

**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*

PLAINTIFFS' FACTUM

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PLAINTIFF'S FACTUM

1. CHRONOLOGY

(Paragraph of draft Amended Statement of Claim in parenthesis)

- 1 Oct 2003 Haldimand County enters into Police Service Agreement with Solicitor General (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 destroy wooden bridge on Stirling Street (40.c.)
 - Protestors start brush fire on south shore of Grand River (40.d.)
 - Protestors prevent fire department from attending to fires (40.e.)
 - Protestors throw vehicle over Highway 6 overpass onto County Road 54 (40.g.)
 - Protestors vandalize model home and office on DCE (40.i)
 - Protestors block Argyle Street (40.a.)
 - Protestors block Hwy. 6 (40.f)
- 21 Apr 2006 Minister of Aboriginal Affairs agrees not to lay charges (72)
- Minister of Aboriginal Affairs puts moratorium on development of DCE (74)
- 3 May 2006 Minister of Community Safety and Correctional Services undertakes not to call in federal police assistance (77)
- 22 May 2006 Transformer on Argyle Street is vandalized and power is interrupted to residents throughout Haldimand County and Norfolk County (41)
- 24 May 2006 Traffic opens on Argyle Street (50)
- 28 May 2006 Matt Walcoff, reporter for Kitchener Record, assaulted (42.a)
- 4 Jun 2006 William Cowan, security guard at transformer station assaulted (42.b)
- David Hartless assaulted on Braemar Avenue (42.c)
- 9 Jun 2006 Kathe and Gunther Golke assaulted in Canadian Tire parking lot (42.d)
- Ken McKay and Nick Garbutt of CH TV assaulted (42.e)
 - Residents of Thistlemoor requested to vacate premises (42.f)

13 Jun 2006 Highway 6 is reopened (53)

4 Jul 2006 Minister of Public Infrastructure and Renewal become owners of DCE (45)

2. **AMENDMENT OF PLEADINGS**

3. Rule 5.04(2) of the Rules of Civil Procedure provides:

“(2) At any stage of a proceeding the court may, by order add, delete or substitute a party or correct the name of a party incorrectly named, on such terms as are just, unless prejudice would result that could not be compensated by costs or an adjournment.”

Rule 5.04, Rules of Civil Procedure, Book of Authorities, Tab 1

4. Rule 26.01 of the Rules of Civil Procedure provides:

“26.01 On motion at any stage of an action the court **shall** grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.”

Rule 26.01, Rules of Civil Procedure, Book of Authorities, Tab 2

5. Rule 26.02 of the Rules of Civil Procedure provides:

“26.02 A party may amend the party’s pleading,

- (a) without leave, before the close of pleadings, if the amendment does not include or necessitate the addition, deletion or substitution of a party to the action;
- (b) on filing the consent of all parties and, where a person is to be added or substituted as a party, the person’s consent; or
- (c) with leave of the court.”

Rule 26.02, Rules of Civil Procedure, Book of Authorities, Tab 3

6. All of the parties proposed to be added as plaintiffs to the action have consented to be added as plaintiffs to the action.

Consent of Kevin and Esta Clark, Motion Record, Tab 12
Consent of Christina and Jeffrey Acciaccferro, Motion Record, Tab 13
Consent of Steve and Lori Tong, Motion Record, Tab 14
Consent of Russell and Michelle Kavanagh, Motion Record, Tab 15
Consent of Paul and Stefany Durcek, Motion Record, Tab 16
Consent of Quintin and Donna Chausse, Motion Record, Tab 17
Consent of Anne Marie and James Paul VanSickle, Motion Record, Tab 18
Consent of J.P. Woolley Surveying Ltd., Motion Record, Tab 19
Consent of Margaret Cook, Motion Record, Tab 20

7. The pleadings disclose reasonable causes of action by the plaintiffs against the defendants, as set out in the discussion of s. 5(1) of the *Class Proceedings Act, 1992* (the “CPA”) below.

