Court File No. 114/2006/CP

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,
and ONTARIO PROVINCIAL POLICE INSPECTOR BRIAN HAGGITH

Defendants

Proceeding under the *Class Proceedings Act, 1992*

FACTUM OF THE PLAINTIFF
(RESPONDING PARTY)
[Haldimand County Rule 20 Motion]

FINDLAY McCARTHY LLP
66 James Street North
Hamilton, Ontario
L8R 2K5

John W. Findlay
LSUC No. 19502C

Tel: 905-526-8943
Fax: 905-526-8696
Eml: *findlay@findlaymccarthy.com*

Counsel for the Plaintiffs

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1. CHRONOLOGY

(Paragraph of draft Amended Statement of Claim in parenthesis)

28 Jan 2004	Haldimand County enters into Police Service Agreement with Province (19)
28 Feb 2006	Protestors occupy the Douglas Creek Estates (28)
3 Mar 2006	Henco Industries Limited brings Application in Superior Court (31)
3 Mar 2006	Order of Justice B. Matheson provides interim injunction (32)
9 Mar 2006	Order of Justice T. Marshall makes injunction permanent (33)
17 Mar 2006	Order of Justice T. Marshall issuing Warrants for contempt (34)
28 Mar 2006	Order of Justice T. Marshall making findings of contempt (35)

20 Apr 2006	OPP arrests 16 protestors (38)
	Protestors set fire to tires on Argyle Street (40.b.)
	Protestors block Argyle Street (40.a.)
	Protestors block Hwy. 6 (40.f)
3 May 2006	Minister of Community Safety and Correctional Services undertakes not to call in federal police assistance (77)
24 May 2006	Traffic opens on Argyle Street (50)
13 Jun 2006	Highway 6 is reopened (53)
4 Jul 2006	Minister of Public Infrastructure and Renewal become owners of DCE (45)

2. ISSUES

3. Causes of Action Asserted in Amended Statement of Claim

4. The Plaintiffs in this action have in the Amended Statement of Claim asserted two causes of action against the Defendant, Haldimand County:

(a) a claim based upon nuisance arising from the closure of Argyle Street on behalf of the Caledonia Business Class and the Property Owners Class (the "Nuisance Claim"); and

(b) a claim based upon the breach of the duty of the Defendant, Haldimand County, to provide adequate and effective police services under s. 4 of the *Police Services Act*, on behalf of the Caledonia Business Class, the Property Owners Class and the Contractors Class (the "Police Services Claim").

5. **Abandonment of Police Services Claim**

6. The Plaintiffs are abandoning the Police Services Claim.

7. The Plaintiffs advised the solicitors for Haldimand County of the abandonment of the Police Services Claim by letter on June 14, 2007.

8. **FACTS**

9. Caledonia is the largest urban centre in Haldimand County.

Transcript of Cross-Examination of William Pearce, Responding Party's Motion Record, Tab 2, Q. 14

10. Argyle Street is a municipal highway under the jurisdiction of Haldimand County.

Affidavit of Margaret McCarthy, Motion Record [Certification], Tab 4, para. 27
Transcript of Cross-Examination of William Pearce, Responding Party's Motion Record, Tab 2, Q. 33

11. Argyle Street is the main arterial road through Caledonia.

Transcript of Cross-Examination of William Pearce, Responding Party's Motion Record, Tab 2, Q. 15

12. The businesses located along Argyle Street are highly dependent upon the volume of traffic along Argyle Street.

Affidavit of Richard Peart, Motion Record [Certification], Tab 22, para. 6.
Affidavit of Christopher Leonard, Motion Record [Certification], Tab 23, para. 6.

13. Public passage along Argyle Street was blocked from the Third Line to Celtic Drive for the entire period from April 20, 2006 to May 24, 2006 (the "Closure Period").

Affidavit of Margaret McCarthy, Motion Record [Certification], Tab 4, para. 29

14. During the Closure Period, Haldimand County did not pass any by-law pursuant to s. 35 of the *Municipal Act* removing or restricting the common law right of passage by the public over Argyle Street.

Transcript of Cross-Examination of William Pearce, Responding Party's Motion Record, Tab 2, Q. 36

15. During the Closure Period, Haldimand County did not pass a by-law pursuant to s. 42 of the *Municipal Act* delegating to a committee of council or to any employee of the municipality a power to temporarily close Argyle Street for any purpose.

Transcript of Cross-Examination of William Pearce, Responding Party's Motion Record, Tab 2, Q. 37

16. During the Closure Period, Haldimand County did not take any steps to seek the assistance of the courts to remove the protestors or the barricades from Argyle Street.

Transcript of Cross-Examination of William Pearce, Responding Party's Motion Record, Tab 2, Qs. 81, 89 and 93.

