

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**KRP ENTERPRISES INC. and
1643078 ONTARIO INC.**

Plaintiffs

- and -

**THE CORPORATION OF HALDIMAND COUNTY,
ONTARIO PROVINCIAL POLICE COMMISSIONER GWEN M. BONIFACE,
and ONTARIO PROVINCIAL POLICE INSPECTOR BRIAN HAGGITH**

Defendants

Proceeding under the Class Proceedings Act, 1992

**RESPONDING FACTUM
OF KRP ENTERPRISES ET AL.**

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PART I

1. **OVERVIEW**

2. This action is a proposed class proceeding under the *Class Proceedings Act, 1992* (the "CPA").
3. This Factum is in response to the defendants' motion under Rule 21 of the Rules of Civil Procedure.
4. The plaintiffs had previously brought a motion seeking a formal amendment of the Statement of Claim and seeking certification under the CPA.

5. It has been agreed by the parties that the determination of the defendants' Rule 21 motion will determine the plaintiffs' requirement to satisfy s. 5(1)(a) of the CPA.
6. If the plaintiffs are successful in this Rule 21 motion, then the defendants intend to file affidavit material and the determination of whether ss. 5(1) (b) to (e) have been satisfied will be scheduled for a hearing at a later date.
7. The representative plaintiffs are proposing to represent four classes of plaintiffs:
8. *Caledonia Business Class*

“All those persons, including sole proprietors, partnerships, corporations or organizations, whether for profit or non-profit, with places of business within the N3W Canada Post postal division whose businesses have been affected by the closure of Argyle Street from April 20, 2006 until May 24, 2006, the occupation by protestors of the Douglas Creek Estates or the interruption of hydro service from damage done to the Hydro One Caledonia transformer station on May 22, 2006, excluding members of the Contractors Class.”
9. The Caledonia Business Class is represented by KRP Enterprises Inc. (the Dairy Queen) and 1643078 Ontario Inc. (St. George Arms), two businesses located along Argyle Street.
10. *Property Owners Class*

“All those persons, including individuals, trusts, corporations or organizations, who, on February 28, 2006, owned or occupied real property located within the N3W Canada Post postal division, and have been affected by the occupation by protestors of the Douglas Creek Estates, the closure of Argyle Street from April 20, 2006 until May 24, 2006, the closure of Highway 6 between Green Road and the junction of Argyle Street South from April 20, 2006 until June 13, 2006, and the interruption of hydro service from damage done to the Hydro One Caledonia transformer station on May 22, 2006, excluding members of the Caledonia Business Class.”

11. The Property Owners Class is represented by Kevin Clark, Esta Clark, Christina Acciaccferro, Jeffrey Acciaccferro, Steve Tong, Lori Tong, Russell Kavanagh, Michelle Kavanagh, Paul Durcek, Stefany Durcek, Quintin Chausse, Donna Chausse, Anne Marie VanSickle and James Paul VanSickle, all real property owners residing in Caledonia Ontario.

12. *Contractors Class*

“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 Estates subdivision on February 28, 2006.”

13. The Contractors Class is represented by J.P. Woolley Surveying Ltd., a local land surveying company.

14. *Highway 6 Class*

“All those persons, including sole proprietors, partnerships, corporations or organizations, resident in the Province of Ontario who carry on a business, whether for profit or non-profit whose businesses have been affected by the closure of Highway 6 between Green Road and the junction of Argyle Street South from April 20, 2006 until June 13, 2006 and the occupation of protestors on the Douglas Creek Estates, excluding members of the Caledonia Business Class.”

15. The Highway 6 Class is represented by Margaret Cook, the owner of Verrips Greenhouses located along Highway 6 in Jarvis, Ontario.

16. The claims of the plaintiffs all arise out the actions of the Defendants, Ontario Provincial Police Commissioner Gwen Boniface (“Commissioner Boniface”), Ontario Provincial Police Inspector Brian Haggith (“Inspector Haggith”) and various ministers of the Province of Ontario (collectively the “Crown Defendants”) during an occupation of a

residential subdivision known as the Douglas Creek Estates by native protestors commencing on February 28, 2006.

17. The plaintiffs are basing their claims against Commissioner Boniface and Inspector Haggith on the tort of malfeasance in a public office, negligence and nuisance.
18. The plaintiffs are basing their claims against the various Crown Defendants on the tort of malfeasance in a public office and nuisance.

