

**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, ONTARIO PROVINCIAL
POLICE INSPECTOR BRIAN HAGGITH and
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO**

Defendants

**MOTION RECORD
(Returnable June 18, 2007)**

June 5, 2007

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**NOTICE OF MOTION
(Returnable June 18, 2007)**

I N D E X

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**ONTARIO
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**NOTICE OF MOTION
(Returnable June 18, 2007)**

THE DEFENDANT, The Corporation of Haldimand County (the "County") will make a motion to a Judge of the Ontario Superior Court of Justice on June 18, 2007, at 10:00 a.m. or as soon after that time as the motion can be heard at 393 University Avenue, Toronto, Ontario.

PROPOSED METHOD OF HEARING: The motion is to be heard

- in writing under subrule 37.12.1(1) because it is on consent or unopposed or made without notice;
- in writing as an opposed motion under subrule 37.12.1(4)
- orally.

THE MOTION IS FOR:

- (a) an order granting summary judgment dismissing the claim against the County;

- (b) the costs of this motion and of this action on a substantial indemnity basis; and
- (c) such further and other relief as counsel may advise and this Honourable Court may permit.

THE GROUNDS FOR THE MOTION ARE:

- a) The only claims being advanced by the plaintiffs as against the County are for nuisance and the closure of Argyle Street, Caledonia;
- b) The County did not pass a by-law closing Argyle Street permanently or at all and accordingly, Part III of the *Municipal Act, 2001*, S.O. 2001, c. 25, and section 34 in particular, is not applicable;
- c) A portion of Argyle Street was effectively closed between April 20, 2006 and May 23, 2006 as a result of barricades that were constructed by members of the Six Nations of Grand River band and others (hereinafter referred to as the "protesters") and was not the result of any acts or omissions on the part of the County;
- d) The County has never given permission or license to the protesters to construct the barricades on Argyle Street;
- e) The County did not close a highway or give license for the erection or commission of a nuisance on a highway;
- f) The County did not owe a duty to the plaintiffs to forcibly remove the barricades and protestors from Argyle Street in order to provide for a common law right of passage over Argyle Street;
- g) The response to the occupation of the Douglas Creek Estates and the barricades on Argyle Street was at all times under the jurisdiction and control of the federal and provincial governments and the Ontario Provincial Police;

- h) There was nothing that could have reasonably been done by the County to remove the barricades on Argyle Street;
- i) The plaintiffs have failed to establish that there is a genuine issue for trial with respect to the claim against the County;
- j) Rule 20 of the *Rules of Civil Procedure* and sections 24 to 68 of the *Municipal Act, 2001*, S.O. 2001 c. C.25; and
- k) Such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- a) Affidavit of William Pearce and exhibits attached thereto;
- b) Pleadings and proceedings herein;
- c) Such further and other documentary evidence as counsel may advise and this Honourable Court may permit.

June 5, 2007

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Solicitors for the Defendant
Corporation of Haldimand County

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Cayuga

NOTICE OF MOTION

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**ONTARIO
SUPERIOR COURT OF JUSTICE**

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- and -

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Defendants

AFFIDAVIT OF WILLIAM PEARCE

I, **WILLIAM PEARCE**, of the Community of Cayuga, in the Province of Ontario, **MAKE OATH AND SAY:**

Overview:

1. I am the Chief Administrative Officer of The Corporation of Haldimand County (the "County"), a single-tier municipality located in southwestern Ontario, and as such have knowledge of the matters to which I hereinafter depose.
2. The Community of Caledonia is located within the County and lies just east of the Six Nations of the Grand River Indian Reserve ("Six Nations"), which is the most populous reserve in Canada. Douglas Creeks Estates is a parcel of property located in Caledonia which was owned by Henco Industries Limited ("Henco").
3. Since February 28, 2006, the Douglas Creek Estates have been occupied by a group of protesters, mainly comprised of members of the Six Nations, who claim

that the Douglas Creek Estates belongs to them and oppose the building of a subdivision on the property (the "Protesters").