17. During the Closure Period Haldimand County did not seek any assistance from the provincial government or the federal government to request that the federal government provide RCMP, Defence Department or other federal assistance to remove the protestors from Argyle Street.

Transcript of Cross-Examination of William Pearce, Responding Party's Motion Record, Tab 2, Qs. 100 to 108.

18. As a result of the closure of Argyle Street business owners in Caledonia were damaged by the reduction of sales revenues.

Affidavit of Richard Peart, Motion Record [Certification], Tab 22, paras. 7 and 10.
Affidavit of Christopher Leonard, Motion Record [Certification], Tab 23, para. 10.

19. A substantial number of property owners in Caledonia use Argyle Street as the main route of traveling through Caledonia and entering and exiting Caledonia and the closure of Argyle Street has diminished the enjoyment of their property.

Affidavit of Christina Acciaccaferro, Motion Record [Certification], Tab 25, para. 11.
Affidavit of Steve Tong, Motion Record [Certification], Tab 24, para. 11.
Affidavit of Michelle Kavanagh, Motion Record [Certification], Tab 227, para. 11.
Affidavit of Paul Durcek, Motion Record [Certification], Tab 28, para. 11.

20. **LAW**

21. **The Nuisance Claim**

22. **Nuisance**

23. A public nuisance has been defined as any activity which reasonably interferes with the public's interest in questions of health, safety, morality, comfort or convenience. The conduct complained of must amount to an attack on the rights of the public generally to live their lives unaffected by inconvenience, discomfort or other forms of interference. An individual may bring a private action in public nuisance by pleading and proving special damages.

Ryan v. Victoria (City) **[1999] S.C.J. No. 7, per Major, J., para. 52, Plaintiff's Book of Authorities, Tab 59**

24. Justice Major in *Ryan v. Victoria (City)* stated:

> "Such actions commonly involve allegations of unreasonable interference with a public right of way, such as a street or highway...."

Ryan v. Victoria (City), **ibid.,**

25. **Common Law Right of Passage**

26. The Corporation of Haldimand County was created by the *Town of Haldimand Act, 1999*, S.O. 1999, c. 14, Schedule B.

27. Section 2(2) of the *Town of Haldimand Act, 1999*, provides that Haldimand County has the status of a city and a local municipality for all purposes.

Town of Haldimand Act, 1999**, S.O. 1999, c. 14, Schedule B., Plaintiff's Book of Authorities, Tab 11**

28. Section 1(1) of the *Municipal Act, 2001* defines "highway" as follows:

"highway" means a common and public highway and includes any bridge, trestle, viaduct or other structure forming part of the highway and, except as otherwise provided, includes a portion of a highway."

Section 1(1) of the Municipal Act, 2001, S.O. 2001, c. 25, Plaintiff's Book of Authorities, Tab 12

29. There is no inherent right or authority in the municipality to close a highway, such right or authority must be expressly conferred by the Legislature.

***Code v. Jones* [1923] O.J. No. 57 (Ont.C.A.), Plaintiff's Book of Authorities, Tab 13**
***Hydro-Electric Power Commission of Ontario v. Grey (County)* [1924] O.J. No. 31 (C.A.), Plaintiff's Book of Authorities, Tab 14**

30. Section 35 of the *Municipal Act, 2001* provides:

"35. Except as otherwise provided in this Act, under the sphere of jurisdiction 'Highway, including parking and traffic on highways', a municipality may pass by-laws removing or restricting the common law right of passage by the public over a highway and the common law right of access to the highway by an owner of land abutting a highway."

***Municipal Act, 2001*, S.O. 2001, c. 25, s.35, Plaintiff's Book of Authorities, Tab 15**

31. What the municipal council has not power to do, it cannot authorize others to do.

***Code v. Jones*, supra, per. Kelly, J., para. 6, ibid.**

32. The Crown cannot license the erection or commission of a nuisance; nor can a municipal corporation do so by virtue of any inherent or general powers. A building, or other structure of a like nature erected upon a street without the sanction of the Legislature, is

a nuisance, and local authorities cannot give permission to occupy streets without express or plain power to this end conferred upon them by charter or statute.

