

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**KRP ENTERPRISES INC., 1643078 ONTARIO INC., KEVIN CLARK, ESTA CLARK,  
CHRISTINA ACCIACCAFERRO, JEFFREY ACCIACCAFERRO,  
STEVE 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**

Plaintiffs

**THE 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**

Defendants

Proceedings under the *Class Proceedings Act, 1992*  
(Returnable June 18, 2007)

**FACTUM OF THE DEFENDANT (MOVING PARTY),  
THE CORPORATION OF HALDIMAND COUNTY**

June 14, 2007

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**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**KRP ENTERPRISES INC., 1643078 ONTARIO INC., KEVIN CLARK, ESTA CLARK, CHRISTINA ACCIACCAFERRO, JEFFREY ACCIACCAFERRO, STEVE 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**

**Plaintiffs**

**- and -**

**THE 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**

**Defendants**

*Proceedings under the Class Proceedings Act, 1992  
(Returnable June 18, 2007)*

**FACTUM OF THE DEFENDANT (MOVING PARTY),  
THE CORPORATION OF HALDIMAND COUNTY**

**PART I – NATURE OF MOTION**

1. This Factum is filed in support of the motion brought on behalf of the defendant, The Corporation of Haldimand County (“the County”) for:
  - a. an order granting summary judgment with respect to the claim against the County; and
  - b. an order granting the County the costs of this motion.

## **PART II – THE FACTS**

### **Overview:**

2. This class action arises out of a land claims dispute between the Six Nations of the Grand River Indian Band (“Six Nations”) and the federal government which resulted in the occupation by members of the Six Nations of the Douglas Creek Estates and subsequent barricading by the Six Nations and others of a portion of Argyle Street in the Community of Caledonia.
3. Given the nature and scope of the dispute, the provincial government (“the Province”), the federal government and the Ontario Provincial Police (“O.P.P.”) immediately took control of the situation and were entirely responsible for determining and implementing the response to the occupation and closure of Argyle Street from both a political and a policing perspective.
4. Although it is alleged in the Amended Statement of Claim that the County failed to adequately respond to the ongoing situation, the County was powerless to do anything given the involvement of the upper levels of government and the O.P.P. and the nature of the issues involved.
5. The Caledonia occupation was and remains a complex and delicate matter of provincial and federal importance. In order to properly deal with this occupation and the threat of future occupations, the underlying land claims dispute must be resolved. It is naïve to suggest that the situation in Caledonia could have been dealt with at a municipal level.
6. The claim against the County relates only to the alleged failure to provide adequate policing and the failure to ensure that Argyle Street remain open.

**Background:**

7. The County is a single-tier municipality located in southwestern Ontario. The Community of Caledonia is located within the County and lies just east of the Six Nations Reserve, which is the most populous reserve in Canada. The Douglas Creek Estates is a parcel of property located in Caledonia which was owned by Henco Industries Limited ("Henco") and is now owned by the Province.

Reference: *Affidavit of William Pearce*, sworn June 4, 2007, at paras. 1 and 2

8. On or about January 28, 2004, the County entered into a five-year agreement with the Province for the provision of police services pursuant to section 10 of the *Police Services Act* ("the Police Services Agreement"). This agreement was in effect at times material to this action and required the O.P.P. to provide the County with adequate and effective Police Services.

Reference: *Affidavit of William Pearce*, sworn June 4, 2007, at para. 4  
*Police Services Agreement*, dated January 28, 2004

9. As a result of the Police Services Agreement, all policing functions in the County were under the direct control of the O.P.P. who reported to the Police Services Board.
10. In a letter dated February 1, 2007, the O.P.P. confirmed that occurrences or emergencies of provincial or national scope are included in the O.P.P.'s mandate and specifically that "the O.P.P. resources deployed to ensure the safety and security of the community around Douglas Creek Estates have been applied subject to this provincial mandate with associated costs borne by the province."

Reference: *Letter from O.P.P. to Mayor*, dated February 1, 2007, *Affidavit of William Pearce*, sworn June 13, 2007, Ex. A

**The Occupation:**

11. On February 28, 2006, members of the Six Nations ("the Protesters") commenced the occupation of the Douglas Creek Estates. They erected blockades and manned all entrances to the property. The Six Nations claim that the Douglas Creek Estates belongs to them and opposed the building of a subdivision on the property.

Reference: *Affidavit of William Pearce*, sworn June 4, 2007, at para. 3  
*Reasons for Ruling of Matheson J. in Henco Industries Limited v. Haudenosaunee Six Nations*, at p. 2  
*Amended Statement of Claim*, at para. 28 and 29

12. The response to the occupation, including all policing issues arising therefrom, was controlled entirely by the provincial and the federal governments and the O.P.P. The County did not have any authority to act other than at the request and direction of the provincial and federal governments.