8. **CERTIFICATION**

9. *Preliminary Considerations*

10. In a certification motion the courts are not to 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 of the legislation, specifically,

- More efficient judicial economy
- Improved access to justice
- Behaviour modification

Western Canadian Shopping Centres Inc. v. Dutton [2001] 2 S.C.R. 534, per McLachlin, C.J. at paras. 27, 28 and 29, Book of Authorities, Tab 4
Hollick v. Toronto (City) [2001] S.C.J. No. 67, per McLachlin, C.J. at para. 15, Book of Authorities, Tab 5,

11. The certification stage is decidedly not meant to be a test of the merits of the action, rather it focuses on the form of the action.

Hollick v. Toronto (City), supra., per McLachlin C.J. at para. 16

12. The question at certification is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action.

Hollick v. Toronto (City), supra, per. McLachlin, C.J., at para. 16

13. *Section 5 of the CPA*

14. The test for certification of a class proceeding under the CPA is set out in s. 5:

“5(1) The court **shall** certify a class proceeding on a motion under section 2, 3 or 4 if,

- (a) the pleadings or the notice of application disclose a cause of action;
- (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
- (c) the claims or defences of the class members raise common issues;
- (d) a class proceeding would be the preferable procedure for resolution of the common issues;
- (e) there is a representative plaintiff or defendant who,
 - (i) would fairly and adequately represent the interests of the class,
 - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding; and
 - (iii) does not have, on the common issues for the class, an interest in conflict with the interest of other class members.”

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 5, Book of Authorities, Tab 6

15. *Identifiable Classes (Section 5(1)(b))*
16. The plaintiffs are proposing four classes, defined as follows:

Caledonia Business Class

“All those persons, including sole proprietors, partnerships, corporations or organizations, whether for profit or non-profit, with places of business within the N3W Canada Post postal division whose businesses have been affected by the closure of Argyle Street from April 20, 2006 until May 24, 2006, the occupation by protestors of the Douglas Creek Estates or the interruption of hydro service from damage done to the Hydro One Caledonia transformer station on May 22, 2006, excluding members of the Contractors Class.”

Property Owners Class

“All those persons, including individuals, trusts, corporations or organizations, who, on February 28, 2006, owned or occupied real property located within the N3W Canada Post postal division, and have been affected by the occupation by protestors of the Douglas Creek Estates, the closure of Argyle Street from April 20, 2006 until May 24, 2006, the closure of Highway 6 between Green Road and the junction of Argyle Street South from April 20, 2006 until June 13, 2006, and the interruption of hydro service from damage done to the Hydro One Caledonia transformer station on May 22, 2006, excluding members of the Caledonia Business Class.”

Contractors Class

“All contractors or subcontractors of Henco Industries Limited or their agents, who were contracted to provide services and materials to owners, developers, builders or contractors on the Douglas Creek Estates subdivision on February 28, 2006.”

Highway 6 Class

“All those persons, including sole proprietors, partnerships, corporations or organizations, resident in the Province of Ontario who carry on a business, whether for profit or non-profit whose businesses have been affected by the closure of Highway 6 between Green Road and the junction of Argyle Street South from April 20, 2006 until June 13, 2006 and the occupation of protestors on the Douglas Creek Estates, excluding members of the Caledonia Business Class.”

Affidavit of Margaret McCarthy, Motion Record, Tab 4, para. 6

17. Each of these classes is identifiable and contains two or more persons.

Affidavit of Margaret McCarthy, Motion Record, Tab 4, paras. 40 and 41

18. Each of the Classes would be represented by a representative plaintiff as follows:

Class	Representative Plaintiff(s)
<i>Caledonia Business Class</i>	KRP Enterprises Inc. 1643078 Ontario Inc.
<i>Property Owners Class</i>	Kevin and Esta Clark Christina and Jeffrey Acciaccferro Steve and Lori Tong Michelle and Russell Kavanagh Paul and Stefany Durcek Quintin and Donna Chausse Anne Marie and James Paul VanSickle
<i>Contractors Class</i>	J.P. Woolley Surveying Ltd.
<i>Highway 6 Class</i>	Margaret Cook

19. ***Pleadings Disclose a Cause of Action (Section 5(1)(a))***
20. The test for finding a cause of action under s. 5(1)(a) is the same as that enunciated by the Supreme Court of Canada in *Hunt v. Carey Canada Inc.*:

“...[A]ssuming the facts as stated in the statement of claim can be proved, is it ‘plain and obvious’ that the plaintiff’s statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be ‘driven from the judgment seat.’ Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. ...”

