockaded by the protestors allegedly as a result of the conduct of the Crown defendants.

Perruzza Aff., Motion Record, Tab 2, para. 11

d) The Fasano Action

11) The plaintiff in the Fasano Action operates a business in Caledonia and alleges that the Crown is liable for the losses his business suffered as a result of the occupation of the DCE Lands.

Perruzza Aff., Motion Record, Tab 2, para. 13

12) On March 23, 2007, the Crown Law Office – Civil received a notice of a mandatory settlement conference (the "Notice") scheduled for May 8, 2007. According to the Notice, each party must serve on every other party and file with the court a copy of any document to be relied on at the trial and a list of proposed witness and other persons with knowledge of the matters in dispute in the action at least 14 days before the settlement conference.

Perruzza Aff., Motion Record, Tab 2, para. 14

13) Small Claims Court actions in Cayuga are currently being set down for trial for late April or early May, 2007. Based on that information, a trial of the Fasano Action could be held as early as mid-July, 2007.

Perruzza Aff., Motion Record, Tab 2, para. 15

14) In addition to the above-mentioned claims, Crown Law Office – Civil has so far received correspondence from eleven other individuals contemplating legal action against the Crown or its servants in relation to the occupation of the DCE Lands.

Perruzza Aff., Motion Record, Tab 2, para. 4

The Similarities in the Statements of Claim

15) The Caledonia actions have many similarities. In particular, all of the Caledonia actions:

- are brought by individuals or businesses who reside or carry on business in Caledonia or surrounding areas;
- name the Crown and/or the Ontario Provincial Police (the "OPP") as defendants;
- arise from the occupation of the DCE lands;
- raise claims grounded in negligence and/or misfeasance as a result of the manner in which the Crown and/or the OPP responded to (or failed to prevent) the occupation of the DCE Lands (and events incidental thereto); and
- allege that they have suffered damages as a result of the Crown's response to the occupation of the DCE lands.

Perruzza Aff., Motion Record, Tab 2, para. 16

16) As such, many of the issues for trial in all of the Caledonia actions will involve the same legal analysis including, but not limited to:

- in the circumstances giving rise to the Caledonia actions, whether any particular Crown servant owes a private law duty of care to each of the plaintiffs (or a class of plaintiffs);
- if a duty exists, did any particular Crown servant's response to the occupation of the DCE Lands amount to a breach of that duty or to misfeasance in public office;
- did any particular Crown servant's conduct cause the plaintiffs to suffer compensable harm; and
- whether the plaintiffs contributed to their own harm or losses.

Perruzza Aff., Motion Record, Tab 2, para. 17

The Similarities in Procedure

17) Due to the similar allegations in all of the Caledonia actions, it will be necessary to determine the facts regarding the Crown and/or the OPP's response to the occupation of the DCE Lands. The following procedural duplications will result in each Caledonia related action:

- the productions of the Crown will be substantially similar or possibly even identical;
- the examinations for discovery of the Crown will cover the same material and require many of the same parties;
- the trial evidence in each action will be lengthy and virtually identical.

Perruzza Aff., Motion Record, Tab 2, para. 18

18) The volume of documents the Crown will be required to disclose in accordance with the *Rules of Civil Procedure* and the *Rules of the Small Claims Court* will be substantial. The Crown will need to disclose documents from the OPP, the Ministry of the Attorney General, the Ministry of Community Safety and Correctional Services, the Ministry of Public Infrastructure and Renewal, the Ministry of Municipal Affairs and Housing and the Ontario Secretariat for Aboriginal Affairs. At present, there is the electronic equivalent of approximately 100 banker boxes of documents from the OPP alone. The Crown currently expects its production will exceed 300,000 documents.

Perruzza Aff., Motion Record, Tab 2, para. 19

19) The volume of documents will result in extensive oral discoveries expected to take several weeks to complete.