PART II

19. FACTS

20. The proposed Amended Statement of Claim sets out various facts upon which the plaintiffs base their claims.
21. As acknowledged by the Defendants, in a Rule 21 motion the facts set out in the Amended Statement of Claim must be accepted as proven. As a result, the following statements set out in paragraphs 22 to 62, which are all contained in the Amended Statement of Claim, must be taken as proven.
22. On or about October 1, 2003, in accordance with s. 10 of the *Police Services Act*, R.S.O. 1990, c. P.15, Haldimand County entered into an agreement with the Solicitor General of Ontario (the "Haldimand Police Services Agreement") under which it was agreed that police services would be provided to Haldimand County by the Ontario Provincial Police (the "OPP") for a five year period.

Amended Statement of Claim, Responding Motion Record, Tab 2, para. 7.

23. On or about February 28, 2006 a group of protesters occupied a parcel of property in Caledonia that had been registered under the Ontario *Land Titles Act* R.S.O. 1990, c. L.5, as a Plan of Subdivision in the Land Registry Office for the Land Titles Division of Haldimand comprised, firstly, as Parts of Lot B and C, Range West of Plank Road, geographic township of Oneida, in Haldimand County and being Parts 2 and 3 on Reference Plan 18R-6217 and, secondly, as part of Lot 18, Broken Front Concession on the Grand River, geographic Township of Oneida, in Haldimand County and being Parts 2 and 3 on Reference Plan 18R-6217 (hereinafter referred to as the “Douglas Creek Estates”).

Amended Statement of Claim, Responding Motion Record, Tab 2, para. 28.

24. The owner in fee simple with an absolute title to the Douglas Creek Estates was Henco Industries Limited (“Henco”).

Amended Statement of Claim, Responding Motion Record, Tab 2, para. 29.

25. On March 3, 2006, Henco brought an application to the Superior Court of Justice at Cayuga against the Haudenosaunee Six Nations Confederacy Council and the protesters, their agents or persons acting under their instruction seeking an interim and permanent injunction restraining the protesters from interfering with the work going on in the subdivision, requiring the protesters to remove the barricades and requiring the Ontario Provincial Police at the request of the Sheriff to remove any persons who refuse to obey the requirements of the injunction.

Amended Statement of Claim, Responding Motion Record, Tab 2, para. 31.

26. On March 3, 2006, Justice B Matheson issued an Order providing for the following:

“1. THIS COURT ORDERS an interim and interlocutory injunction restraining the Haudenosaunee Six Nations Confederacy Council (“Confederacy Council”) and the individual Respondents and their servants or agents, whose identity is unknown,

from interfering with the Applicant [Henco] or its employees or agents, or the Applicant's contractors or subcontractors, or their agents, use of roadways known municipally as Thistlemoor Drive and Surrey Street, formerly in the Town of Caledonia and the Township of Oneida, now known as The Corporation of Haldimand County, or from in any way obstructing these or other roadways in Douglas Creek Estates or preventing the Applicant or its employees or agents, or the Applicant's contractors or subcontractors, or their agents, from using these or other roadways for the purpose of entering Douglas Creek Estates more particularly described in Schedule 'A' attached hereto;

2. THIS COURT FURTHER ORDERS an interim and interlocutory injunction restraining the Confederacy Council and the individual Respondents, their servants or agents, and any other person having notice of the injunction, from hindering, interfering with, intimidating, physically obstructing or otherwise impeding the operations of the Applicant or its employees or agents, or the Applicant's contractors or subcontractors, or their agents, in the performance of work relating to the construction of the Douglas Creek Estate subdivision ('the subdivision') within the area, set out at Schedule 'A', until the trial of this matter or until such time as this Honourable Court may direct;
3. THIS COURT FURTHER ORDERS that an interim mandatory Order requiring the Respondents to remove any vehicles and to tear down and remove any barricades owned, placed or maintained by them, constructed across Thistlemoor Drive and Surrey Street, the public highway and/or roadway, or any other obstruction on the public highway and/or roadway, owned and maintained by the Respondent, The Corporation of Haldimand County, preventing access to the Douglas Creek Estates;
4. THIS COURT FURTHER ORDERS that any peace officer of the Ontario Provincial Police shall, at the request of the Sheriff, accompany the Sheriff and

assist in the execution of the Order, including the removal of any persons who refuse the request of the Sheriff to obey the provisions of the interlocutory Order.