The Police Services Agreement:

4. On or about January 28, 2004, the County entered into a five-year agreement with the Ontario Minister of Community and Safety Correctional Services on behalf of the Solicitor General for the provision of adequate and effective police services, pursuant to section 10 of the *Police Services Act*, R.S.O. 1990 c. P.15 (the "Police Services Agreement"). Attached hereto and marked as Exhibit A to this my affidavit is a copy of the Police Services Agreement.
5. Pursuant to the Police Services Agreement, the Ontario Provincial Police ("O.P.P.") is responsible for the provision of police services to the County in accordance with minimum service level requirements set out in of the Agreement, which included 24-hour proactive and reactive policing, crime prevention, incident command and traffic services. The O.P.P. is also required to be capable of providing provincial level response that can be mobilized for emergencies, disaster or specialized needs.
6. The Haldimand County O.P.P. Detachment Commander is responsible to oversee all aspects of the delivery of police services to the County.
7. The Police Services Agreement provides that the O.P.P. shall be liable for any damages that may arise as a result of any negligent acts or omissions of its members in the performance of agreement.

The Occupation:

8. The occupation of the Douglas Creek Estates by members of the Six Nations commenced on February 28, 2006. Although initial contact with the Protesters was through the local O.P.P. Detachment, responsibility for dealing with the Protesters and the occupation, shifted almost immediately to the provincial and federal government levels.

9. The response to the occupation was controlled entirely by the provincial and 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. The County responded to all requests made by both levels of government as described in more detail below.
10. The O.P.P. set up a Command Centre, separate from the local O.P.P. Detachment, to deal with the situation under the direction of a provincially-appointed Command Post Commander.
11. On March 3, 2006, Henco brought an application to the Superior Court of Ontario against the Haudenosaunee Six Nations Confederacy Council (the "Confederacy"), various individual band members and the County, requesting, among other things, an injunction restraining Confederacy and the individual band members from continuing the occupation of the Douglas Creek Estates as well as an order requiring the respondents to remove any barricades from the public roadways which traverse the Douglas Creek Estates. Although the Court made various orders requiring action to be taken on behalf of the Confederacy, the individual band members and the O.P.P., no orders were made requiring the County to do or refrain from doing anything.
12. On March 24, 2006, the County participated in a conference call with the Honourable Jim Prentice, the Federal Minister of Indian Affairs and Northern Development ("Prentice") and the Honourable Diane Finley, the Federal Minister of Human Resources and Social Development ("Finley") regarding the occupation. The County requested that the federal government formulate a speedy resolution to the occupation of the Douglas Creek Estates and surrounding issues.
13. On April 7, 2006, County representatives met with Ministers Prentice and Finley as well as Lloyd St. Amand, a Member of Parliament. During this meeting, the County formally requested that the federal and provincial governments take action. Although the County advised that it was prepared to assist, practically speaking, the County was relegated, and continues to be relegated to the sidelines by the

federal and provincial governments, who have taken charge of the situation, to the exclusion of the County.

14. On April 11, 2006, the County was requested by the provincial government to send representatives to attend preliminary negotiations between all affected parties, scheduled for April 12, 2006. Although the County sent a delegation to the preliminary negotiations and specifically requested representation, it was only granted observer status at a sidetable. The County has not been included by the provincial or federal governments in any further negotiations after April 13, 2006 despite requests for representation.
15. On April 20, 2006, the O.P.P. attempted to forcibly remove 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 did not participate in the removal of the Protesters. In fact, the County was only advised of this police action as it was occurring.

The Closure of Argyle Street:

16. Following the O.P.P. action of April 20, 2006, Protesters set up barricades on Argyle Street, in Caledonia. There were three barricades that were erected: one at the southern end of the business area of Argyle Street; one at the intersection of Argyle Street and Highway 6, but on Highway 6; and one in between. The County did not give its permission to the Protesters to erect the barricades on Argyle Street.
17. As was the case with the occupation of the Douglas Creek Estates, responsibility for dealing with the barricades on Argyle Street rested entirely with the federal and provincial governments and the O.P.P. There was nothing that could reasonably have been done by the County to remove the barricades on Argyle Street, either by force or otherwise.

