

**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*

PLAINTIFFS' FACTUM

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PLAINTIFF'S FACTUM

1. CHRONOLOGY

(Paragraph of draft Amended Statement of Claim in parenthesis)

- 1 Oct 2003 Haldimand County enters into Police Service Agreement with Solicitor General (19)
- 28 Feb 2006 Protestors occupy the Douglas Creek Estates (28)
- 3 Mar 2006 Henco Industries Limited brings Application in Superior Court (31)
- 3 Mar 2006 Order of Justice B. Matheson provides interim injunction (32)
- 9 Mar 2006 Order of Justice T. Marshall makes injunction permanent (33)
- 17 Mar 2006 Order of Justice T. Marshall issuing Warrants for contempt (34)
- 28 Mar 2006 Order of Justice T. Marshall making findings of contempt (35)

- 20 Apr 2006 OPP arrests 16 protestors (38)
- Protestors set fire to tires on Argyle Street (40.b.)
 - Protestors destroy wooden bridge on Stirling Street (40.c.)
 - Protestors start brush fire on south shore of Grand River (40.d.)
 - Protestors prevent fire department from attending to fires (40.e.)
 - Protestors throw vehicle over Highway 6 overpass onto County Road 54 (40.g.)
 - Protestors vandalize model home and office on DCE (40.i)
 - Protestors block Argyle Street (40.a.)
 - Protestors block Hwy. 6 (40.f)
- 21 Apr 2006 Minister of Aboriginal Affairs agrees not to lay charges (72)
- Minister of Aboriginal Affairs puts moratorium on development of DCE (74)
- 3 May 2006 Minister of Community Safety and Correctional Services undertakes not to call in federal police assistance (77)
- 22 May 2006 Transformer on Argyle Street is vandalized and power is interrupted to residents throughout Haldimand County and Norfolk County (41)
- 24 May 2006 Traffic opens on Argyle Street (50)
- 28 May 2006 Matt Walcoff, reporter for Kitchener Record, assaulted (42.a)
- 4 Jun 2006 William Cowan, security guard at transformer station assaulted (42.b)
- David Hartless assaulted on Braemar Avenue (42.c)
- 9 Jun 2006 Kathe and Gunther Golke assaulted in Canadian Tire parking lot (42.d)
- Ken McKay and Nick Garbutt of CH TV assaulted (42.e)
 - Residents of Thistlemoor requested to vacate premises (42.f)

13 Jun 2006 Highway 6 is reopened (53)

4 Jul 2006 Minister of Public Infrastructure and Renewal become owners of DCE (45)

2. **AMENDMENT OF PLEADINGS**

3. Rule 5.04(2) of the Rules of Civil Procedure provides:

“(2) At any stage of a proceeding the court may, by order add, delete or substitute a party or correct the name of a party incorrectly named, on such terms as are just, unless prejudice would result that could not be compensated by costs or an adjournment.”

Rule 5.04, Rules of Civil Procedure, Book of Authorities, Tab 1

4. Rule 26.01 of the Rules of Civil Procedure provides:

“26.01 On motion at any stage of an action the court **shall** grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.”

Rule 26.01, Rules of Civil Procedure, Book of Authorities, Tab 2

5. Rule 26.02 of the Rules of Civil Procedure provides:

“26.02 A party may amend the party’s pleading,

- (a) without leave, before the close of pleadings, if the amendment does not include or necessitate the addition, deletion or substitution of a party to the action;
- (b) on filing the consent of all parties and, where a person is to be added or substituted as a party, the person’s consent; or
- (c) with leave of the court.”

Rule 26.02, Rules of Civil Procedure, Book of Authorities, Tab 3

6. All of the parties proposed to be added as plaintiffs to the action have consented to be added as plaintiffs to the action.

