

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

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

**Plaintiffs**

**- and -**

**ONTARIO PROVINCIAL POLICE COMMISSIONER GWEN M. BONIFACE,  
and ONTARIO PROVINCIAL POLICE INSPECTOR BRIAN HAGGITH**

**Defendants**

*Proceeding under the Class Proceedings Act, 1992*

**PLAINTIFFS' SUPPLEMENTARY FACTUM**

**[For Certification of Proceeding]**

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**1. CHRONOLOGY**

(Paragraph of draft Fresh as Amended Statement of Claim in parenthesis)

- 1 Oct 2003 Haldimand County enters into Police Service Agreement with Solicitor General (18)
- 28 Feb 2006 Protestors occupy the Douglas Creek Estates (26)
- 3 Mar 2006 Henco Industries Limited brings Application in Superior Court (29)
- 3 Mar 2006 Order of Justice B. Matheson provides interim injunction (30)
- 9 Mar 2006 Order of Justice T. Marshall makes injunction permanent (31)
- 17 Mar 2006 Order of Justice T. Marshall issuing Warrants for contempt (32)
- 28 Mar 2006 Order of Justice T. Marshall making findings of contempt (33)
- 20 Apr 2006 OPP arrests 16 protestors (36)

- Protestors set fire to tires on Argyle Street (38.b.)
- Protestors destroy wooden bridge on Stirling Street (38.c.)
- Protestors start brush fire on south shore of Grand River (38.d.)
- Protestors prevent fire department from attending to fires (38.e.)
- Protestors throw vehicle over Highway 6 overpass onto County Road 54 (38.g.)
- Protestors vandalize model home and office on DCE (38.i)
- Protestors block Argyle Street (38.a.)
- Protestors block Hwy. 6 (38.f)
- 21 Apr 2006 Minister of Aboriginal Affairs agrees not to lay charges (81)
- Minister of Aboriginal Affairs puts moratorium on development of DCE (84)
- 3 May 2006 Minister of Community Safety and Correctional Services undertakes not to call in federal police assistance (92)
- 22 May 2006 Transformer on Argyle Street is vandalized and power is interrupted to residents throughout Haldimand County and Norfolk County (39)
- 24 May 2006 Traffic opens on Argyle Street (48)
- 28 May 2006 Matt Walcoff, reporter for Kitchener Record, assaulted (40.a)
- 4 Jun 2006 William Cowan, security guard at transformer station assaulted (40.b)
- David Hartless assaulted on Braemar Avenue (40.c)
- 9 Jun 2006 Kathe and Gunther Golke assaulted in Canadian Tire parking lot (40.d)
- Ken McKay and Nick Garbutt of CH TV assaulted (40.e)
- Residents of Thistlemoor requested to vacate premises (40.f)
- 13 Jun 2006 Highway 6 is reopened (50)
- 4 Jul 2006 Minister of Public Infrastructure and Renewal become owners of DCE (43)

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. ***Pleadings Disclose a Cause of Action (Section 5(1)(a))***

16. On June 7, 2007, the Defendants brought a motion under Rule 21 to strike the Statement of Claim against the Defendants.

**Affidavit of Margaret McCarthy, Supplementary Motion Record, Tab 4, para. 4(e).**

17. It was agreed between counsel that the Rule 21 motion would apply to the determination under s. 5(1)(a) of the *Class Proceedings Act* in the certification process.

**Order of Justice Crane, Supplementary Motion Record, Tab 11, para. 5.**

18. Following hearing of the Defendants' Rule 21 motion, the court ordered as follows:

- (a) that the Defendants' motion to strike the Amended Statement of Claim with respect to the claims of the Property Owners Class, as that class is defined in the Statement of Claim, is granted with leave to the Plaintiff to amend the pleading to redefine the class to pursue a claim in nuisance;
- (b) that the Defendants' motion to strike with respect to the other classes is dismissed;
- (c) that the court reserves the right on the oncoming certification motion to deny certification, if appropriate, under s. 5 of the *Class Proceedings Act*; and
- (d) that costs of the Rule 21 motion be reserved for submissions, unless otherwise agreed by the parties.

**Order of Justice Crane, Supplementary Motion Record, Tab 10.**

19. In the Reasons issued on December 21, 2007, Justice Crane stated:

“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 in 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.”

**Reasons of Justice Crane, Supplementary Motion Record, Tab 11, paras. 8 and 9.**

20. In his reasons, Justice Crane adopted the reasons in the companion motion in *Railink Canada Ltd. v. The Queen*:

“[22] It is now well established that a claim of pure economic loss in negligence is recognized through established categories, each with its own policy considerations. There is some judicial divergence as to whether a successful claim must fit into one of the five established categories, or rather only that the categories should be used to assist the analysis. Perhaps as a move to the former approach, a very recent statement in the Supreme Court of Canada is that lower courts are to be cautious and not “strain to create new categories” (see *Brooks et al. v. Canadian Pacific Railway Limited*, [2007] S.J. No. 367 at para. 63.)

[23] In my view what is driving the policy of claims outside the five established categories is the sufficiency of a proximate relationship. The policy of avoiding situations of an indeterminate number of plaintiffs with indeterminate numbers of claims resulting in an indeterminate quantum of damages. In the circumstances as pleaded in this case, these policy restrictions would not seem to apply.

[24] I concluded that the very complex process that is required to establish a new category of claim, is not amenable to this case at the stage of a Rule 21 motion brought on the Statement of Claim. In order to consider the proximity between the defendant’s actions and the plaintiff’s injury, a court would need to know a great deal more about each. However, taking the case as pleaded, it would appear to have proximity as ‘a close relationship of such a nature that the defendants may be said to have been under an obligation to be mindful of the plaintiff’s interest.’ (see *Brooks supra*. Para. 80).”

**Reasons of Justice Crane, Supplementary Motion Record, Tab 11, para. 17.**  
***Railink Canada Ltd. v. The Queen* (November 30, 2007)**

21. Further in the reasons, Justice Crane states:

“[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