Court File No. 114/2006-CP

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

KRP ENTERPRISES INC. and
1643078 ONTARIO INC.

Plaintiffs

- and -

ONTARIO PROVINCIAL POLICE COMMISSIONER GWEN M. BONIFACE, and ONTARIO PROVINCIAL POLICE INSPECTOR BRIAN HAGGITH

Defendants

Proceeding under the *Class Proceedings Act, 1992*

PLAINTIFFS' SUPPLEMENTARY FACTUM

[For Certification of Proceeding]

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1. CHRONOLOGY

(Paragraph of draft Fresh as Amended Statement of Claim in parenthesis)

1 Oct 2003	Haldimand County enters into Police Service Agreement with Solicitor General (18)
28 Feb 2006	Protestors occupy the Douglas Creek Estates (26)
3 Mar 2006	Henco Industries Limited brings Application in Superior Court (29)
3 Mar 2006	Order of Justice B. Matheson provides interim injunction (30)
9 Mar 2006	Order of Justice T. Marshall makes injunction permanent (31)
17 Mar 2006	Order of Justice T. Marshall issuing Warrants for contempt (32)
28 Mar 2006	Order of Justice T. Marshall making findings of contempt (33)
20 Apr 2006	OPP arrests 16 protestors (36)

	Protestors set fire to tires on Argyle Street (38.b.)
	Protestors destroy wooden bridge on Stirling Street (38.c.)
	Protestors start brush fire on south shore of Grand River (38.d.)
	Protestors prevent fire department from attending to fires (38.e.)
	Protestors throw vehicle over Highway 6 overpass onto County Road 54 (38.g.)
	Protestors vandalize model home and office on DCE (38.i)
	Protestors block Argyle Street (38.a.)
	Protestors block Hwy. 6 (38.f)
21 Apr 2006	Minister of Aboriginal Affairs agrees not to lay charges (81)
	Minister of Aboriginal Affairs puts moratorium on development of DCE (84)
3 May 2006	Minister of Community Safety and Correctional Services undertakes not to call in federal police assistance (92)
22 May 2006	Transformer on Argyle Street is vandalized and power is interrupted to residents throughout Haldimand County and Norfolk County (39)
24 May 2006	Traffic opens on Argyle Street (48)
28 May 2006	Matt Walcoff, reporter for Kitchener Record, assaulted (40.a)
4 Jun 2006	William Cowan, security guard at transformer station assaulted (40.b)
	David Hartless assaulted on Braemar Avenue (40.c)
9 Jun 2006	Kathe and Gunther Golke assaulted in Canadian Tire parking lot (40.d)
	Ken McKay and Nick Garbutt of CH TV assaulted (40.e)
	Residents of Thistlemoor requested to vacate premises (40.f)
13 Jun 2006	Highway 6 is reopened (50)
4 Jul 2006	Minister of Public Infrastructure and Renewal become owners of DCE (43)

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 Acciaccaferro, 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. ***Pleadings Disclose a Cause of Action (Section 5(1)(a))***

16. On June 7, 2007, the Defendants brought a motion under Rule 21 to strike the Statement of Claim against the Defendants.

Affidavit of Margaret McCarthy, Supplementary Motion Record, Tab 4, para. 4(e).

17. It was agreed between counsel that the Rule 21 motion would apply to the determination under s. 5(1)(a) of the *Class Proceedings Act* in the certification process.

Order of Justice Crane, Supplementary Motion Record, Tab 11, para. 5.

18. Following hearing of the Defendants' Rule 21 motion, the court ordered as follows:

(a) that the Defendants' motion to strike the Amended Statement of Claim with respect to the claims of the Property Owners Class, as that class is defined in the Statement of Claim, is granted with leave to the Plaintiff to amend the pleading to redefine the class to pursue a claim in nuisance;

(b) that the Defendants' motion to strike with respect to the other classes is dismissed;

(c) that the court reserves the right on the oncoming certification motion to deny certification, if appropriate, under s. 5 of the *Class Proceedings Act*; and

(d) that costs of the Rule 21 motion be reserved for submissions, unless otherwise agreed by the parties.

Order of Justice Crane, Supplementary Motion Record, Tab 10.