***Hunt v. Carey Canada Inc.* [1990] S.C.J. No. 93, per Wilson J., at para. 33,
Book of Authorities, Tab 7**

21. In cases involving multiple plaintiffs and defendants each plaintiff need not have a cause of action against each defendant. The pleadings must disclose a reasonable cause of action against each defendant by a representative plaintiff.

***Bendall v. McGhan Medical Corp.* [1993] O.J. No. 1948, Book of Authorities, Tab 8
Ragoonanan v. Imperial Tobacco Canada Ltd. [2000] O.J. No. 4597, Book of Authorities,
Tab 9
Hughes v. Sunbeam Corporation (Canada) Ltd. [2002] O.J. No. 3457 (C.A.),
Book of Authorities, Tab 10**

22. The Amended Statement of Claim discloses the following causes of action that are summarized in chart form below.

Defendant	Cause of Action	Plaintiffs
Haldimand County	Closure of Argyle Street	Caledonia Business Class Property Owners Class
	Failure to Provide Police Services	Caledonia Business Class Property Owners Class Contractors Class
Commissioner Boniface and Inspector Haggith	Closure of Argyle Street	Caledonia Business Class Property Owners Class
	Closure of Highway 6	Highway 6 Class
	Violation of Police Services Act Duties	Caledonia Business Class Property Owners Class Contractors Class
	Negligence (Hydro Interruption)	Caledonia Business Class Property Owners Class
Minister of Public Infrastructure and Renewal	Nuisance	Property Owners Class
Minister of Transportation	Closure of Highway 6	Highway 6 Class
Minister of Community Safety and Correctional Services	Failure to Provide Police Services	Caledonia Business Class Property Owners Class Contractors Class Highway 6 Class
Minister of Aboriginal Affairs	Agreement not to Prosecute Protestors	Caledonia Business Class Property Owners Class Contractors Class
	Moratorium on Development	Contractors Class
Attorney General	Failure to Enforce Law	Caledonia Business Class Property Owners Class Contractors Class Highway 6 Class

23. **Liability of Haldimand County**

24. *Common Law Right of Passage on Highways*

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

26. 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., Book of Authorities, Tab 11

27. 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, Book of Authorities, Tab 12

28. 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.), Book of Authorities, Tab 13
Hydro-Electric Power Commission of Ontario v. Grey (County) [1924] O.J. No. 31 (C.A.), Book of Authorities, Tab 14

29. 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, Book of Authorities, Tab 15

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

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

31. 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 with express or plain power to this end conferred upon them by charter or statute.

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

32. "... 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

33. The Amended Statement of Claim pleads that Haldimand County took no steps to close Argyle Street in accordance with the requirements of the *Municipal Act, 2001*.

Amended Statement of Claim, Plaintiffs Compendium, Tab 1, para. 49

34. The Amended Statement of Claim pleads that from April 20, 2006 to May 24, 2006 no public passage or traffic was allowed upon Argyle Street from the Third Line to Celtic Drive.

Amended Statement of Claim, Plaintiffs Compendium, Tab 1, para. 50

35. 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. et al. v. City of Galt (1976), 10 O.R. (2d) 225, 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.), Book of Authorities, Tabs 17 and 18
Membery v. Smith [1918] O.J. No. 280 (Ont.Sup.Ct.), Book of Authorities, Tab 19
Ronville Lodge Ltd. v. Franklin (Township) [1975] S.C.J. No. 110, Book of Authorities, Tab 20
Vancouver (City) v. McPhalen (1911), 45 S.C.R. 194, Book of Authorities, Tab 21

36. The pleadings state that the duty is owed to the members of the Caledonia Business Class and the members of the Property Owners Class and that the members of both of these classes have suffered damages as a result of the closure of the roads.