***Code v. Jones*, supra. per Kelly J., at para. 7, ibid.**

33. The common law right of passage is distinct and apart from the responsibility of the municipality to keep proper maintenance or repair of the highway. It is liable, **on the ground of misfeasance or nonfeasance**, if it permits obstacles to be placed on the highway which prove dangerous to travelers. As stated by Boyd, C. in *Pow v. Township of West Oxford*:

> "Under our Municipal Act and the decisions, the local municipality where the road is situate is responsible for keeping in proper maintenance and repair the traveled part of the road; but, apart from this distinct statutory liability for non-repair, the municipality is also liable, on the ground of misfeasance or nonfeasance, if it permits obstacles to be placed alongside of the traveled way, which prove dangerous to travelers lawfully within the limited of the public highway. These obstacles may amount to a standing nuisance, and any traveler, in the exercise of reasonable care, who suffers injury from coming in contact with them, has a right of action against the municipality.
>
> It is a general rule of law that the public has a right to travel over the whole width of a public way as laid out, and this without being subjected to any other or greater danger than may arise from natural obstacles or from those occasioned by the repairing of the traveled part. If outside of the traveled path an obstacle naturally exists or is necessarily placed there, the traveler takes his course there cum periculo, at his own risk; but where the obstruction is wrongly placed or allowed to be there, and is so placed as to become a nuisance to travel reasonably taken over that part of the highway, then the municipality which can remove the danger or abate the nuisance becomes liable if injury results, and notice of the situation is brought home to the governing body.
>
> This case may rested upon the broad ground that the municipality, having power to control the construction of the electric railway tracks so that they should not be a nuisance on the public highway, failed to exercise any or any effective supervision, resulting in a considerable obstruction being superimposed on the surface of the road allowance and allowed to remain there without abatement or amendment.

> The right of passage over the whole road allowance outside of the traveled portion is made dangerous for those who are led to use it for lawful purposes. It is part of the duty of the municipality to keep the whole road allowance free for use of the public, and not to allow dangerous obstruction being superimposed on the surface of the road allowance and allowed to remain there without abatement or amendment.

Pow v. Township of West Oxford **[1908] O.J. No. 527 (Ont.Div.Ct.), per Boyd, C., affirmed by the Court of Appeal [1908] O.J. No. 773 (Ont.C.A.) Plaintiff's Book of Authorities, Tabs 17 and 18**

34. The right of free passage along a highway is paramount and can only be curtailed or modified by unequivocally expressed statutory language. As stated by Masten, JA.:

> "... It has long been recognized in the Courts of Ontario and England that the right of the public to free passage along the King's highway is paramount, cannot be interfered with even by the Crown itself, but only by Parliament or the Legislature. ... This view of the law is not in controversy in the present appeal, but I mention it in order to bring into bolder relief the fact that the right of the public in the King's highway has always been jealously guarded by the Courts and is not lightly to be interfered with. There is no question but that the Legislature of Ontario can by statute modify or abolish that right; but, if it is modified and the rights of the public curtailed or affected, the will of the Legislature must be unequivocally expressed."

Hydro-Electric Power Commission of Ontario v. Grey (County), **supra, per Masten, J.A. at para. 21**

35. The common law right of passage by the public over a highway and the common law right of access to the highway by an owner of land abutting the highway is referred to, thereby explicitly acknowledged, in s. 35 of the *Municipal Act, 2001*.

Section 35 of the Municipal Act, 2001, S.O. 2001, c. 25, Plaintiff's Book of Authorities, Tab 15

36. The only provisions in the *Municipal Act, 2001* that unequivocally modify or curtail the public's right to right of passage over or access to a highway are: s. 34 (which allows for a permanent closure of a road), s. 35 (which allows for the removal or restrictions of such rights), s. 41 (which allows for a permanent prohibition of motor vehicle traffic and s. 42 (which allows for a temporary closure of a highway).

Sections 34, 35, 41 and 42 of the *Municipal Act, 2001*, S.O. 2001, c. 25, Plaintiff's Book of Authorities, Tab 15

37. Although a municipality has authority to close a highway it must do so in accordance with the provisions of the *Municipal Act, 2001* and if a highway is closed before the passing and registration of a proper by-law it will be responsible in damages.

***Bill's Variety Ltd. el al. v. City of Galt* (1976), 10 O.R. (2d) 225, Plaintiff's Book of Authorities, Tab 16**
***Pow v. Township of West Oxford* [1908] O.J. No. 527 (Ont.Div.Ct.) and [1908] O.J. No. 773 (Ont.C.A.), ibid.**
***Membery v. Smith* [1918] O.J. No. 280 (Ont.Sup.Ct.), Plaintiff's Book of Authorities, Tab 19**
***Ronville Lodge Ltd. v. Franklin (Township)* [1975] S.C.J. No. 110, Plantiff's Book of Authorities, Tab 20**
***Vancouver (City) v. McPhalen* (1911), 45 S.C.R. 194, Plaintiff's Book of Authorities, Tab 21**

38. Whether or not a particular activity constitutes a public nuisance is a question of fact. Many factors may be considered, including the inconvenience caused by the activity, the difficulty involved in lessening or avoiding the risk, the utility of the activity, the difficulty involved in lessening or avoiding the risk, the utility of the activity, the general practice of others, and the character of the neighbourhood.