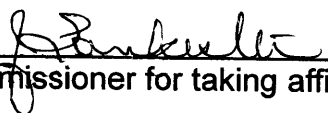
18. On April 21, 2006, in order to respond to the Argyle Street barricades, the County activated its Emergency Control Sub Group ("ECSG") which placed detour signs directing vehicles around the barricaded section of Argyle Street, in order to ensure safe passage and access to the business area of Argyle Street. The ESCG was kept apprised of the situation on Argyle Street which was being closely monitored and actively patrolled by the O.P.P.
19. On April 24, 2006, County Council passed a motion asking for observer status at negotiations with the Confederacy and designating me as the County representative. On April 27, 2006, the County was advised by the federal government that it had been granted observer status on a working group sub-committee dealing with the Douglas Creek Estates occupation, but nothing more.
20. On April 29, 2006, the Province announced that David Peterson ("Peterson") had been appointed to try and resolve short term issues relating to the occupation including a resolution of the barricades on Argyle Street.
21. On May 12, 2006, Peterson met with County Council to provide an update as to the negotiations with the leadership of the Six Nations. Petersen advised that it was possible that the barricades on Argyle Street could be removed within a week. Peterson continued to provide updates to the County as to the status of the negotiations.
22. On May 15, 2006, County Council made a public statement encouraging the protestors to remove the barricades on Argyle Street in order to show good faith on the part of the Six Nations leadership and help re-build and improve relationships between Six Nations and surrounding communities.
23. On May 22, 2006, native protestors removed the barricades on Argyle Street, however, non-native protestors continued to block the road and halt traffic. On May 23, 2006, the O.P.P. arranged or otherwise negotiated the removal of barricades and the County was requested to assist with the opening of Argyle Street through road repairs to damaged sections.

Conclusion:

24. The County did not, at any time, close Argyle Street. No by-laws were passed by the County which had the effect of closing or altering Argyle Street in any way. The barricades on Argyle Street were placed by members of the Six Nations Band and others without the consent of the County.
25. The County was not in a position to take steps to remove the barricades as the situation was under the direct control of the O.P.P. and the federal and provincial governments. That being said, the County offered its assistance when required and actively encouraged an expeditious resolution to the situation.
26. Although the plaintiffs have pleaded that the County took "no steps ... to ensure passage at common law along Argyle Street South for the period from [April] 20, 2006 to May 24, 2006", I am not aware of any further steps that could have been taken by the County to remove the barricades.
27. This affidavit is made on behalf of the County in support of its motion for summary judgment and for no other or improper purpose.

SWORN BEFORE ME

at Haldimand County
on June4....., 2007.



Commissioner for taking affidavits

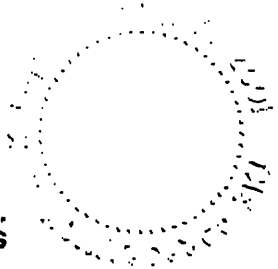


WILLIAM PEARCE

This is Exhibit "A" referred to in the
affidavit of William Pearce
sworn before me, this 4th
day of JUNE 2007.

J. Pearce

A COMMISSIONER FOR TAKING AFFIDAVITS



This Agreement made in 4 originally executed copies, this 28th day of JANUARY, 2004

**AGREEMENT FOR THE PROVISION OF POLICE SERVICES
UNDER SECTION 10 OF THE POLICE SERVICES ACT, R.S.O. 1990, c. P.15, as am.**

BETWEEN:

THE MINISTER OF COMMUNITY SAFETY AND CORRECTIONAL SERVICES

("Ontario")

OF THE FIRST PART

AND:

THE CORPORATION OF HALDIMAND COUNTY

(the "Municipality")

OF THE SECOND PART

RECITALS:

- (a) Under s. 4(1) of the *Police Services Act*, R.S.O. 1990, c. P.15, as am., the Municipality is required to provide adequate and effective police services in accordance with its needs;
- (b) Under s. 5 of the *Police Services Act*, the Municipality's responsibility for providing police services may be discharged by entering into an Agreement with the Solicitor General under s. 10 of the Act;
- (c) Pursuant to Order-in-Council 1708/2003, the powers assigned to the Solicitor General in law, including those set out in the *Police Services Act*, have been transferred to the Minister of Community Safety and Correctional Services; therefore, all references to the Minister of Community Safety and Correctional Services shall be deemed to include the powers previously exercised by the Solicitor General;
- (d) The Municipality has expressed its intent to provide police services, in pursuance of its responsibilities under s. 5 of the *Police Services Act*, by means of this Agreement, as evidenced by by-law number 421/03, dated 22nd day of September 2003 (a copy of which is attached as Schedule "A");
- (e) This Agreement reflects the intent of the parties to provide a level of police services for the Municipality as set out in the "Proposal for Policing Services," dated September, 2002 (attached as Schedule "B");
- (f) This Agreement reflects the intent of the parties that the proportion of the total cost of maintaining the Haldimand County Detachment of the Ontario Provincial Police (the "O.P.P.")

