

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

**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

- 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*

**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**

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 20th 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

they allegedly breached their statutory duties or other obligations. The plaintiffs contend that the Crown is vicariously liable for the conduct of the Ministers referred to above.

Amended Statement of Claim, para. 53-56, 69-80

(i) Minister of Transportation

14. The plaintiffs claim that the Minister of Transportation “allowed” the protestors to occupy Highway 6 from April 20, 2006 to June 13, 2006 and, thereby, violated s. 2(3) of the *Public Transportation and Highway Improvement Act* (“*PTHIA*”). Section 2(3) of the *PTHIA* concerns the use of space and areas over or under a highway:

2(3) The Minister may authorize any ministry or agency of the Crown or any municipality or any local board, as defined in the *Municipal Affairs Act*, or any corporation or person, by lease, licence or other arrangement,

(a) to use; or

(b) to construct, maintain and use buildings, structures or improvements in or on,

any space or area located over, across or under a highway under the jurisdiction of the Ministry where, in the opinion of the Minister, such construction, maintenance or use can be carried out without unduly interfering with the public use of the highway.

Public Transportation and Highway Improvement Act, R.S.O. 1990, c. P.50, s. 2(3) [PTHIA]
Amended Statement of Claim, paras. 69-71

15. The plaintiffs have not pleaded that the Minister of Transportation intended to injure the plaintiffs or engaged in deliberate unlawful conduct knowing that the plaintiffs would likely be harmed.

(ii) Minister of Aboriginal Affairs

16. With respect to the Minister for Aboriginal Affairs (properly called the Minister Responsible for Aboriginal Affairs), the plaintiffs allege that the Minister agreed to proceed no further with any criminal charges against the protestors and further agreed to a “moratorium on development” on the Douglas Creek Estates contrary to the *Planning Act*. No specific section of the *Planning Act* is cited.

Amended Statement of Claim, paras. 72-75
Planning Act, R.S.O. 1990, c. P.13

17. The plaintiffs have not pleaded that the Minister Responsible for Aboriginal Affairs intended to injure the plaintiffs or engaged in deliberate unlawful conduct knowing that the plaintiffs would likely be harmed.

(iii) The Attorney General

18. The plaintiffs’ claim that the Attorney General acquiesced to the agreements made by the Minister Responsible for Aboriginal Affairs and, thereby, violated s. 5(b) of the *Ministry of the Attorney General Act* [“*MAG Act*”] which provides simply that “[t]he Attorney General...shall see that the administration of public affairs is in accordance with the law.”

Amended Statement of Claim, paras. 72-75
Ministry of the Attorney General Act, R.S.O. 1990, c. M.17, s. 5(b) [MAG Act]

19. The plaintiffs have not pleaded that the Attorney General intended to injure the plaintiffs or engaged in deliberate unlawful conducting knowing that the plaintiffs would likely be harmed.

(iv) The Minister of Community Safety and Correctional Services

20. The plaintiffs claim that the Minister of Community Safety and Correctional Services breached his obligations under section 3(2) of the PSA by allegedly:

- (a) providing a written undertaking to the Confederacy Council not to ask for military support from the federal government (which was allegedly outside of his authority);
- (b) failing to ensure that the OPP had sufficient resources to enforce the Court's orders;
- (c) failing to ensure that the OPP had sufficient resources to keep Argyle Street and Highway 6 free from nuisance and open for passage.

Amended Statement of Claim, paras. 76-79
PSA, supra, s. 3(2)

21. The plaintiffs have not pleaded, however, that the Minister of Community Safety and Correctional Services intended to injure the plaintiffs or engaged in deliberate unlawful conduct knowing that the plaintiffs would likely be harmed.

PART III – ISSUES and the LAW

22. The issues to be addressed are as follows:

Issue 1: There is no cause of action in misfeasance in public office against (a) Commissioner Boniface, (b) Inspector Haggith or (c) the Crown.

Issue 2: There is no cause of action in negligence against (a) Commissioner Boniface or (b) Inspector Haggith regarding damage to the hydro transformer station.

Issue 3: There is no cause of action in nuisance against the Crown.

