COURT FILE NO.: 114/2006/CP
DATE: 20071221

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
KRP ENTERPRISES INC. and 1643078 ONTARIO INC.	**John W. Findlay, and Margaret McCarthy, counsel on behalf of the Plaintiffs/Respondents**
Plaintiffs/Respondents	
- and -	
THE 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	**Dennis W. Brown, Q.C., and Orlando V. DaSilva, counsel on behalf of the Crown Defendants**
Defendants/Applicant	
	HEARD: September 25, 2007 And Reserved (at Hamilton)

CRANE J.

[1] The issues of law raised in the Statement of Claim, now challenged under this Rule 21 motion by the Crown, are complex in the extreme. On the allegations in this action and the related actions that are also challenged by the Crown by Rule 21 motions may lead a reasonable person to conclude that the residents of Caledonia have had many adverse consequences

from the events that occurred from February to June, 2006, through the blockades and occupations of public property and to the present occupations of Crown-owned Henco lands. The over-arching issue is whether these many and diverse individuals have common law rights of action.

[2] It is noteworthy to observe that a common feature of municipal policing was absent in these cases, namely that the police would be under the jurisdiction and authority of the municipality. In this case the Corporation of Haldimand County (a former defendant in this action) contracted out those services pursuant to s. 10 of the ***Police Services Act*** and in so doing transferred all authority and discretion to the Ontario Provincial Police as administered through the defendants Gwen M. Boniface and Brian Haggith, and indirectly to the defendant, Her Majesty the Queen in Right of Ontario. Essentially this dispute arises from the belief, by the plaintiffs and those they seek to represent in this class proceeding, that statutorily mandated police services were not provided to them by the defendants.

[3] The issue before me on this motion is whether the plaintiffs have framed their complaints into legally recognized causes of action by the pleading of the required constituent factual elements and legal ingredients and, more largely,

whether the complaints are causes of action when properly pleaded.

[4] The plaintiffs have amended their Statement of Claim a number of times. The amended pleading of 9 July, 2007 is attacked by the applicants in this motion. There is, however, a further draft Amended Statement of Claim, for which counsel for the plaintiffs seeks leave of the Court. This draft has been served on all counsel and is part of the materials forming the Record herein.

[5] Counsel have agreed that the present Rule 21 motion applies to s. 5(1)(a) of the ***Class Proceedings Act*** certification process.

[6] The grounds cited by the applicant Crown on this motion may be summarized as follows, that:

1. the Statement of Claim fails to plead the *tort* of misfeasance in public office;

2. the Statement of Claim fails to plead the requirements of the *tort* of negligence;

3. a duty of care of the OPP to the plaintiffs cannot co-exist with its duty to the public at large;

4. that the Statement of Claim is, in essence, a complaint against police discretion during a native protest, a discretion that is not, by law, fettered by the private law of negligence and of nuisance; and

5. that the claims of the proposed business class and property owners classes seek damages in pure economic loss in circumstances that are not recognized as a category for recovery in law.

[7] A thumbnail chronology, taken from the Statement of Claim, is as follows:

28 February, 2006 - First occupation of Douglas Creek Estate by three Clan Mothers of the Haudenosaunee Confederacy;

3 March, 2006 - Interlocutory Injunction issued to remove occupants;

9 March, 2006 - A permanent Injunction together with findings of contempt and orders for arrest of those occupying Douglas Creek Estates;

20 April, 2006 - OPP action into Douglas Creek Estates;

20 April, 2006 - Native push back with barricading of Argyle Street and Highway 6 - burning of the Sterling Street railway bridge, vehicle thrown onto Highway 54 - various cases of reckless driving of motorized vehicles - vandalizing of the local Hydro facility with the interruption of power - blockage of the Railink Railway right-of-way tracks;

The laying of 53 charges involving breaches of the peace;

22 May, 2006 - Power restored following repair of the damaged Hydro facility;

12 June, 2006 - This action commenced;

13 June, 2006 - Native blockade of Argyle Street, Highway 6 and RaiLink right-of-way lifted;

mid-June, 2006 - Purchase of Douglas Creek Estates by the Crown in settlement of claims of the owner and injunction applicant, Henco Limited; - Permission granted by the Crown In Right of Ontario as the owner of Douglas Creek