Amended Statement of Claim, Plaintiffs Compendium, Tab 1, paras. 59, 86 and 89

37. *Duty to Provide Police Services*

38. The duty of every municipality is set out in section 4 of the *Police Services Act*:

“4 (1) Every municipality to which this subsection applies shall provide adequate and effective police services in accordance with its needs.

- (2) Adequate and effective police services must include, at a minimum, all of the following police services:

1. Crime Prevention.
2. Law Enforcement.
3. Assistance to victims of crime.
4. Public order maintenance.
5. Emergency response.

- (3) in providing adequate and effective police services, a municipality shall be responsible for providing all the infrastructure and administration necessary for providing such services, including

vehicles, boats, equipment, communication devices, buildings and supplies.

- (4) Subsection (1) applies to,
 - (a) single-tier municipalities;”

* * *

Police Services Act, R.S.O. 1990, c. P.15, s. 4, Book of Authorities, Tab 22

- 39. It is pleaded that Haldimand County owed this duty to members of the Caledonia Business Class, members of the Property Owners Class and members of the Contractors Class.

Amended Statement of Claim, Plaintiffs Compendium, Tab 1, paras. 59 and 59A

- 40. It is pleaded that Haldimand County did not provide adequate and effective police services in accordance with the *Police Services Act* and the failure on the part of Haldimand County to provide adequate and effective police services led various criminal acts and breaches of the law.

Amended Statement of Claim, Plaintiffs Compendium, Tab 1, paras. 40, 41 and 42

- 41. It is pleaded that the failure on the part of Haldimand County to provide adequate and effective police services has caused damages to members of the Caledonia Business Class, members of the Property Owners Class and members of the Contractors Class.

Amended Statement of Claim, Plaintiffs Compendium, Tab 1, paras. 86, 89 and 90

42. **Liability of Commissioner Boniface and Inspector Haggith**

43. *Duties of a Chief of Police*

44. Subsections (1) and (6) of section 10 of the *Police Services Act*, provide:

“10 (1) The Solicitor General may enter into an agreement with the council of a municipality or jointly with the councils of two or more municipalities for the provision of police services for the municipality or municipalities by the Ontario Provincial Police.

* * *

(6) When the agreement comes into effect, the Ontario Provincial Police detachment assigned to the municipality or municipalities shall provide police services for the municipality or municipalities, and shall perform such other duties, including by-law enforcement, that are specified in the agreement.”

Police Services Act, R.S.O. 1990, c. P.15, s.10, Book of Authorities, Tab 23

45. The term “chief of police” is defined in s. 2 of the *Police Services Act* to mean “a municipal chief of police or the Commissioner of the Ontario Provincial Police and includes an acting chief of police”.

Police Services Act, R.S.O. 1990, c. P.15, s. 2, Book of Authorities, Tab 24

46. Commissioner Boniface at all material times was the Commissioner of the Ontario Provincial Police.

Amended Statement of Claim, Plaintiffs Compendium, Tab 1, para. 20

47. Inspector Haggith was at all material times the chief of the Haldimand County detachment of the Ontario Provincial Police.

Amended Statement of Claim, Plaintiffs Compendium, Tab 1, para. 21

48. The term “police officer” is defined in s. 2 of the *Polices Services Act* to mean “a chief of police or any other police officer, but does not include a special constable, a First Nations Constable, a municipal law enforcement officer or any auxiliary member of a police force.”