Consent of Kevin and Esta Clark, Motion Record, Tab 12
Consent of Christina and Jeffrey Acciaccferro, Motion Record, Tab 13
Consent of Steve and Lori Tong, Motion Record, Tab 14
Consent of Russell and Michelle Kavanagh, Motion Record, Tab 15
Consent of Paul and Stefany Durcek, Motion Record, Tab 16
Consent of Quintin and Donna Chausse, Motion Record, Tab 17
Consent of Anne Marie and James Paul VanSickle, Motion Record, Tab 18
Consent of J.P. Woolley Surveying Ltd., Motion Record, Tab 19
Consent of Margaret Cook, Motion Record, Tab 20

7. The pleadings disclose reasonable causes of action by the plaintiffs against the defendants, as set out in the discussion of s. 5(1) of the *Class Proceedings Act, 1992* (the “CPA”) below.

8. **CERTIFICATION**

9. *Preliminary Considerations*

10. In a certification motion the courts are not to take an overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters of the legislation, specifically,

- More efficient judicial economy
- Improved access to justice
- Behaviour modification

Western Canadian Shopping Centres Inc. v. Dutton [2001] 2 S.C.R. 534, per McLachlin, C.J. at paras. 27, 28 and 29, Book of Authorities, Tab 4
Hollick v. Toronto (City) [2001] S.C.J. No. 67, per McLachlin, C.J. at para. 15, Book of Authorities, Tab 5,

11. The certification stage is decidedly not meant to be a test of the merits of the action, rather it focuses on the form of the action.

Hollick v. Toronto (City), supra., per McLachlin C.J. at para. 16

12. The question at certification is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action.

Hollick v. Toronto (City), supra, per. McLachlin, C.J., at para. 16

13. *Section 5 of the CPA*

14. The test for certification of a class proceeding under the CPA is set out in s. 5:

“5(1) The court **shall** certify a class proceeding on a motion under section 2, 3 or 4 if,

- (a) the pleadings or the notice of application disclose a cause of action;
- (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
- (c) the claims or defences of the class members raise common issues;
- (d) a class proceeding would be the preferable procedure for resolution of the common issues;
- (e) there is a representative plaintiff or defendant who,
 - (i) would fairly and adequately represent the interests of the class,
 - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding; and
 - (iii) does not have, on the common issues for the class, an interest in conflict with the interest of other class members.”

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 5, Book of Authorities, Tab 6

15. ***Identifiable Classes (Section 5(1)(b))***
16. The plaintiffs are proposing four classes, defined as follows:

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.”

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.”

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.”

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.”

Affidavit of Margaret McCarthy, Motion Record, Tab 4, para. 6

17. Each of these classes is identifiable and contains two or more persons.

Affidavit of Margaret McCarthy, Motion Record, Tab 4, paras. 40 and 41

18. Each of the Classes would be represented by a representative plaintiff as follows:

Class	Representative Plaintiff(s)
<i>Caledonia Business Class</i>	KRP Enterprises Inc. 1643078 Ontario Inc.
<i>Property Owners Class</i>	Kevin and Esta Clark Christina and Jeffrey Acciaccferro Steve and Lori Tong Michelle and Russell Kavanagh Paul and Stefany Durcek Quintin and Donna Chausse Anne Marie and James Paul VanSickle
<i>Contractors Class</i>	J.P. Woolley Surveying Ltd.
<i>Highway 6 Class</i>	Margaret Cook

19. ***Pleadings Disclose a Cause of Action (Section 5(1)(a))***
20. The test for finding a cause of action under s. 5(1)(a) is the same as that enunciated by the Supreme Court of Canada in *Hunt v. Carey Canada Inc.*:

“...[A]ssuming the facts as stated in the statement of claim can be proved, is it ‘plain and obvious’ that the plaintiff’s statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be ‘driven from the judgment seat.’ Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. ...”

***Hunt v. Carey Canada Inc.* [1990] S.C.J. No. 93, per Wilson J., at para. 33,
Book of Authorities, Tab 7**

21. In cases involving multiple plaintiffs and defendants each plaintiff need not have a cause of action against each defendant. The pleadings must disclose a reasonable cause of action against each defendant by a representative plaintiff.

***Bendall v. McGhan Medical Corp.* [1993] O.J. No. 1948, Book of Authorities, Tab 8
Ragoonanan v. Imperial Tobacco Canada Ltd. [2000] O.J. No. 4597, Book of Authorities,
Tab 9
Hughes v. Sunbeam Corporation (Canada) Ltd. [2002] O.J. No. 3457 (C.A.),
Book of Authorities, Tab 10**