Estates to the native protestors to remain in occupation;

For a more detailed discussion of events, one may see the proceedings in ***Henco Industries Limited v. Haudenosaunee Six Nation Confederacy Council***, Docket: C45859 and C45933

[8] I look first as to whether the facts as alleged support or are capable of supporting, a claim known to the law for the damages that are sought on behalf of the proposed class claimants. This analysis is initiated by reference to the decision of the Divisional Court in ***Jane Doe v. Board of Commissioners of Police et al.*** 74 O.R. (2d) 225 @ p. 238:

> *Have the causes of action been properly pleaded?*
>
> *In my opinion, having regard to the general principles that apply to all statements of claim, these pleadings are sufficient.*
>
> *So far as the alleged failure on the part of the plaintiff to specifically plead a special proximate relationship between her and the police, I am satisfied that the facts alleged implicitly support this.*
>
> *As regards the submission that in the area of policy, the plaintiff has failed to specifically plead that the discretion of the defendants or any of them was irresponsibly made, this too is implicit in the facts alleged.*

> *In my view, these arguments go to form as opposed to substance. In accordance with the guidelines set out by Dickson J. (as he then was) in Operation Dismantle, supra, the claim must be read as generously as possible, with a view to accommodating any inadequacies in the form of the allegations due to drafting deficiencies. With this principle in mind, I am satisfied that these pleadings may stand.*

[9] There have been many judges in many cases who have engaged the analysis of proximate or special relationship under the first stage of ***Anns/Kamloops***, followed by the policy considerations of the second stage, for determination of duty of care and for determination of the possibility of a novel category in actions for damages in pure economic loss. Given that this action is under the ***Class Proceedings Act***, the policy considerations are very much an issue. However, a certification motion has not occurred to date and accordingly there is no determination of the definition of classes and sub-classes. I observe that often the definitions proposed by plaintiff's counsel are reduced in scope by the Court.

[10] The Statement of Claim through the various amendments proposes the following classes: the Caledonia Business Class; the Property Owners Class; the Contractors Class and the Highway 6 Class. The definition of those who would comprise the various classes is broad. It might be said generally speaking, to

encompass, the Town of Caledonia and environs. This is a Rule 21 motion. I am required to read the Statement of Claim so as to see the substance from the form. Should I do so, I would see the Caledonia Business Class to be restricted to those persons owning or operating businesses on Argyle Street within the blockaded section, who, due to the alleged OPP enforced blockade, were deprived of an opportunity to carry on their businesses in the period of 20 April to 13 June, 2006. The damage claims of this group is for loss of business revenues, clearly a claim in pure economic loss. It is uncertain whether there is a claim for property damage.

[11] Similarly, the Contractors Class is specifically defined as:

> *All contractors or subcontractors of Henco Industries Limited or their agents, who were contracted to provide services and materials to owners, developers, builders or contractors on the Douglas Creek Estate Subdivision on February 28, 2006.*

[12] This again is a discreet, specific group of claimants claming damages upon the alleged OPP failure to enforce the Henco injunction depriving them the benefits of their contracts. There is a quantitative number of claimants claiming a quantitative sum of specific damages over a specific period of time. Once again, this is a claim in pure economic loss.

[13] The proposed Highway 6 Class is broadly defined. Should the definition be more constricted to those persons owning or carrying on a business in the geographic area within the Highway 6 closure, allegedly enforced by the OPP from Green Road and the junction of Argyle Street South, from the period 20 April to 13 June, 2006, such a claim may fall within the same considerations as the Caledonia Business Class for the purposes of this motion.

[14] The most problematic proposed class is that of the property owners. The plaintiffs have not offered, and I do not see, a legal structure for this claim that links the alleged wrongful conduct of the defendants as the cause of a declining property value throughout the Region. It would seem to be the logical consideration that once the native protest was initiated, whether the response of the Crown was passive or the most extreme alternative of total enforcement of the injunctions by arrests and removal through the overmatching of force by greater force, the market values of properties in the area, both within the Haldimand Tract and adjacent to the Tract, would be adversely affected. This motion, however, is not to test the factual strength of the claim.