Perruzza Aff., Motion Record, Tab 2, para. 20

20) All of the issues raised in the Caledonia actions before the Superior Court of Justice will have to be addressed in the Fasano Action before the Small Claims Court. The Fasano Action will likely involve the same volume of documents, number of

witnesses and length to fairly determine the action on its merits. Absent intervention of the court, the Fasano Action will likely be tried before any other Caledonia related action.

Perruzza Aff., Motion Record, Tab 2, para. 21

PART III – ISSUES

1. Should the Court order that one judge case manage all of the Caledonia Actions by appointing one judge to hear all motions relating to the Caledonia Actions.
2. If so, should the Court order that Justice Crane hear all motions in the Caledonia related proceedings?
3. Should the Court order the Fasano Action transferred from the Cayuga Small Claims Court to the Superior Court of Justice in Hamilton, or
4. In the alternative to (3), should the Court order the Fasano Action stayed?

PART IV - ARGUMENT

21) There are four similar, related, and complex Caledonia actions, including a class proceeding and a Small Claims action. The Caledonia Actions will call for extensive documentary discovery, lengthy cross examination and considerable *vive voce* evidence that not only requires some form of case management, but is also inappropriate for Small Claims Court. As such, an order requiring that all motions be heard by Justice Crane in Hamilton and transferring the Fasano Action to the Superior Court of Justice would avoid unnecessary duplication, achieve judicial economy and result in the most just and expeditious determination of the Caledonia Actions.

A) One judge should hear all motions in the Caledonia actions

22) Rule 37.15 of the *Rules of Civil Procedure* allows for one judge to hear all motions in related proceedings and provides, therefore, an effective form of case over the Caledonia Actions. Absent a form of case management there is “potential for

jurisdictional gridlock and conflicting orders by different judges in different regions” in the Caledonia actions.

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, s. 37.15(1) [*Rules*]
Vitapharm Canada Ltd. v. Hoffman-LaRoche Ltd. (2000), 48 O.R. (3d) 21 at paras. 35-36 (S.C.J.) [*Vitapharm*]
Segnitz v. Royal & Sunalliance, [2002] O.J. No. 2137 at paras. 22, 25 (S.C.J.) [*Segnitz*]

23) To ensure the just, most expeditious and least expensive determination of the actions on their merits, one judge should case manage the Caledonia actions because:

- all of the Caledonia Actions involve similar overlapping allegations regarding the Crown’s actions pertaining to the occupation of the DCE Lands;
- all of the Caledonia Actions request relief in damages for negligence amongst other causes of action;
- all of the Caledonia Actions have common issues which, though requiring individual determination, would benefit from joint case management;
- each Caledonia related action is in a different venue including the Superior Court of Justice in Hamilton, Cayuga and Toronto and the Small Claims Court in Cayuga;
- there are five plaintiffs between the Chatwell, RaiLink and Fasano actions and 18 representative plaintiffs and four classes in the Proposed Class Action;

Rules, supra, r. 37.15(1)
Logan v. Harper, [2001] O.J. No. 3744 at para. 24 (S.C.J.) [*Logan*]
Ludwig v. 1099029 Ontario Ltd., [2004] O.J. No. 702 at paras. 4-5 (S.C.J.)

24) An order providing for the joint case management of the Caledonia Actions will:

- avoid multiplicity of proceedings in accordance with s. 138 of the *CJA*;
- avoid inconsistency in the application of legal principles, both new and settled;
- allow for similar motions to be argued together or sequentially before the same judge, which in turn will prevent inconsistent orders;
- encourage economic use of judicial and other litigation resources in accordance with r. 1.04;
- allow for a common timetable to avoid simultaneous participation in different stages of different proceedings, co-ordinated oral and documentary discovery to

avoiding duplication of efforts, and expeditious scheduling in accordance with r. 1.04.