5. THIS COURT FURTHER ORDERS that posting of the Notice of Application, Notice of Motion and any Court Orders at Thistlemoor Drive and Surrey Street in Douglas Creek Estates and at the municipal offices at The Corporation of Haldimand County at 45 Munsee Street North, P.O. Box 400, Cayuga, Ontario, and by delivery of one copy, of the Notice of Application and Court Orders to any persons manning the barricades, shall be good and sufficient service of the Notice of Motion, Notice of Application and any Court Order on the Respondents, Haudenosaunee Six Nations Confederacy Council, Janie Jamieson, Dawn Smith, Tom Deer, or any agent or person acting under their instruction, John Doe, Jane Doe and other persons unknown;
6. THIS MOTION is returnable before this Court at 55 [sic] Munsee Street North, Cayuga, Ontario on March 9, 2006 at 10:00 a.m.”

Amended Statement of Claim, Responding Motion Record, Tab 2, para. 32.

27. Despite the assertion made by the Defendants in paragraph 8 of their Factum, the plaintiff J.P. Wolley Surveying Ltd, and all the members of the Contractors Class were beneficiaries of the Order of Justice Matheson dated March 3, 2007.

Amended Statement of Claim, Responding Motion Record, Tab 2, para. 32

28. On the return of the motion, on March 9, 2006, Justice T. Marshall, after hearing the submissions of counsel for Henco and for The Corporation of Haldimand County, issued an Order making permanent the injunctions ordered by Justice B. Matheson on March 3, 2006.

Amended Statement of Claim, Responding Motion Record, Tab 2, para. 33.

29. The Sheriff of the Superior Court of Justice at Cayuga attended at the Douglas Creek Estates and served each of the Orders in accordance with the directions set out in the Orders.

Amended Statement of Claim, Responding Motion Record, Tab 2, para. 36.

30. The Sheriff of the Superior Court of Justice at Cayuga has requested the assistance of the OPP to enforce each of the above Orders.

Amended Statement of Claim, Responding Motion Record, Tab 2, para. 37.

31. On or about April 20, 2006, peace officers attended at Douglas Creek Estates to enforce the Order dated March 28, 2006, and arrested 16 of the protestors. The protestors were fingerprinted and released. Within hours many of the protestors were back at the Douglas Creek Estates.

Amended Statement of Claim, Responding Motion Record, Tab 2, para. 38.

32. Aside from the attendance on April 20, 2006, the OPP has taken no further steps to remove the protestors from the Douglas Creek Estates.

Amended Statement of Claim, Responding Motion Record, Tab 2, para. 39.

33. As a result of the attendance on April 20, 2006, the protestors proceeded to do the following:

- a. They barricaded Argyle Street and prevented any public passage or traffic from running north or south;
- b. They piled tires on Argyle Street, poured gasoline on the tires, and set fire to them;

- c. They set fire to and completely destroyed the wooden bridge on Sterling Street that passes over the CN rail line;
- d. They started a brush fire on the southern shore of the Grand River;
- e. They prevented the fire officers from the Haldimand County Fire Department from attending to the fires referred to in subparagraphs c. and d. above;
- f. They placed barricades on Highway 6 between Argyle Street. and Green Road preventing public passage or traffic from passing either north or south on Highway 6;
- g. They threw a vehicle over the barrier of the Highway 6 overpass which landed on Municipal Highway 54;
- h. They recklessly drove ATV vehicles in a dangerous manner throughout the Douglas Creek Estates and along adjoining property, which included a grade school; and
- i. They broke and entered into the model home owned by Henco, destroyed property belonging to Henco and carried away personal property that belonged to Henco.

Amended Statement of Claim, Responding Motion Record, Tab 2, para. 40.

- 34. On May 22, 2006, control systems at the hydro transformer station located on Argyle Street South, just south of the protestors' barricade, were purposefully destroyed and set on fire by participants in the protest causing over \$1 million in damages and power failure throughout Haldimand County and Norfolk County for periods of time ranging from 3 to 48 hours. The act was recorded on security equipment installed at the site and the perpetrators were known to the OPP.

Amended Statement of Claim, Responding Motion Record, Tab 2, para. 41.

35. As of the date of this Statement of Claim, no charges have been laid with respect to any of the offences set out in the paragraphs above.

Amended Statement of Claim, Responding Motion Record, Tab 2, para. 43.

