Court File No. 114/2006 – CP

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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SUPERIOR COURT OF JUSTICE

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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

27. In the case of a defendant's motion for summary judgment, the plaintiff bears the evidentiary onus of demonstrating that his claim is adequately supported by the evidence. The Court is entitled to assume that the record contains all the evidence which the parties will present at trial. The responding party may not rest on allegations or denials in the party's pleading, but must present, by way of affidavit or other evidence, specific facts showing that there is a genuine issue for trial.

Reference: *Dawson v. Rexcraft Storage Warehouse Inc., supra* at para. 17

Augonie v. Galian Solid Waste Material Inc. (1998), 156 D.L.R. (4th) 222 (Ont. C.A.)

28. In considering whether to grant summary judgment, the Court will consider the evidence to determine whether there is a genuine issue for trial with respect to the material facts. The respondent must establish the claim as being one with a real chance of success by adducing coherent evidence based on an organized set of facts. The respondent must put his best foot forward and "lead trump or risk losing". A responding party is not entitled to sit back and rely on the possibility that more favourable facts may evolve at trial.

Reference: *1061590 Ontario Limited v. Ontario Jockey Club* (1995), 21 O.R. (3d) 547 (C.A.)

Irving Ungerman Limited v. Galanis (1991), 4 O.R. (3d) 545 (C.A.)

Transamerica Accidental Life Insurance Co. v. Toronto Dominion Bank, [1998] O.J. No. 1273 (Gen. Div.), varied in part (1999), 44 O.R. (3d) 97 (C.A.)

B. Duty to Provide Policing Services:

29. Pursuant to section 4 of the *Police Services Act,* every single-tier municipality shall provide adequate and effective police services in accordance with its needs.

Reference: *Police Services Act,* R.S.O. 1990, c. P.15, section 4(1) and (4)

30. Section 5 of the *Police Services Act* provides that a municipality's responsibility shall be discharged by entering into an agreement under section 10 of the *Police Services Act* to have police services provided by the O.P.P.

Reference: *Police Services Act,* R.S.O. 1990, c. P.15, sections 5(1) and 10

31. When a Police Services Agreement comes into effect, the O.P.P. shall provide police services to the municipality and shall perform any other duty specified in the agreement.

Reference: *Police Services Act,* R.S.O. 1990, c. P.15, section 10(6)

32. In order to enter into a Police Services Agreement under section 10 of the *Police Services Act,* the municipality must have a Police Services Board. The Police Services Board acts independently of any control by municipal council and may sue or be sued in its own name.

Reference: *Police Services Act,* R.S.O. 1990, c. P.15, sections 10(2) and 30(1)
Berlin (City) and the County Judge of Waterloo (County) (Re), [1914] O.J. No. 7 (Ont. S.C. – H.C.D.) at para. 9-10

33. There can be no liability to a municipality for a loss sustained by residents through inaction on the part of the police. In *Bowles v. City of Winnipeg, infra,* the Court held that a municipality cannot be held liable "for anything done by the police qua police".

Reference: *Bowles v. City of Winnipeg* (1914), 45 D.L.R. 94 (Man. K.B.) at p. 6 (Q.L.)

34. In *Baker v. Toronto (City), infra,* the Ontario Supreme Court struck the plaintiff's claims, holding that a municipality is not under a legal obligation to prevent damage to private property which occurred during a riot. The Court stated as follows:

> ... What is complained of is the non-performance of the duty of preserving the peace and of preventing robberies and other crimes and offences; but that is a duty which the statute casts upon

> members of the force, the chief constable and the constables, and not upon the city corporation.
>
> There have been in many cases attempts to render municipalities liable for wrongs done by constables when acting, as it was alleged, as servants of the municipality. In nearly all of such cases, it has been held that the constables were not the servants of the municipality, and that the municipality was not responsible for wrongs done by them. The position of the City in these cases is, as it appears to me, even stronger than the position of the municipalities which were defendants in those cases; for what is complained of here is merely inaction; and, unless the act left undone was an act which the city corporation was under legal obligation to do it does not bring the corporation under liability, even if the person who was charged with the duty of doing it was a person who, for some purposes and in respect of certain matters, could be looked upon as the servant of the corporation.