The Test Under Rule 21

23. The court has jurisdiction to strike out a pleading for disclosing no reasonable cause of action under rule 21.01(1)(b). On a motion to strike a claim as disclosing no reasonable cause of action, the principles to be applied are:

- (a) the allegations of fact in the statement of claim, unless patently ridiculous or incapable of proof, must be accepted as proven;
- (b) the moving party, in order to succeed, must show that it is plain, obvious and beyond doubt that the plaintiff could not succeed;
- (c) a claim will not be dismissed simply because it is novel; and
- (d) the Statement of Claim must be read generously with allowance for inadequacies due to drafting deficiencies.

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r. 21.01(1)(b)

Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959 at paras. 30-33 (QL)

Eliopoulos v. Ontario (Minister of Health & Long-Term Care), [2006] O.J. No. 4400 at para. 8 (C.A.) (QL) [*Eliopoulos*], leave to appeal to S.C.C. refused, [2006] S.C.C.A. No. 514

Issue 1: There is no cause of action in misfeasance in public office against Commissioner Boniface, Inspector Haggith or the Crown

24. The Supreme Court of Canada described the elements of the tort of misfeasance in public office in *Odhavji Estate v. Woodhouse*. In order to establish the tort of misfeasance in public office, where there is no specific intention to injure alleged, the plaintiffs must establish independently:

- (a) deliberate unlawful conduct by a public officer in the exercise of a public function;
- (b) awareness that the conduct is unlawful and likely to injure the plaintiff; and
- (c) other requirements common to all torts including that the tortious conduct is the legal cause of the plaintiff's injuries and that the injuries suffered are compensable in tort law.

Odhavji Estate v. Woodhouse, [2003] 3 S.C.R. 263 at paras. 22-23, 32 (QL) [*Odhavji*]

Granite Power Corp. v. Ontario (2004), 72 O.R. (3d) 194 at paras. 37-39 (C.A.) (QL) [*Granite Power*], leave to appeal to S.C.C. refused, [2004] S.C.C.A. No. 409
Deep v. Ontario, [2004] O.J. No. 2734 at paras. 70-71 (S.C.J.) (QL) [*Deep*], aff'd [2005] O.J. No. 1294 (C.A.)

25. The purpose behind the imposition of tortious liability for misfeasance in public office is to prevent the intentional injuring of members of the public by deliberate unlawful conduct in the exercise of public functions. The core concept involved in the tort is the intentional abuse of power. Accordingly, it is a “well-established principle that misfeasance in a public office requires an element of “bad faith” or “dishonesty”” such as deliberately engaging in conduct one knows to be inconsistent with the obligations of the office.

Odhavji, supra at paras. 26, 28, and 30
Deep, supra at paras. 70-71
Granite Power, supra at para. 40

26. It is not sufficient to plead only that the public officer knew, or ought to have foreseen, that his or her conduct would cause harm to certain citizens. It is not sufficient, because in a democracy, it is critical that public officers have the authority to make decisions that may be adverse to the interests of certain citizens.

Odhavji, supra at para. 28

27. Nor are the elements of the tort satisfied:

- (a) where the public officer “inadvertently or negligently fails to adequately discharge the obligations of his or her office”;
- (b) where the public officer “fails to discharge the obligations of the office as a consequence of budgetary constraints or other factors beyond his or her control”; or
- (c) for conduct that conflicts with the officer’s statutory obligations.

Odhavji, supra at paras. 24, 26-27

28. Aside from the unparticularized allegations in paragraphs 65 a. and 66A b., the statement of claim does not plead anything contrary to the proper exercise of police discretion by Boniface and Haggith. Indeed, the duties under the *PSA* are general duties and do not circumscribe how the police are to carry out those duties. Rather, police officers have considerable discretion in the specific manner in which their duties are to be exercised.