[14] The alternative to the above analysis would be a pleading that alleges that had the OPP immediately enforced the Interim Injunction it would have diffused the manifested protest before any momentum developed. This approach then leaves the issues of a novel claim in pure economic loss.

[15] Our courts have come to the view that it is a dangerous policy to expand the common law based on motions upon alleged facts that are whatever the plaintiffs' solicitors drafting the Statement of Claim state them to be. The Supreme Court of Canada has most recently cautioned the courts of this danger and to avoid other than incremental and progressive developments in the common law. It is in this regard that one might see with profit the comments in ***Hill v. Hamilton-Wentworth Regional Police Services Board,*** (2007) C.C.C. 41, Docket: 31227, para. 27.

PURE ECONOMIC LOSS

[16] Do these claims for pure economic loss fall within the recognized categories? An argument may be made under the performance of a service and under relational economic loss categories.

[17] This Court, adopts in these reasons, the statements made in the companion motion of the ***Railink*** case, paragraphs 22 through 24.

[18] The Supreme Court of Canada in ***Martel Building Ltd. v. Canada,*** [2000] S.C.J. No. 60 at para. 35 states:

> *As a cause of action, claims concerning the recovery of economic loss are identical to any other claim in negligence in that the plaintiff must establish a duty, a breach, damage and causation. Nevertheless, as a result of the common law's historical treatment of economic loss, the threshold question of whether or not to recognize a duty of care, receives added scrutiny relative to other claims in negligence.*

[19] It is well accepted that the added element adopted in ***Anns/Kamloops*** is an analysis under proximity. The test is a close relationship of such a nature that the defendants may be said to have been under an obligation to be mindful of the plaintiffs' interest, ***Brooks v. Canadian Pacific Railway Ltd.,*** [2007] S.J. No. 367, at para. 80. The Supreme Court in ***Norsk,*** (***Canadian National Railway v. Norsk Pacific Steamship Co.***, [1992] S.C.J. No. 40) and in ***D'Amato,*** (***D'Amato v. Badger***, [1996] S.C.J. No. 84), stated that the factors important to this analysis include: the relationship between the parties, physical propinquity, assumed or imposed obligations and a close causal connection.

[20] It is well known that the second stage of the ***Anns/Kamloops*** test considers whether there are any policy reasons, which justify a denial or restriction of the duty of care. ***Winnipeg Condominium,*** (***Winnipeg Condominium NO. 36 v. Bird Construction***, [1995] S.C.J. No. 2); ***D'Amato***, *supra*.

[21] I find it instructive to the task presented on this motion to quote in full paragraphs 35 and 36 of ***Lowe v. Guarantee Co. of North America***, 80 O.R. (3d) 222 (O.C.A.):

> *[35] In Cooper, the Supreme Court of Canada discussed at paras. 33 and 34 the meaning of proximity and various factors that can be used in determining if a particular relationship meets the threshold of "sufficient proximity":*
>
> > *As this Court stated in Hercules Management Ltd. v. Ernst & Young, [1997] 2 S.C.R. 165, at para. 24, per LaForest J.:*
> >
> > > *The label proximity, as it was used by Lord Wilberforce in Anns, supra, was clearly intended to connote that the circumstances of the relationship inhering between the plaintiff and the defendant are of such a nature that the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs.*
> >
> > *Defining the relationship may involve looking at expectations, representations, reliance, and the property or other interests involved. Essentially, these are factors that allow us to evaluate the closeness of the relationship between the plaintiff and the defendant and to determine whether it is just and fair having regard to that relationship to impose a duty of care in law upon the defendant.*

> *[36] As for the second branch of the test, the court noted that "residual policy considerations" were not concerned with the relationship between the parties but "with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally". In this regard, the court posited several questions at para. 37: "Does the law already provide a remedy? Would recognition of the duty of care create the spectre of unlimited liability to an unlimited class? Are there other reasons of broad policy that suggest that the duty of care should not be recognized?" See also the companion case of Edwards v. Law Society of Upper Canada, [2000] 3 S.C.R. 562, [2001] S.C.J. No. 77.*

[22] In my view, although it may be theoretically possible to do the first stage of the ***Anns/Kamloops*** analysis on a Rule 21 attack of the plaintiffs' pleading, the second stage requires the response of the defendant in a case of this nature.

