

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:)
)
KRP ENTERPRISES INC., 1643078) John W. Findlay, and Margaret
ONTARIO INC. KEVINCLARK, ESTA) L. McCarthy , counsel on
CLARK, CHRISTINA ACCIACCAFERRO,) behalf of the
JEFFREY ACCIACCAFERRO, STEVE) Plaintiffs/Respondents
TONG, LORI TONG, RUSSELL)
KAVANAGH, MICHELLE KAVANAGH,)
PAUL DURCEK, STEFANY DURCEK,)
QUINTIN CHAUSSE, DONNA CHAUSSE,)
ANNE MARIE VANSICKLE, JAMES)
PAUL VANSICKLE, J.P. WOOLLEY)
SURVEYING LTD. and MARGARET)
COOK)
)
Plaintiff/Respondents)
)
- and -)
)
CORPORATION OF HALDIMAND) Leonard Marsello and
COUNTY, ONTARIO PROVINCIAL) Christopher P. Thompson,
POLICE COMMISSIONER GWEN M.) counsel on behalf of the
BONIFACE, ONTARIO PROVINCIAL) Defendants/Appellants
POLICE INSPECTOR BRIAN HAGGITH)
and HER MAJESTY THE QUEEN IN)
RIGHT OF ONTARIO)
)
Defendants/Appellants)
)
)
0 HEARD: April 30 and May 21,
0 2008
) (at Hamilton)

STAYSHYN J.

[1] The moving parties (defendants), less the Corporation of Haldimand County which is no longer a defendant in the action, argued on April 30, 2008 and may 21, 2008. The motion was for:

- (1) an Order abridging the time for service of this notice of motion for leave to appeal, if necessary;
- (2) an Order granting leave to appeal from the Order of the Honourable Justice Crane, dated December 21, 2007, dismissing the moving parties' motion for an order striking out the statement of claim for failing to disclose a reasonable cause of action;
- (3) the costs of the motion; and
- (4) such further and other relief as this Honourable Court deems just.

GROUNDNS FOR THE MOTIONB

[2] The proposed appeal involves matters of such importance that leave to appeal should be granted.

- (a) the Order adversely impacts on the ability of public officials to carry out their duties in the public

interest in the context of responding to a First Nations land claims dispute;

(b) the Order raises the proper role of the courts in reviewing police discretion in the context of policing a First Nations land claims dispute;

(c) the Order makes possible significant economic loss claims against the police and the Crown by members of the public who may have suffered economic loss as a result of the conduct of public officials in responding to emergency situations.

[3] There appears good reason to doubt the correctness of the Order, for the following reasons:

(a) The court erred in law in failing to properly apply the test to strike a statement of claim for failing to disclose a reasonable cause of action;

(b) The court erred in law in concluding that the defendants may be liable for pure economic loss notwithstanding the indeterminate numbers of plaintiffs, with indeterminate numbers of claims and indeterminate damages over an indeterminate time;

- (c) The court erred in law by failing to conduct the first and second stage of the ***Anns/Kamloops*** test in negligence;
- (d) The court erred in law with respect to negligence, by failing to consider the inherent conflict between public duties and potential private law duties of care in the context of policing a First Nations occupation, and in failing to consider the broader policy implications of imposing a private law duty of care to the numerous individuals and businesses in the various classes;
- (e) The court erred in law in finding that the plaintiffs had pled a cause of action in misfeasance in public office;
- (f) The court erred in law in concluding that, in the context of a First Nations occupation, even absent flagrant impropriety or bad faith, the court will judge and balance police actions as against the class interests to determine whether the police action constitutes an actionable nuisance;

(g) The court erred in law by failing to consider the impact of the public policy of allowing the protestors to remain on the property in finding a cause of action in nuisance;

[4] The overview of these proceedings are, at length, set out in paragraphs 3 to 20 of the respondents' factum and will not be repeated here because of the nature of these leave proceedings.

[5] The facts, pursuant to which this leave application proceeded are set out in paragraphs 24 to 62 of the Amended Statement of Claim and for purposes of this application, are accepted as proven.

[6] Mr. Justice Crane, in paragraph 1 of his reasons states, "*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*".

[7] I note that in his 32-page reasons, in paragraph 34, Mr. Justice Crane indicates as follows:

[34] *On the agreement of the parties, this motion under Rule 21 is also under s. 5.1(a) of the class proceedings certification process, should, of course, the action not be dismissed herein. In my*

view, the nature of this action does not lend itself well to an early test of the legal basis for the action by way of a Rule 21 motion. As may be seen, much of the analysis is determinative on issues of proximity and the broader policy against recognizing private rights of action in situations of indiscriminate numbers of claimants with an indiscriminate number of claims seeking indiscriminate and indeterminable amounts of damage. Without the analysis under s. 5 of the **Class Proceedings Act**, as to the definition of who will be claimants, what, if any, common issues they have or indeed if a private law right of action is the appropriate process, as for example, given the government's initiatives under the 'Local Business Emergency Relief Assistance Programme'.

