

**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;