Segnitz, supra at para. 20
Logan, supra at paras. 39-40

Rules, supra, r. 1.04(1)
Courts of Justice Act, R.S.O. 1990, c. C.43, s. 138 [CJA]
Perruzza Aff., Motion Record, Tab 2, paras. 22-23

25) Even if the Caledonia Actions have some differences, a form of case management is necessary to balance the tension between the different fact scenarios and the similar legal principles underlying each claim. This tension is best addressed by one judge “with knowledge and experience of the underlying issues and an overview of what kind of differential or individual treatment may be required”.

Segnitz, supra at para. 24

B) Justice Crane should be appointed to case manage all of the Caledonia Actions

26) Justice Crane has already been appointed to case manage the Proposed Class Action pursuant to s. 34(1) of the *Class Proceedings Act*. As a result, Justice Crane is, or will become, familiar with the similar facts and underlying legal arguments of the Caledonia Actions and should be, therefore, appointed to case manage them.

Class Proceedings Act, 1992, S.O. 1992, c. 6, ss. 34

27) In determining the venue where the Caledonia Actions should be case managed, Hamilton must be considered because it is the closest court to Caledonia with a class proceedings judge. It is clear that the balance of convenience favours Hamilton:

- The location of the parties favours Hamilton. All of the Caledonia actions are brought by individuals or business who reside or carry on business in Caledonia or surrounding areas. Most importantly, the representative plaintiffs and the proposed class members in the Proposed Class Action, which comprises a large proportion of the plaintiffs, are primarily located in and around Caledonia.

- The location of the witness favours Hamilton. Many of the witnesses are located in or around Caledonia.
- It is clear that the subject matter of the litigation is closely tied to Caledonia. The subject matter of the litigation is the occupation of the DCE Lands. All of the plaintiffs allege that they suffered damages as a result of the Crown's response to the occupation.

Vitapharm, supra at paras. 66-67

Ludwig, supra at para. 9

Chippewas of Sarnia Band v. Canada (Attorney General), [1996] O.J. No. 627 at para. 14 (Ct. J. (Gen. Div.))

C) The Fasano Action should be transferred to the Superior Court of Justice

28) The Fasano Action has questions of law and fact in common with the other Caledonia Actions and arises out of the same series of occurrences as the other Caledonia Actions.

CJA, supra, s. 107(1)(a), (b)

29) In addition, the Small Claims Court is not the appropriate forum for the fair and just determination of the issues in the Fasano Action. The issues in the Fasano Action are complex, important and require *viva voce* evidence and documentary discovery of approximately 300,000 documents. The Small Claims Court was not intended for such an action.

Vigna v. Toronto Stock Exchange, [1998] O.J. No. 4924 at para. 5 (Div. Ct.) [*Vigna*]

CJA, supra, s. 107(1)(c)

Perruzza Aff., Motion Record, Tab 2, para. 19

30) Section 107(2) does not prohibit the simple transfer of the Fasano Action to the Superior Court of Justice under subsection (1)(d) absent the consent of the plaintiff. Section 107(2) only prohibits the transfer of Small Claims Court actions if the order is accompanied by an order requiring consolidation, hearing together or hearing following any other proceeding. In any event, the Court can transfer the Fasano Action from the Small Claims Court to the Superior Court of Justice without the consent of the plaintiff pursuant to the Court's inherent jurisdiction.

Vigna, supra at para. 7
Ram Western Express Ltd. v. Baskin, [2004] O.J. No. 3384 at para. 20 (S.C.J.)
CJA, supra, s. 107(1)(d), (2)

31) Therefore, the Fasano Action should be transferred to the Superior Court of Justice in Hamilton.

CJA, supra, s. 107(1)(d)

D) In the alternative, the Fasano Action should be stayed

32) In the alternative, if this Court determines that the Fasano Action should not be transferred pursuant to the Superior Court of Justice, it should be stayed pending the final determination of the Proposed Class Action for the same reasons.