Reference: *Baker v. Toronto (City),* [1919] O.J. No. 135 (Ont. S.C. – H.C.D.) at para. 9

35. It is submitted that in the case at bar, the County has clearly discharged its duty to provide adequate and effective police services pursuant to section 4(1) of the *Police Services Act* by entering into the Police Services Agreement with the O.P.P. Section 5 of the *Police Services Act* clearly states that entering into such an agreement shall be sufficient to discharge the municipality's duty.

Reference: *Police Services Act,* R.S.O. 1990, c. P.15, section 4(1) and 5(1)

36. It is worth mentioning that in paragraph 3 of the Police Services Agreement, it specifically states that:

> 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.

Reference: *Police Services Agreement*, dated January 28, 2004, para. 3
Police Services Act, R.S.O. 1990, c. P.15, section 4(1) and 5(1)

37. It is therefore submitted that there is no genuine issue for trial with respect to the allegations against the County that it failed to discharge its duty to provide adequate and effective police services to prevent crime and to enforce the law.

Reference: *Amended Statement of Claim,* at para. 59A

38. It is further submitted that it is clear that the County cannot be held liable for the failure of the O.P.P. to carry out its duties under the *Police Services Act.* Any cause of action in this regard would be against the O.P.P. or the Province.

C. Closure of Argyle Street

39. The claim against the County with respect to the barricading of Argyle Street is one of nonfeasance, a failure to act. It is alleged that the County:

a. failed to close Argyle Street in accordance with the provisions of the *Municipal Act, 2001*;

b. failed to provide for the common law right of passage on Argyle Street; and

c. failed to ensure that Argyle Street was kept free from nuisances.

Reference: *Amended Statement of Claim,* at para. 57-59A

(i) The County did not close Argyle Street

40. The plaintiffs' claim that the County failed to "close" Argyle Street in accordance with the procedures set out in the *Municipal Act, 2001,* is entirely without merit as the County never closed or intended to close Argyle Street. At no time did the County ever pass a by-law closing Argyle Street. The procedures set out in the *Municipal Act, 2001,* for the closing of a highway by a municipality are therefore irrelevant.

Reference: *Affidavit of William Pearce,* sworn June 4, 2007, at paras. 24
Reference: *Municipal Act, 2001,* S.O. 2001, c.25, sections 34 and 35

41. In fact, what occurred was that the Protesters illegally erected barricades on Argyle Street, following the O.P.P. action of April 21, 2006, which had the effect of closing a portion of Argyle Street. This was obviously done without the authority or consent of the County.

Reference: *Affidavit of William Pearce,* sworn June 4, 2007, at paras. 24

42. To suggest that the County itself closed Argyle Street or that it authorized the Protesters to close Argyle Street is completely absurd and represents a desperate attempt by the plaintiffs to ascribe liability to the County where there is none.

(ii) The County does not have a duty to remove the Protesters

43. As a general rule, a municipality will not be liable for nonfeasance, as opposed to misfeasance, unless there is an express statutory duty requiring the municipality to act. In *Montreal (City) v. Muclair, infra,* the Supreme Court of Canada, in upholding the dismissal of an action against the municipality for allowing a building to encroach onto an established street line, held as follows:

> ... [The incidental demand] does not allege either any single act of non-feasance by the corporation of any duty owed to the public which is contended to have given to the defendants ground in law for presenting their incidental demand. That the non-feasance of any such duty would not give any cause of action to an individual injured thereby unless an action should be expressly given by statute ... must be taken to be conclusive.

Reference: *Montreal (City) v. Muclair,* [1898] 28 S.C.R. 458 at p. 7 (Q.L.)