***Ryan v. Victoria (City)* [1999] S.C.J. No. 7, per Major, J., para. 53, ibid.**

39. Interference with a public right of way, such as a street or highway, has been held to constitute a nuisance.

Ryan v. Victoria (City) **[1999] S.C.J. No. 7, per Major, J., para. 52, ibid.**
Chessie v. J.D. Irving Ltd.**, 140 D.L.R. (3d) 501 (N.B.C.A.), Plaintiffs Book of Authorities, Tab 60**

40. The defence of "statutory authority" or "inevitability" will be strictly construed. As stated by LaForest, J., in *Tock v. St. John's Metropolitan Area Board:*

> "... Where, as here, the authorizing statute does not specifically provide that a right of action in nuisance is taken away ... I see no point in donning the cloak of a soothsayer to plumb the intent of the legislature. After all, if the legislature wishes to shift the risk from a public authority to the individual, it can do so in express terms. I see no reason why it should be presumed to be authorizing a serious nuisance. Nor do I accept that any weight should be accorded a showing by the public body that damage was inevitable. The determination that damage was inevitable, in the sense in which that term was defined earlier, does not provide a rationale for concluding that it is reasonable to demand of the person whom misfortune has singled out that he or she pay for the damage concerned. The costs of damage that is an inevitable consequence of the provision of services that benefit the public at large should be borne equally by all those who profit from the service."

Tock v. St. John's Metropolitan Area Board **[1989] S.C.J. No. 122, per Sopinka J., at para. 34, Plaintiff's Book of Authorities, Tab 58**

41. Nuisance is not the same as negligence. It is a higher standard. The traditional view is stated by Sopinka J., in *Tock v. St. John's Metropolitan Area Board*, which statement is adopted by the Supreme Court of Canada in *Ryan v. Victoria (City)*:

> "The defendant must negative that there are alternative methods of carrying out the work. The mere fact that one is considerably less expensive will not avail. If only one method is practically feasible, it must be established that it was practically impossible to avoid the nuisance. It is insufficient for the defendant to negative negligence. The standard is a higher one. While the defence gives rise to some factual difficulties, in view of the allocation of the burden of proof they will be resolved against the defendant.

Tock v. St. John's Metropolitan Area Board **[1989] S.C.J. No. 122, per Sopinka J., at para. 94, ibid.**
Ryan v. Victoria (City) **[1999] S.C.J. No. 7, per Major, J., para. 55, ibid.**

42. It cannot be said by the Defendant, Haldimand County, that it was practically impossible to avoid the nuisance, because the County could have taken the following steps, which, for whatever reasons, it chose not to do:

(a) it could have passed a by-law under s. 35 or 42 of the *Municipal Act*;

(b) it could have sought injunction relief from the court to remove the protestors from Argyle Street;

(c) it could have sought policing assistance from the federal government.

43. Passing a by-law under s. 35 or 42 of the *Municipal Act, 2001* in a timely fashion would have, or could have, avoided the nuisance.

44. The solicitor for Haldimand County, in his own submissions to Justice Marshall, indicated that seeking injunctive relief would provide a "failsafe" against the illegal occupation.

Affidavit of J. Patrick Woolley, sworn on June 6, 2007, para. 22 and Exhibit "C", Responding Party's Motion Record, Tabs 1 and C.

45. The Defendant has not adduced any evidence that a request for federal policing assistance would have been ineffective.

46. The legal or persuasive burden is on the moving party to satisfy the court that there is no genuine issue for trial. The evidential burden, or something akin to an evidential burden

(because the motions judge does not find facts), of the responding party is to respond with evidence setting out specific facts showing that there is a genuine issue for trial.

Hi-Tech Group Inc. v. Sears Canada Inc. **[2001] O.J. No. 33 (C.A), Plaintiff's Book of Authorities, Tab 61**

47. The evidence adduced by the Defendant does satisfy the standard as established by the Supreme Court of Canada in *Tock v. St. John's Metropolitan Area Board* and *Ryan v. Victoria (City)* and therefore summary judgment should not be granted.

48. As stated by the Supreme Court of Canada, the determination of whether or not there is a nuisance is a matter of fact and the evidence adduced by the Plaintiff and through the cross-examination of the deponent for the Defendant has shown that there are genuine issues for trial with respect to the material facts.

49. **ORDER REQUESTED**

50. An Order that the Defendant's motion for summary judgment be dismissed.

51. An Order that the Plaintiffs have their costs of this motion on a substantial indemnity scale payable forthwith.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

June 18, 2007

John W. Findlay

per for Margaret McCarthy

Margaret McCarthy

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L8R 2K5

John W. Findlay
LSUC No. 19502C
Tel: (905) 526-8943
Fax: (905) 526-8696

Counsel for the Plaintiffs