CJA, supra, s. 107(1)(a), (b), (c), (e)(i)

PART IV – ORDER REQUESTED

33) The Crown respectfully requests:

- a) An order that the Proposed Class Action, Chatwell Action, RaiLink Action and Fasano Action be managed together by Mr. Justice Crane or his designate;
- b) An order transferring the Fasano Action from the Small Claims Court to the Superior Court of Justice; or
- c) In the alternative to the relief requested in paragraph 46(b), an order staying the Fasano Action pending the final determination of the Proposed Class Action.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

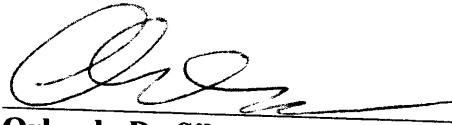
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SCHEDULE "A"**List of Authorities**

1. *Vitapharm Canada Ltd. v. Hoffman-LaRoche Ltd.* (2000), 48 O.R. (3d) 21 (S.C.J.)
2. *Segnitz v. Royal & Sunalliance*, [2002] O.J. No. 2137 (S.C.J.)
3. *Logan v. Harper*, [2001] O.J. No. 3744 (S.C.J.)
4. *Ludwig v. 1099029 Ontario Ltd.*, [2004] O.J. No. 702 (S.C.J.)
5. *Chippewas of Sarnia Band v. Canada (Attorney General)*, [1996] O.J. No. 627 (Ct. J. (Gen. Div.))
6. *Vigna v. Toronto Stock Exchange*, [1998] O.J. No. 4924 (Div. Ct.)
7. *Ram Western Express Ltd. v. Baskin*, [2004] O.J. No. 3384 (S.C.J.)

SCHEDULE "B"

Relevant Provisions of Statutes

1. *Courts of Justice Act*, R.S.O. 1990, c. C.43, ss. 107, 138
2. *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rules 1.04(1), 37.15(1)
3. *Class Proceedings Act, 1992*, S.O. 1992, c. 6, ss. 12, 13, 34

Courts of Justice Act, R.S.O. 1990, c. C.43

- 107** (1) Where two or more proceedings are pending in two or more different courts, and the proceedings,
- (a) have a question of law or fact in common;
 - (b) claim relief arising out of the same transaction or occurrence or series of transactions or occurrences; or
 - (c) for any other reason ought to be the subject of an order under this section, an order may, on motion, be made,
 - (d) transferring any of the proceedings to another court and requiring the proceedings to be consolidated, or to be heard at the same time, or one immediately after the other, or
 - (e) requiring any of the proceedings to be,
 - i. stayed until after the determination of any other of them, or
 - ii. asserted by way of counterclaim in any other of them.
- (2) A proceeding in the Small Claims Court shall not be transferred under clause (1)(d) to the Superior Court of Justice without the consent of the plaintiff in the proceeding in the Small Claims Court.
- (3) A proceeding in the Small Claims Court shall not be required under subclause (1)(e)(ii) to be asserted by way of counterclaim in a proceeding in the Superior Court of Justice without the consent of the plaintiff in the proceedings in the Small Claims Court
- (4) The motion shall be made to a judge of the Superior Court of Justice
- (5) An order under subsection (1) may impose such terms and give such directions as are considered just, including dispensing with service of a notice of readiness or listing for trial and abridging the time for placing an action on the trial list.
- (6) A proceeding that is transferred to another court under clause (1)(d) shall be titled in the court to which it is transferred and shall be continued as if it had been commenced in that court.

138 As far as possible, multiplicity of legal proceedings shall be avoided.

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

37.15 (1) Where a proceeding involves complicated issues or where there are two or more proceedings that involve similar issues, the Chief Justice or Associate Chief Justice of the Superior Court of Justice, a regional senior judge of the Superior Court of Justice or a judge designated by any of them may direct that all motions in the proceeding or proceedings be heard by a particular judge, and rule 37.03 (place of hearing of motions) does not apply to these motions.

Class Proceedings Act, 1992, S.O. 1992, c. 6

12 The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.

13 The court, on its own initiative or on the motion of a party or class member, may stay any proceeding related to the class proceeding before it, on such terms as it considers appropriate.

34 (1) The same judge shall hear all motions before the trial of the common issues.