paid by the Municipality is directly attributable to the cost of providing police services in and for the Municipality;

NOW THEREFORE, in consideration of the premises and covenants herein, the parties agree as follows:

1. (a) The parties warrant that the recitals are true.
- (b) The Municipality asserts that it has the authority to bind the Board to the terms of this Agreement.
- (c) Ontario asserts that it has the authority to bind the O.P.P. to the terms of this Agreement.

Definitions

2. In this Agreement:

- (a) "Annual Budget" means a budgetary estimate of the Municipality's annual police costs, showing the budgetary estimate for each component and the service levels and equipment and all other matters prepared by Ontario, the O.P.P. or the Commissioner and submitted to the Board for review and to the Municipality for review and approval by the Municipality under this Agreement.
- (b) "Annual Financial Statement" means a financial statement which contains a reconciliation of the Municipality's actual annual police costs incurred against the Annual Budget estimate for the year, in accordance with generally accepted accounting principles, subject to this Agreement, prepared by Ontario, the O.P.P. or the Commissioner and submitted to the Board for review and to the Municipality for review and approval by the Municipality under this Agreement.
- (c) "Board" means the Haldimand County Police Services Board.
- (d) "Commissioner" means the Commissioner of the O.P.P.
- (e) "Detachment Commander" means the O.P.P. officer in charge of the Haldimand County Detachment.
- (f) "Memorandum of Understanding" means the collective agreement negotiated from time-to-time between the Crown and the Ontario Provincial Police Association, pertaining to compensation, benefits, and working conditions of the civilian and uniformed members of the O.P.P., up to and including the rank of Sergeant-Major.

General Provisions

3. Ontario shall provide adequate and effective police services in accordance with the needs of the Municipality in compliance with the terms and conditions of the Agreement. The

Municipality shall pay Ontario for the police services provided under this Agreement in accordance with this Agreement.

4. The Commissioner shall ensure that the Detachment Commander responds appropriately to the Board's objectives and priorities for police services, developed after consultation with the Detachment Commander, pursuant to s. 10(9)(b) of the *Police Services Act*.
5. The Commissioner shall cause the Detachment Commander or his or her designate to report to the Board at mutually agreed upon intervals in accordance with the *Police Services Act* regarding the provision of police services in and for the Municipality. The Board, in consultation with the Detachment Commander, and in accordance with the *Police Services Act*, will determine the information to be contained in the reports and the format in which they will be provided.
6. (a) For the purposes of s. 10(6) of the *Police Services Act*, the O.P.P. shall provide police services to the Municipality, including the enforcement of mutually agreed upon by-laws. The parties shall annually review this part of the Agreement with a view to revising or updating the list of by-laws requiring O.P.P. enforcement.
- (b) Municipal Building Code violations overseen by the Municipality's Building Code inspector and those by-laws related to animal control will not form part of this Agreement.

Service Levels

7. (a) Ontario shall cause the Commissioner to assign police officers and other persons to duties relating to the police services in and for the Municipality so as to meet the minimum service level requirements set out in Schedule "C" attached to and forming part of this Agreement. The parties shall review the service levels as are found in Schedule "C" annually and shall make the appropriate adjustments to the Annual Budget. No adjustment to the service levels as set out in Schedule "C" shall be made without the consent of the Municipality.
- (b) In the event that the Municipality requests an increase in excess of the minimum service level requirement as set out in Schedule "C", it shall be responsible for all costs associated with such increase. In the event that the Municipality decides to revert to the minimum service level, it shall be responsible for all costs associated with such reduction.
- (c) In the event that the Municipality decides to reduce the number of employees employed by the Municipality in connection with this agreement, the Municipality shall bear all costs and expenses incurred as a result of any such reduction.

Liability of Ontario

8. The O.P.P. shall be liable for any damages that may arise as a result of any negligent acts or omissions of its members in the performance of this Agreement.