[23] I state a conclusion, without setting out the voluminous burden of the analysis, that it is not established that the facts as alleged in the Statement of Claim here, would fit within any of the recognized categories, and in particular, neither relational economic loss nor negligent performance of a service. However the very circumstances of this case are in themselves novel. They are of a kind that unfortunately our society may see at an increasing frequency going forward in time. It may well be that a variation of the cause of action in

nuisance as discussed in the companion ***Railink*** reasons may come to be adopted as the common law develops to deal with this and like situations. Namely, the recognition of the test of unreasonable interference, by balancing exceptional private loss of an individual against the social utility of the governmental conduct for the benefit of the larger community, see ***Schenck v. Ontario***, 15 D.L.R. (4th) 320; aff'd. [1987] S.C.J. No. 55; and ***Mandrake v. T.T.C. Management***, [1993] O.J. No. 995 (O.C.A.).

[24] This motion, if successful, eliminates the costly process of a certification motion. On the other hand, it is of a limiting nature when brought in class proceedings actions. The consideration of the definition of the classes and therefore the identification of the claimants, their causes of action as specifically stated and the nature of the damages claimed, are all to be determined under the certification motion. A determination that could, possibly, result in a dismissal of the action. The onus on certification is on the plaintiffs pursuant to s. 5 of the ***Class Proceedings Act***.

NEGLIGENCE

[25] The Statement of Claim pleads relief under the law of negligence. Again, the definition of the classes impacts on the issue of whether it is reasonably foreseeable that the defendants or any of them, ought to have contemplated damages to the plaintiffs as a consequence of their respective actions. For instance, the decision made by the Commissioner and Local Superintendent of the OPP not to enter Douglas Creek Estates on the issuance of the Interim Injunction and immediately following the issuance of the Permanent Injunction, was in circumstance reasonably foreseeable that those working on the construction of the subdivision would be deprived of an opportunity to continue work on the site. Whether this group was in sufficient proximity to the OPP defendants to found a duty of care, based upon the intention of the governing statute,[1] the ***Police Services Act***, perhaps would be one of time; on whether the shutdown should be a matter of a brief period, or an extended period of time.

[26] The House of Lords, as so often is the case, has put a difficult legal situation succinctly. In situations of police inaction in the face of civil protest, Lord Slynn of Hadley

---

[1] See ***Torts Tomorrow, A Tribute to John Fleming***, chapter 3 and; ***Liability of the Crown***, 3rd Ed. Prof's. Hogg & Monahan, pg. 170 - 177.

stated at para. 23 of ***R. v. Chief Constable of Sussex: ex parte International Trader's Ferry Ltd.*** (1999) A.E.R. 129:

> *In a situation where there are conflicting rights and the police have a duty to uphold the law, the police may, in deciding what to do, have to balance a number of factors, not the least of which is the likelihood of a serious breach of the peace being committed. That balancing involves the exercise of judgment and discretion.*

It is to be noted that this passage was quoted by the Court of Appeal in the ***Henco*** case, *supra*.

[27] Lord Slynn continued his analysis with a reference to Lord Justice Simon Brown's reasons in ***Phoenix Aviation v. Coventry Airport***, [1995] E.W.J. No. 4488 at page 37 quoting in part para. 119 of ***Phoenix***, *supra*:

> *...One thread runs consistently throughout all the case law: the recognition that public authorities must beware of surrendering to the dictates of unlawful pressure groups.*

The balance of Lord Simon Brown's para. 119 is as follows:

> *...[as above]...*
> *The implications of such surrender for the rule of law can hardly be exaggerated. Of course, on occasion, a variation or even short-term suspension of services may be justified. As suggested in certain of the authorities, that may be a lawful response. But its one thing to respond to unlawful threats, quite another to submit to them (the difference, although perhaps difficult to define, will generally be easy to*

> *recognize). Tempting though it may sometimes be for public authorities to yield too readily to threats of disruption, they must expect the courts to review any such decision with particular vigour - this is not an area where they can be permitted a wide measure of discretion. As when fundamental human rights are in play, the courts will adopt a more interventionist role.*

The English Courts then went on to indeed scrutinize the balancing that the police authority made in each case upon a test of what is fair and reasonable.