36. Since May 22, 2006, the following criminal acts have occurred:
- a. on or about May 28, 2006, Matt Walcoff, a business reporter for the Kitchener Record, was assaulted and had his digital camera stolen by protestors on municipal property outside of the Douglas Creek Estates in plain view of OPP officers watching the incident;
 - b. on or about June 4, 2006, after the OPP had refused Hydro One's request to provide policing of the Caledonia transformer station, a 20 year old student, William Cowan, who had been hired by a private security firm to guard the transformer station, was swarmed by a number of the protestors who smashed the security car while he was inside the vehicle, threatened him with death if he did not leave, then put gasoline on the car and entirely destroyed the vehicle;
 - c. at approximately 10:00 pm on June 4, 2006, David Hartless, a police officer with the Hamilton Police Services, walked outside of his house, which is located on Braemar Avenue approximately 50 feet from Douglas Creek Estates, and observed about 40 to 50 protestors threatening and harassing 3 males who had been sitting at the end of the street passively smoking cigarettes. Mr. Hartless, asked one of the female protestors what was going on and was told: "You got no business here fucking leave or I will knock you dead right now." When the protestors began physically attacking one of the males, he intervened and found himself being punched in the back and thrown to the ground by other protestors. One of the protestors had a hand held taser and attempted to shock him with it. Only when

other residents of the street came out of their houses and formed a line of defence which Mr. Hatless was able to get behind did the assault stop. The OPP were called, took a report and took no further steps against the protestors;

- d. on June 9, 2006, an elderly couple, Kathe Golke and Gunther Golke, of Simcoe, Ontario, stopped their car on Argyle Street near the protestors' barricade to look into Douglas Creek Estates. The couple were followed into the nearby Canadian Tire parking lot by approximately 25 protestors who surrounded their car, would not let them leave, and taunted them with threats of death or physical harm. One protestor put his hand through the open window and others jumped on the vehicle. Mr. Golke suffered a heart attack that required treatment at West Haldimand Memorial Hospital. This incident took place in full view of nearby OPP officers;
- e. on June 9, 2006, two CH TV newsmen, Ken MacKay, a reporter and Nick Garbutt, a cameraman, were assaulted by protestors when they attempted to film the incident referred to in subparagraph d. above. When they arrived at the scene, Garbutt set up his television camera approximately 50 feet away and was told by one of the OPP officers at the site not to get any closer. A group of the protestors left the Golke's car, walked past two OPP officers, and demanded that Mr. Garbutt hand over his camera and film. When one of the protestors reached for the camera Mr. Garbutt grabbed his arm. He was then spun around, thrown against the side of the CH TV van, held in a head lock and punched in the head. His camera was taken and the video tape inside was removed. Mr. Garbutt required treatment at West Haldimand General Hospital. Mr. MacKay reported that approximately 15 OPP officers witnessed the assault, but took no steps to prevent it; and
- f. on the evening of June 9, 2006, the residents of Thistlemoor Avenue, were requested by members of the OPP to vacate their premises for the evening.

37. No arrests were made at the scene by the attending OPP officers with respect to any of the incidents referred to in the preceding paragraph.

Amended Statement of Claim, Responding Motion Record, Tab 2, para. 44.

38. The police officers of the OPP took no steps to ensure passage at common law through Argyle Street from March 20, 2006 to May 24, 2006.

Amended Statement of Claim, Responding Motion Record, Tab 2, para. 52.

39. From April 20, 2006 up until June 13, 2006, there was no public passage or traffic allowed by the protestors along Highway 6 between Argyle Street and Green Road.

Amended Statement of Claim, Responding Motion Record, Tab 2, para. 53A.

40. The police officers of the OPP have failed to carry on the duties of police officers, in contravention of s. 42 of *the Police Services Act*, specifically,

- a. They have failed to preserve the peace;
- b. They have failed to apprehend criminals and other offenders and others who may lawfully be taken into custody, specifically,
 - (i) they have failed to carry out the mandatory orders of the Honourable Justice Matheson dated March 3, 2006 and the Honourable Justice Marshall dated March 9, 2006, requiring them to remove those who were requested by the Sheriff to comply with the said Orders;
- c. They have failed to prevent crimes and other offences, in particular;
 - (i) they have willfully ignored the criminal contempt of the Orders of Justice T. Marshall dated March 17 and March 28, 2006 by the Respondents;

- (ii) they have willfully ignored violations of suspended sentences and probation orders by the Respondents who returned to the Douglas Creek Estates following their arrest under the Orders of Justice T. Marshall dated March 17 and March 28, 2006;
- (iii) they have willfully ignored acts of break and entry and damage to private property, specifically, the buildings and contents owned by Henco located on the Douglas Creek Estates;
- (iv) they have willfully ignored acts of theft, specifically, the conversion to their own use by the protestors of property belonging to Henco;
- (v) they have willfully ignored acts of public mischief that have taken place, specifically the act by protestors of throwing a vehicle over the Highway 6 bypass damaging both the bridge and the municipal road below, and thereby further allowing the endangerment of vehicular and pedestrian traffic passing along the municipal highway below;
- (vi) they have willfully ignored acts of theft and public mischief to take place by allowing the protestors to take property, specifically, hydro towers owned by Hydro One, and converting them to their own use;
- (vii) they have willfully ignored acts of arson that have taken place, such as the burning of the Sterling St. bridge;
- (viii) they have failed to protect the Hydro One Caledonia transformer station when they knew that the transformer station would have been a likely target of attack;