[8] In considering the leave application pursuant to rule 62.02(4)(a) and (b), of the **Rules of Civil Procedure**, I will not review the requirements under that rule, as they have been dissected and considered in many acknowledged authorities, many of which were referred to in the material filed.

[9] I do note, however, that in considering (a) conflicting decisions and (b) correctness of Order and Matter of Importance, I have carefully read the material, listed to well-briefed and experienced counsel and reflected upon the submissions advanced:

(a) I noted that, in part, Crane J. refers to the two stage analysis of **Anns/Kamloops** in paragraphs [9] to

[14] and reviews the principles as they apply to each of the classes.

- (b) On pure economic loss, Justice Crane finds that an argument can be made that the economic loss may fall under performance of a service and under relational economic loss categories. Crane J., adopts the reasoning in the companion **Railink** case (paras. 22 to 24) and the case of **Martel Building Ltd. v. Canada** ([2000] S.C.C. 60 CanLII)
- (c) In paragraph [19] Justice Crane conducts an analysis under proximity as adopted in **Anns/Kamloops**. He refers to **Brooks v. Canadian Pacific Railway Ltd.** (2007) SKQB 247 CanLII, **Canadian National Railway v. Norsk Pacific Steamship Co.** [1992] 1 S.C.R. 1021 (S.C.C.), and **D'Amato v. Badger** [1996] 2 S.C.R. 1071 (S.C.C.). He states factors important to this analysis including: the relationship between the parties, physical propinquity, assumed or imposed obligations and a close causal connection.
- (d) Crane J states in paragraph 23 that, although it may be theoretically possible to do the first stage of the **Anns/Kamloops** analysis on a Rule 21 motion, the second

stage of the test requires the response of the defendant in a case of this nature.

- (e) Crane J., in paragraphs 20 to 28 finds that there could be sufficient proximity to found a duty of care based upon the intention of the governing statute, the **Police Services Act**.
- (f) Crane J., also in paragraph 29 to 30, finds a claim in misfeasance in a public office.
- (g) Justice Crane discussed nuisance in paras. 31 to 33.
- (h) Justice Crane, as earlier indicated, states that the nature of this action does not lend itself to an early test of the legal basis of the action.
- (i) In paragraph 36 Crane J. specifically reserves the right to reconsider in the certification motion.

[10] As indicated by Crane J., class actions offer important advantages as a procedural tool. They provide three important advantages over a multiplicity of individual suits:

- (a) By aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis;

- (b) By distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own; and
- (c) Class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public.

[11] Chief Justice McLachlin, in **Hollick v. Toronto (City)**, [2001] S.C.J. No. 67 at para. 15, has stated that it is essential that courts not 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.

[12] I have considered the submission of appellant counsel that the Rule 21 motion is brought prior to certification, however, with the preamble in para. 34 that "*on the agreement of the parties, this motion under Rule 21 is also under rule 5(1)(a) of the class certification process, should the action not be dismissed herein*".

[13] I also note that Justice Crane, is an experienced class action judge and as a result his decision is entitled to substantial deference. The interference of the court should be limited to matters of general principle. **Cassano v. Toronto-Dominion Bank** [2007] O.J. No. 4406, at para. 23, per Winkler J.A.; **Markson v. MBNA Canada Bank** (2007), 85 O.R. (3d) 321 (C.A.); **Cloud v. Canada (A.G.)**, (2004), 73 O.R. (3d) 401 (C.A.)

[14] In these proceedings Crane J. specifically exercised a discretion predicated on the totality of the evidence before him that the matter should be best dealt with on the certification hearing.

[15] The authorities are clear that a court is obliged to read the Statement of claim as generously as possible and to accommodate any inadequacies in the form of the allegations which are the result of drafting deficiencies.

[16] Here, throughout his Reasons, Crane J., exhibited concern of the complicated nature of the proceedings. He clearly was of the view that the Rule 21 application was premature and so indicated in para. 24.

[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**.

He also noted in para. 34 the comments already addressed

[17] As a consequence of the above, I refuse leave to appeal.

[18] Submissions as to costs of this leave application should be made within 15 days, not to exceed five pages and are to be at least double-spaced.


STAYSEN J.

Released: May 29, 2008

COURT FILE NO.: 114/2006CP
DATE: 20080529

ONTARIO

SUPERIOR COURT OF JUSTICE

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Plaintiff/Respondents

- and -

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

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REASONS FOR JUDGMENT

STAYSHYN J.

WTS/sh