

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

**KRP ENTERPRISES INC., 1643078 ONTARIO INC., KEVIN CLARK, ESTA CLARK,  
CHRISTINA ACCIACCAFFERRO, JEFFREY ACCIACCAFFERRO, 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 -

**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

Proceeding under the *Class Proceedings Act, 1992*

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**FACTUM OF DEFENDANTS (MOVING PARTIES),  
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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June 8, 2007

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**PART I – OVERVIEW**

1. This putative class action arises from civil unrest in and around the town of Caledonia, Ontario caused by a blockade and subsequent occupation by native protestors of a residential development site known as Douglas Creek Estates. As potential class representatives, the plaintiffs are a diverse group of individuals and businesses who have attempted to plead causes

of action based on events in Caledonia as if those events constituted a single, preventable occurrence rather than a number of isolated occurrences involving different people, to different extents, and at different times. Despite the diversity of these events, the plaintiffs have pleaded, in one claim, causes of action in misfeasance, negligence, and nuisance, which, on the face of the pleading, cannot be sustained. More specifically, the amended statement of claim does not disclose a reasonable cause of action in:

- (a) misfeasance in public office against Commissioner Boniface, Inspector Haggith or the Crown;
- (b) negligence against Boniface or Haggith; or
- (c) nuisance against the Crown.

2. By this motion, the Crown seeks an order, under Rule 21.01(1)(b) of the *Rules of Civil Procedure*, striking out the plaintiffs' amended statement of claim.

## PART II – FACTS

### **Background: The Contextual History**

3. The Caledonia land dispute began on February 28, 2006 when a group of native protestors occupied and blockaded Douglas Creek Estates, a residential development then owned by Henco Industries Limited (“Henco”).

#### **Amended Statement of Claim, paras. 28-29**

4. As a result of the blockade and occupation, Henco obtained an interim and interlocutory injunction on March 3, 2006, enjoining the protestors from interfering with Henco's operations

on Douglas Creek Estates. The injunction was made permanent, without trial, on March 9, 2006 (the "Injunction Order").

**Amended Statement of Claim, paras. 31-32, and 33**

5. Not all native protestors complied with the Injunction Order. Accordingly, on Henco's motion, Mr. Justice Marshall issued, ultimately, two contempt orders and warrants of arrest in respect of protestors who were in breach of the Injunction Order. The Ontario Court of Appeal has held that following the execution of the orders on April 20, 2006, the contempt orders and warrants of arrest did not permit any further convictions for criminal contempt.

**Amended Statement of Claim, paras. 34 - 35**  
***Henco Industries Ltd. v. Haudenosaunee Six Nations Confederacy Council*, [2006] O.J. No. 4790 at paras. 100-103 (C.A.) (QL) [*Henco Industries*]**

6. On April 20, 2006, the Ontario Provincial Police (the "OPP") executed the warrants of arrest and arrested 16 protestors. According to the amended statement of claim, following the OPP's attendance on Douglas Creek Estates on April 20<sup>th</sup> and in the days and weeks that followed, the native protestors engaged in such diverse conduct as:

- barricading Argyle Street, the main street of Caledonia
- setting ablaze the Stirling Street bridge which crosses a rail line
- starting a brush fire along the southern shore of the Grand River
- barricading Highway 6 between Argyle Street and Green Road
- throwing a vehicle onto Highway 54 from the Highway 6 overpass
- driving ATVs recklessly throughout Douglas Creek Estates'
- unlawfully entering a model home owned by Henco

- vandalizing a hydro transformer station
- engaging in various isolated assaults, threats, and intimidation

**Amended Statement of Claim, paras. 38-42**

7. On July 4, 2006, the Minister of Public Infrastructure and Renewal became the registered owner of Douglas Creek Estates. The plaintiffs have pleaded that, since that date, they have experienced the following acts of nuisance emanating from or near the property:

- loud noises from music, drums, gunfire, shouting, and the use of heavy machinery and ATVs,
- smoke and odour from bonfires
- verbal insults and threats
- objects thrown onto neighbouring properties
- bright lights along the perimeter
- higher traffic volume
- police surveillance

8. On June 12, 2006, the plaintiffs, none of whom were parties to (or beneficiaries of) the Injunction Order, commenced an action against Boniface, Haggith, and the Crown seeking damages for the following conduct:

- (a) the alleged reaction of the protestors to the execution of the warrants of arrest on April 20, 2006;

**Amended Statement of Claim, para. 40**

- (b) the interruption of power when the hydro transformer was vandalized on May 22, 2006;

**Amended Statement of Claim, paras. 41, 62, 67-68**

(c) criminal acts allegedly committed by some native protestors;

**Amended Statement of Claim, paras. 42, 61(c)(iii)-(vii)**

(d) the manner in which the OPP enforced the contempt orders;

(e) the manner in which the Crown and the OPP dealt with the Caledonia land dispute in general;

**Amended Statement of Claim, paras. 43-44, 61-68, 69-81**

(f) the protestors committing acts of nuisance on the Douglas Creek Estates;

**Amended Statement of Claim, paras. 46-47**

(g) the temporary closure of Argyle Street and Highway 6.

**Amended Statement of Claim, paras. 48-56, 60**

**Amended Statement of Claim, paras. 1(b)-(b1), 2(b)-(c), 3(a)-(b), 4(a)-(b), 60-66, 69-80**

9. Although not specifically pleaded as an act of misfeasance, the plaintiffs' claim that both Boniface and Haggith (though not a chief of police within the meaning of the *Police Services Act*) (the "PSA") owed and breached duties under s. 41(1) of the PSA which requires a chief of police to ensure that members of the police force carry out their duties in accordance with section 42(1) of the PSA.

**Amended Statement of Claim, paras. 60-62, 64-65(a)**  
**Police Services Act, R.S.O. 1990, c. P.15, ss. 41(1), 42(1) [PSA]**

10. These duties of a police officer are listed in section 42(1) of the PSA and include, in part, the following:

- preserving the peace;
- preventing crimes and other offences and providing assistance and encouragement to other persons in their prevention;
- assisting victims of crime;

- apprehending criminals and other offenders and others who may lawfully be taken into custody;
- laying charges and participating in prosecutions;
- executing warrants that are to be executed by police officers and performing related duties;
- performing the lawful duties that the chief of police assigns.

*PSA, supra, s. 42(1)*

11. The plaintiffs allege that Boniface (and to a lesser extent Haggith) breached her obligations under s. 41 of the *PSA* by purportedly:

- instructing the OPP not to arrest protestors without authorization;
- wilfully frustrating the Injunction Order;
- acquiescing to the Minister Responsible for Aboriginal Affairs' commitment to not prosecute the protestors;
- ignoring the needs of the community.

Amended Statement of Claim, paras. 63, 65  
*PSA, supra, s. 41(1)*

12. Nowhere in the amended statement of claim have the plaintiffs alleged that Boniface or Haggith acted in bad faith, or intended, by act or omission, to injure the plaintiffs.

13. With regard to the Crown, the plaintiffs specifically plead that four Ontario Cabinet Ministers (the Minister of Transportation, the Minister Responsible for Aboriginal Affairs, the Attorney General, and the Minister of Community Safety and Correctional Services (formerly known as the Solicitor General)) were responsible for misfeasance in public office insofar as