- d. they have failed to provide passage at common law over Argyle Street, as they are required to do as constables under common law;
- e. they have failed to provide passage at common law over Highway 6, as they are required to do as constables under common law;

Amended Statement of Claim, Responding Motion Record, Tab 2, para. 61.

- 41. The willful destruction of the Hydro One Caledonia transfer station was a direct and foreseeable consequence of the willful failure on the part of the OPP police officers to carry out their duties as set out in the above paragraph.

Amended Statement of Claim, Responding Motion Record, Tab 2, para. 62.

- 42. Commissioner Boniface willfully instructed officers of the OPP not to make any arrests of any protestors without the prior authorization of OPP headquarters.

Amended Statement of Claim, Responding Motion Record, Tab 2, para. 63.

- 43. Commissioner Boniface:
 - a. knowingly allowed police officers under her authority to violate their duties;
 - b. from April 20, 2006 to June 13, 2006 ordered the blockage of traffic along highway 6 between Argyle Street and Green Road;
 - c. frustrated the Orders of the Honourable Justice Matheson and the Honourable Justice Marshall in determining, and stating to the representative of the Premier of Ontario, that the protestors would not be forcibly removed from the Douglas Creek Estates in any circumstance;

- d. acquiesced in a commitment by the Minister of Aboriginal Affairs for Ontario not to prosecute the protestors for any criminal offences,
- e. instructed the Defendant, Inspector Haggith, to refrain from enforcing the Orders of the Honourable Justice Matheson and the Honourable Justice Marshall; and
- f. carried out her duties in a manner that ignored the needs of the community of Haldimand County, specifically, she has restricted the police officers under her jurisdiction from carrying out their duties for fear the exercise of their duties in Haldimand County may, hypothetically, promote breaches of the peace in communities outside of Haldimand County.

Amended Statement of Claim, Responding Motion Record, Tab 2, para. 65.

44. Inspector Haggith:

- a. failed to oversee the Cayuga Detachment of the OPP in accordance with the needs of the community of Haldimand County;
- b. knowingly allowed police officers under his authority to violate their duties;
- c. acquiescing in the frustration of the Orders of the Honourable Justice Matheson and the Honourable Justice Marshall by the Defendant, Commissioner Boniface, ensuring that the protestors would not be forcibly removed from the Douglas Creek Estates;
- d. acquiescing in a commitment by the Minister of Aboriginal Affairs for Ontario not to prosecute the protestors for any criminal offences

Amended Statement of Claim, Responding Motion Record, Tab 2, para. 66.

45. The Minister of Transportation allowed Highway 6 from Argyle Street to Green Road to be occupied by the protestors from April 20, 2006 to June 13, 2006 and took no steps to remove the protestors from the highway, which prevented public use of the highway during the entire period contrary to s. 2(3) of the *Public Transportation and Highway Improvement Act*.

Amended Statement of Claim, Responding Motion Record, Tab 2, para. 71.

46. The Minister for Aboriginal Affairs, David Ramsey, in an agreement with the Haudenosaunee Six Nations Confederacy Council, made on or about April 21, 2006, agreed not to proceed with any further with any criminal charges arising from the intervention by the OPP on April 20, 2006.

Amended Statement of Claim, Responding Motion Record, Tab 2, para. 72.

47. The Minister of Aboriginal Affairs, in an agreement with Haudenosaunee Six Nations Confederacy Council made on or about April 21, 2006, also agreed to a moratorium on development on the Douglas Creek Estates, which agreement was made without the consent or consultation with the legal owners of the property and which moratorium applied immediately and was contrary to the provisions of s. 47 of the *Planning Act*.

Amended Statement of Claim, Responding Motion Record, Tab 2, para. 74.

48. The agreements made by the Minister of Aboriginal Affairs were made with the knowledge and acquiescence of the Attorney General of Ontario.

Amended Statement of Claim, Responding Motion Record, Tab 2, para. 75.

49. On May 3, 2006, the Minister of Community Safety and Correctional Services, Monte Kwinter, provided a written undertaking to the Haudenosaunee Six Nations Confederacy Council that he would not ask the federal government to provide military support to a