Henco Industries, supra at paras. 113-114
R. v. Beare, [1988] 2 S.C.R. 387 at paras. 51-53 (QL)
Ochiichagwe'babigo'ining v. Beardy, [1996] O.J. No. 2229 at paras. 17-22 (Ct. J. (Gen. Div.)) (QL)
 [Ochiichagwe'babigo'ining]
Hill v. Chief Constable of West Yorkshire, [1988] 2 All E.R. 238 240-241 (H.L.) [*Hill*]
Arsenault v. Charlottetown (1992), 90 D.L.R. (4th) 379 at 390-392 (P.E.I.C.A.) [*Arsenault*], leave to appeal to S.C.C. refused 95 D.L.R. (4th) vii

29. Even in the face of direct breaches of the law, the police must balance many competing rights and obligations and take into account many considerations in determining a course of action. Such considerations include Aboriginal and treaty rights, constitutional rights, the right to lawful enjoyment of property, the right to lawful protest, concerns about public safety, and significantly, the government's obligation to reconcile Aboriginal and non-Aboriginal peoples through negotiation. The immediate enforcement of the law may not always be the course of action that best serves the public interest.

Henco Industries, supra at paras. 113-114
R. v. Chief Constable of Sussex, ex parte International Trader's Ferry Ltd., [1999] 1 All E.R. 129 at 136-138, 141-142 (H.L.)
Odhavji, supra at para. 28
Ochiichagwe'babigo'ining, supra at paras. 17-22

30. Apart from occurrences of flagrant impropriety or civil actions for malicious prosecution, courts should not interfere with police discretion. Judicial respect for the separation of powers

and the rule of law depend on the courts ordinarily not interfering with how the police exercise their discretion.

Henco Industries, supra at paras. 116-118
Arsenault, supra at 390-392
Brooks v. Commissioner of Police for the Metropolis, [2005] 2 All E.R. 409 at paras. 30, 32, 35 (H.L.) [*Brooks*]
Hill, supra at 240-241

31. The plaintiffs have not pleaded any facts to support an allegation that Boniface or Haggith exercised their discretion in bad faith or that they deliberately acted in a manner that they knew was inconsistent with the obligations of their offices.

a. As against the Minister of Transportation

32. The plaintiffs claim that the Minister of Transportation breached his statutory duty under s. 2(3) of the *Public Transportation and Highway Improvement Act* and thereby engaged in misfeasance in public office.

Amended Statement of Claim, paras. 69-71
PTHIA, supra, s. 2(3)

33. Section 2(3) of the *PTHIA* concerns the use of space and areas over or under a highway. The *PTHIA*, in general, broadly deals with the transportation needs of the province, particularly the “procedures for designation, construction, maintenance and financing of roads and for the determining of the needs for and the use of roads”.

Hamilton-Wentworth (Regional Municipality) v. Ontario (Minister of Transportation) (1991), 2 O.R. (3d) 716 at 727-728 (Div. Ct.)
PTHIA, supra, s. 2(3)

34. The Minister of Transportation does not have a duty or the authority under s. 2(3), or

elsewhere under the *PTHIA*, to remove protestors from a highway. Where a claim of misfeasance in public office is based on an omission, as the plaintiffs have pleaded, that omission only results in misfeasance if there was a legal duty to act. Since there is no legal duty to act on the Minister of Transportation in these circumstances, there cannot be misfeasance in public office.

Odhavji, supra at para. 24
PTHIA, supra, s. 2(3)

35. The plaintiffs have not pleaded any facts to support an allegation that the Minister of Transportation acted in bad faith, or that he deliberately acted in a manner that he knew was inconsistent with the obligations of his office, or that he knew that his conduct would likely injure the plaintiffs.

b. As against the Minister Responsible for Aboriginal Affairs

36. The plaintiffs claim that the Minister Responsible for Aboriginal Affairs agreed (a) not to “proceed any further with any criminal charges arising from the intervention of the OPP on April 20, 2006” and (b) to a moratorium on development on the Douglas Creek Estates “without the consent of or consultation with the legal owners of the property ... contrary to the provisions of the *Planning Act*”.

Amended Statement of Claim, paras. 72-75

37. The plaintiffs have failed, however, to plead any facts to support an allegation that the Minister acted in bad faith, that he deliberately acted in a manner that he knew was inconsistent with the obligations of his office, or that he knew his conduct would likely injure the plaintiffs.