44. This principle was reiterated by the Ontario High Court of Justice in *Brown v. Hamilton (City), infra.* In that case, the plaintiff was injured by the discharge of a firecracker on a public road during a political demonstration contrary to the Municipality's by-law. The Court dismissed the claim against the municipality on the basis that there was no statutory duty on the part of the municipality to enforce its by-law prohibiting the discharging of firecrackers in public or to prevent a public nuisance. The Court stated:

> A different feature would be presented if the city authorities had by act or license sanctioned or encouraged this display of fireworks in the streets. In the case of a public nuisance, that might be regarded as an act of misfeasance. Such appears to be the case cited in *Forget v. Corporation of Montreal* (1888) 4 Mon. Sup. Ct. 77. But here all that can be attributed to the defendants is that they did not

> intervene to stop the procession; which, at the highest, is only nonfeasance. And English and Canadian law is well settled that in regard to the governance and control of highways mere nonfeasance on the part of the municipal corporation in which the way is vested, forms no ground for seeking redress from the courts.

Reference: *Brown v. Hamilton (City),* [1902] O.J. No. 135 H.C.J. at para. 13

Freitag v. Penetanguishene (Town), [2005] O.J. No. 4019 (Div. Ct.) at para. 13

45. Finally in *Lefebvre v. Grande-Mere (Town), infra,* the Supreme Court of Canada again asserted that the failure of a municipality to exercise its power to regulate the use of a public highway does not form the basis of a cause of action unless such an action is expressly provided by statute and such failures do not offend a municipality's duty to kept its roads in a safe condition. The Court held as follows:

> .... The powers conferred by ... Art. 5641 R.S.Q. [which gave the municipality the right to regulate the use of public highways and streets] are clearly legislative or governmental and injury resulting from a failure to exercise them does not give rise to a right of action except where specifically so provided. The liability of the municipality for the bad state of the roads, streets, avenues, etc ... does not cover a case such as this. ... the power conferred by [Art 5641 R.S.Q.] is a governmental power to pass by-laws and failure to exercise it, in the absence of specific provisions to that effect, cannot form the basis of a right of action.

Reference: *Lefebvre v. Grande-Mere (Town)* (1917), 55 S.C.R. 121 at pp. 5-6 (Q.L.)

46. It is respectfully submitted that there is no express duty upon a municipality, either by statute or common law, which requires it to provide for the public's common law right of passage on public roads or to ensure that its public roads are free from nuisance, subject to the duty to keep a highway in a "reasonable state of repair" pursuant to section 44 of the *Municipal Act, 2001.* In fact, section 35 of the *Municipal Act, 2001,* specifically allows a municipality to pass by-laws removing or restricting the common law right of passage by the public over a highway.

Reference: *Municipal Act, 2001,* S.O. 2001, c.25, section 35 and 44

47. It is important to note that the public's common law right of passage over a highway, which is not disputed, does not necessarily create a corresponding obligation on a municipality to protect or enforce that right.

48. Pursuant to section 44 of the *Municipal Act, 2001,* a municipality has a specific statutory duty to keep a highway in a "reasonable state of repair". A municipality only has an obligation to eliminate nuisances that interfere with the reasonable state of repair of the highway.

Reference: *Municipal Act, 2001,* S.O. 2001, c.25, section 35 and 44

49. The purpose of this provision is to ensure that roads and bridges are properly designed, constructed and maintained and reasonably free from physical features which would render the road unsafe for those travelling upon it. It does not compel a municipality to remove persons who are demonstrating or protesting on a public road, thereby creating a public nuisance.

Reference: *Municipal Act, 2001,* S.O. 2001, c.25, section 44

50. It is submitted that this provision cannot reasonably be interpreted as imposing a general duty upon a municipality to ensure that the public's common law right of passage on public roads is preserved. Such an interpretation is not consistent with the use of the term "reasonable state of repair" in the statute. Had the legislature intended on imposing such a broad duty upon municipalities, it would have done so expressly.

51. With respect to the case at bar, the duty to keep a highway in a reasonable state of repair does not impose an affirmative duty upon the County to take steps to remove the barricades on Argyle Street, which were erected as an act of political protest by the Six Nations during the course of a land claims dispute with the federal government, as the presence of the Protesters does not affect the state of repair of Argyle Street.