[28] I conclude that inasmuch as counsel for the Crown has made the submission on this Rule 21 motion that the court simply accept the statement of a public policy decision taken by the Crown defendants and thereupon dismiss the action, that submission is rejected.

MISFEASANCE IN PUBLIC OFFICE

[29] It is my view that the Amended Statement of Claim of 9 July, 2007 does not contain the typically pleaded essential elements of this cause of action. However, it may be inferred from the pleading that the defendant(s) knew that damage to the plaintiffs would likely occur in consequence of his and her deliberate actions or omissions. The plaintiffs plead that it is misfeasance under the duties imposed by the ***Police Services Act***, for the Commissioner and Superintendent to desist from her and

his duties to the plaintiffs or some of them, in order to reduce the risk of unlawful conduct by others in other places.

[30] As noted in paragraph [4], in the interim between the response to the present motion and the hearing of the motion, the plaintiff's have added amendments to specifically state the elements of the *tort* of misfeasance in public office. This further pleading has been filed in these proceedings and is dated 25 September, 2007. Although very much in mind of the difficulties for the applicants/defendants to strike against such a moving target, I would nonetheless consider these proposed amendments of September. I do so as it has been a practice of this court in hearing certification motions to allow amendments to the Statement of Claim when an appropriate case is made. Broadly stated, the Court will apply principles that are informed by Charter values of access to justice. We are not yet at the certification motion stage, simply at the first preliminary challenge to the action made by the defendants. I do consider the September amendments on misfeasance given that, on a broad and generous reading of the July amended pleading, one can see that there is an intention to plead this cause of action. The July pleading contains the citation of duties and breach of those duties and considerable particulars (if not also

evidence). The Amended Statement of Claim of 25 September, 2007, paragraphs 60 through 64E, in my view, pleads a cause of action against the Crown defendants; and as against the Ministers of the Crown, paragraphs 69 through 81. I note that the defendants have accepted a very similar case of misfeasance pleaded against them upon the motion that was before me and later withdrawn by those defendants in ***Brown and Chatwell***, File 172/2006.

NUISANCE

[31] Justice Linden and Professor Feldthusen in ***Canadian Tort Law***, 8th ed., discussed four factors for the finding of a private nuisance claim in reference to the decision of ***Mandrake Management Consultants Ltd.***, *supra*, namely, the type and severity of harm, the character of the locale, issues of abnormal sensitivity, and the utility of the defendant's conduct.

[32] On the balancing that the court must do between that of a seemingly clear case of ***Schenck***, *supra*, and the more difficult situation of ***Mandrake Management***, much is to be determined on the facts of the particular case. As one example,

taken from their article, the learned authors state in part under the fourth factor of utility of the defendant's conduct:

> *...whether there has been an unreasonable interference with the use and enjoyment of the plaintiff's land is a question of judgment based on all the facts in the circumstances. As is so often the case in tort law, much is left to the good sense of the judge to arrive at an appropriate decision after weighing the various factors, such as extent of harm, the nature of the locality, the type of use by the plaintiff and the quality of the defendant's conduct. As a result there are no definitive guidelines for the courts here, which certainly breeds uncertainty, but there is considerable flexibility built into the process, which should foster just decisions in the circumstances of each case.* (pages 580 - 581)

[33] The plaintiff's plead at paragraph 47 of the July 2007 Statement of Claim as follows:

> *47. Since July 4, 2006, the protestors and the Province of Ontario, in disregard for the quiet enjoyment of the neighbouring property owners, have engaged in or allowed the following acts of nuisances:*
>
> *a. on a continuing basis loud noises have emanated from the Douglas Creek Estates at all hours of the night, including gunfire, shouting and yelling, heavy machinery, unmuffled ATVs, music and drum beating;*
>
> *b. smoke and smells blow into the property from open fires that have been allowed on the Douglas Creek Estates in violation of the municipal by-laws;*