Police Services Act, s. 2, ibid., Book of Authorities, Tab 24

49. The duties of a chief of police are set out in section 41 of the *Police Services Act*:

“41 (1) The duties of a chief of police include,

- (a) In the case of a municipal police force, administering the police force and overseeing its operation in accordance with the objectives, priorities and policies established by the board under subsection 31(1);
 - (b) ensuring that members of the police force carry out their duties in accordance with this Act and the regulations and in a manner that reflects the needs of the community, and that discipline is maintained in the police force;
 - (c) ensuring that the police force provides community-oriented police services;
 - (d) apprehending criminals and other offenders and others who may lawfully be taken into custody;
- (2) administering the complaint system in accordance with Part V.

Police Services Act, R.S.O. 1990, c. P.15, s. 41, Book of Authorities, Tab 25

50. The duties of a police officer are set out in section 42 of the *Police Services Act*, R.S.O. 1990:

“42 (1) The duties of a police officer include,

- (a) preserving the peace;

- (b) preventing crimes and other offences and providing assistance and encouragement to other persons in their prevention;
 - (c) assisting victims of crime;
 - (d) apprehending criminals and other offenders and others who may lawfully be taken into custody;
 - (e) laying charges and participating in prosecutions;
 - (f) executing warrants that are to be executed by police officers and performing related duties;
 - (g) performing lawful duties that the chief of police assigns;
 - (h) in the case of a municipal police force and in the case of an agreement under section 10 (agreement for provision of police services by O.P.P.), enforcing municipal by-laws;
 - (i) completing the prescribed training.
- (3) A police officer has authority to act as such throughout Ontario.
- (4) A police officer has the powers and duties ascribed to a constable at common law.”

Police Services Act, R.S.O. 1990, c. P.15, s. 42, Book of Authorities, Tab 26

51. The OPP has the responsibility of patrolling Highway 6 under the s. 19 of the *Police Services Act*.

Police Services Act, R.S.O. 1990, c. P.15, s. 19, Book of Authorities, Tab 27

52. A duty of a constable at common law includes the preservation of the peace, the prevention of crime and the protection of life and property, and from the latter duty flows the duty to control traffic on the public roads.

R. v. Dedman [1985] S.C.J. No. 45, per Dickson, C.J., at para. 14, Book of Authorities, Tab 28

53. As stated by Chief Justice Dickson in *R. v. Dedman*:

“It has always been a fundamental tenant of the rule of law in this country that the police in carrying out their general duties as law enforcement officers of the state, have limited powers and are only entitled to interfere with the liberty or property of the citizen to the extent authorized by law. Laskin, C.J., dissenting, in *R.v. Biron* [1976] 2 S.C.R. 56, made the point at pp. 64-65:

‘Far more important, however, is the social and legal, and indeed, political, principle upon which our criminal law is based, namely, the right of an individual to be left alone, to be free of private and public restraint, save as the law provides otherwise. Only to the extent to which it so provides can a person be detained or his freedom of movement arrested.’

Absent explicit or implied statutory authority, the police must be able to find authority for their actions at common law. Otherwise they act unlawfully.”

R. v. Dedman supra, per Dickson, C.J., at para. 12

54. By Order dated March 3, 2006, Justice B. Matheson issued an interim and interlocutory injunction providing for the following:

- “1. THIS COURT ORDERS an interim and interlocutory injunction restraining the Haudenosaunee Six Nations Confederacy Council (‘Confederacy Council’) and the individual Respondents and their servants or agents, whose identity is unknown, from interfering with the Applicant [Henco] or its employees or agents, or the Applicant’s contractors or subcontractors, or their agents, use of roadways known municipally as Thistlemoor Drive and Surrey Street, formerly in the Town of Caledonia and the Township of Oneida, now known as The Corporation of Haldimand County, or from in any way obstructing these or other roadways in Douglas Creek Estates or preventing the Applicant or its employees or agents, or the Applicant’s contractors or subcontractors, or their agents, from using these or other roadways for the purpose of entering Douglas Creek Estates more particularly described in Schedule ‘A’ attached hereto;
2. THIS COURT FURTHER ORDERS an interim and interlocutory injunction restraining the Confederacy Council and the individual Respondents, their servants or agents, and any other person having notice of the injunction, from hindering, interfering with, intimidating,