Reference: *Affidavit of William Pearce*, sworn June 4, 2007, at para. 9

13. On March 3, 2006, Henco brought an application to the Superior Court of Justice against the Haudonosaunee Six Nations Confederacy Council, various individual band members and the County, requesting, among other things, an injunction restraining the Protesters from continuing the occupations of the Douglas Creek Estates and ordering the removal of any barricades on public roadways.

Reference: *Affidavit of William Pearce*, sworn June 4, 2007, at para. 11  
*Amended Statement of Claim*, at para. 32

14. As the County had not yet assumed any of the roadways on the Douglas Creek Estates and had no interest in the property, it did not participate in the original application.

Reference: *Supplementary Affidavit of William Pearce*, sworn June 13, 2007, at paras. 3 and 4

15. On March 6, 2006, the Honourable Justice Matheson issued an Order granting an interim and interlocutory injunction as against the Six Nations and the individual respondents, requiring them to effectively end the occupation. The Order also required the O.P.P. to assist in the execution of the Order at the request of the Sheriff, including the removal of any persons who refuse to comply. No order was made requiring the County to do or refrain from doing anything.

Reference: *Amended Statement of Claim*, at para. 32

16. On March 9, 2006, the Honourable Justice Marshall issued an Order making the Order of Justice Matheson permanent.

Reference: *Amended Statement of Claim*, at para. 33

17. As the majority of the Protesters failed to comply with the Injunction Order, Justice Marshall ultimately issued two contempt orders with respect to the Protesters who were in breach. There were numerous appearances before Justice Marshall who took a very active role in monitoring the situation.

Reference: *Amended Statement of Claim*, at para. 34-35

18. On April 20, 2006, the O.P.P. attempted to forcibly remove the Protesters from the Douglas Creek Estates, however it was not able to secure the property which was re-occupied by Protesters shortly thereafter. The County was not consulted by the O.P.P. with respect to this action and was only advised of this police action as it was occurring.

Reference: *Amended Statement of Claim*, at para. 38

*Affidavit of William Pearce*, sworn June 4, 2007, at para. 15

**The Closure of Argyle Street:**

19. Following the O.P.P. action of April 20, 2006, Protesters set up barricades on Argyle Street. The County did not itself close Argyle Street nor did it in any way authorize, permit or sanction the closure Argyle Street.

Reference: *Affidavit of William Pearce*, sworn June 4, 2007, at para. 16 and 24

20. The responsibility for dealing with the barricades on Argyle Street remained entirely with the Province, the O.P.P. and the federal government. Again, there was nothing that could reasonably have been done by the County to remove the barricades on Argyle Street, either by force or otherwise.

Reference: *Affidavit of William Pearce*, sworn June 4, 2007, at para. 17-18

21. The barricades on Argyle Street were, at all times, being closely monitored and actively patrolled by the O.P.P. who were in direct control of the situation.

Reference: *Affidavit of William Pearce*, sworn June 4, 2007, at para. 18

22. On April 29, 2006, the Province announced that David Peterson had been appointed to attempt to resolve short-term issues relating to the occupation, including a resolution of the barricades on Argyle Street. Petersen engaged in negotiations with the Six Nations leadership over the next three weeks which ultimately resulted in the barricades being removed on May 22, 2006.

Reference: *Affidavit of William Pearce*, sworn June 4, 2007, at paras. 20-23

23. Although the County has offered to assist the Province and the Federal government in resolving the issues surrounding the occupation, the County has been and continues to be relegated to the sidelines. The County has been largely excluded from the negotiations with the Six Nations which commenced in March of 2006 despite the County's willingness to participate. The County has, at all times, urged the federal government to formulate an expeditious

resolution to the occupation of the Douglas Creek Estates and surrounding issues.

Reference: *Affidavit of William Pearce*, sworn June 4, 2007, at paras. 12-14 and 19-21

### **PART III – ISSUES AND THE LAW**

24. The County states that the following issues arise on this motion:

- a. Is there a genuine issue for trial having regard to the allegations in the Amended Statement of Claim and the evidence which is before the Court;
- b. Does the County owe a duty to the plaintiffs to provide adequate and effective police services and if so, did it comply with its duty;
- c. Can the County be liable to the plaintiffs for nuisance arising from the barricading of Argyle Street.

#### **A. Test on Summary Judgment**

25. A party to an action may move for a determination of all or part of the claim pursuant to Rule 20 of the *Rule of Civil Procedure*. Where the Court is satisfied that there is no genuine issue for trial with respect to the claim or defence, the Court shall grant summary judgment accordingly.

Reference: Rule 20.01(3) and 20.04(2) of the *Rules of Civil Procedure*

26. A motion for summary judgment is the mechanism provided for in the *Rules of Civil Procedure* for deciding cases where it has been demonstrated that a trial is unnecessary.

Reference: *Dawson v. Rexcraft Storage Warehouse Inc.*, [1998] O.J. No. 3240 (C.A.) at para. 29