19. In the Reasons issued on December 21, 2007, Justice Crane stated:

"I look first as to whether the facts as alleged support or are capable of supporting, a claim known to the law for the damages that are sought on behalf of the proposed class claimants. This analysis is initiated by reference to the decision of the Divisional Court in *Jane Doe v. Board of Commissioners of Police et al.* 74 O.R. (2d) 225 @ p. 238:

> 'Have the causes of action been properly pleaded?
> In my opinion, having regard to the general principles that apply to all statements of claim, these pleadings are sufficient.
>
> So far as the alleged failure on the part of the plaintiff to specifically plead a special proximate relationship between her and the police, I am satisfied that the facts alleged implicity support this.
>
> As regards the submission that in the area of policy, the plaintiff has failed to specifically plead that the discretion of the defendants or any of them was irresponsibly made, this too is implicit in the facts alleged.
>
> In my view, these arguments go to form as opposed to substance. In accordance with the guidelines set out in Dickson J. (as he then was) in Operation Dismantle, supra, the claim must be read as generously as possible, with a view to accommodating any inadequacies in the form of the allegations due to drafting deficiencies. With this principle in mind I am satisfied that these pleadings may stand.'"

Reasons of Justice Crane, Supplementary Motion Record, Tab 11, paras. 8 and 9.

20. In his reasons, Justice Crane adopted the reasons in the companion motion in *Railink Canada Ltd. v. The Queen*:

"[22] It is now well established that a claim of pure economic loss in negligence is recognized through established categories, each with its own policy considerations. There is some judicial divergence as to whether a successful claim must fit into one of the five established categories, or rather only that the categories should be used to assist the analysis. Perhaps as a move to the former approach, a very recent statement in the Supreme Court of Canada is that lower courts are to be cautious and not "strain to create new categories" (see *Brooks et al. v. Canadian Pacific Railway Limited*, [2007] S.J. No. 367 at para. 63.)

[23] In my view what is driving the policy of claims outside the five established categories is the sufficiency of a proximate relationship. The policy of avoiding situations of an indeterminate number of plaintiffs with indeterminate numbers of claims resulting in an indeterminate quantum of damages. In the circumstances as pleaded in this case, these policy restrictions would not seem to apply.

[24] I concluded that the very complex process that is required to establish a new category of claim, is not amenable to this case at the stage of a Rule 21 motion brought on the Statement of Claim. In order to consider the proximity between the defendant's actions and the plaintiff's injury, a court would need to know a great deal more about each. However, taking the case as pleaded, it would appear to have proximity as 'a close relationship of such a nature that the defendants may be said to have been under an obligation to be mindful of the plaintiff's interest.' (see Brooks supra. Para. 80)."

Reasons of Justice Crane, Supplementary Motion Record, Tab 11, para. 17.
Railink Canada Ltd. v. The Queen **(November 30, 2007)**

21. Further in the reasons, Justice Crane states:

"[18] The Supreme Court of Canada in *Martel Building Ltd. v. Canada* [2000] S.C.J. No. 60 at para. 35 states:

> 'As a cause of action, claims concerning the recovery of economic loss are identical to any other claim in negligence in that the plaintiff must establish a duty, a breach, damage and causation. Nevertheless, as a result of the common law's historical treatment of economic loss, the threshold question of whether or not to recognize a duty of care, receives added scrutiny relative to other claims in negligence.'

[19] It is well accepted that the added element adopted in Anns/Kamloops is an analysis under proximity. The test is a close relationship of such a nature that the

defendants may be said to have been under an obligation to be mindful of the plaintiff's interest, *Brooks v. Canadian Pacific Railway Ltd.*, [2007] S.J. No. 367 at para. 80. The Supreme Court in *Norsk* (*Canadian National Railway v. Norsk Pacific Steamship Co.*, [1992] S.C.J. No. 40) and in *D'Amato*, (*D'Amato v. Badger*, [1996] S.C.J. No. 84), stated that the factors important to this analysis include: the relationship between the parties, physical propinquity, assumed or imposed obligations and a close causal connection."

Reasons of Justice Crane, Supplementary Motion Record, Tab 11, paras. 18 and 19.

22. Since the hearing of the Rule 21 motion the plaintiffs have revised and restricted the definitions of the four classes of claimants. The plaintiffs are now proposing four classes, defined as follows:

Caledonia Business Class

"All those persons, including sole proprietors, partnerships, corporations or organizations, who carried on a business, whether for profit or non-profit, on April 20, 2006, with business addresses on Argyle Street between Highway 6 and Green Road or on Caithness Street East or Caithness Street West between Inverness Street and Edinburgh Square East in Caledonia, Ontario, and whose businesses have been affected by the closure of Argyle Street, 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, excluding members of the Contractors Class."

Property Occupiers Class

"All those persons who from February 28, 2006 have occupied real property located within the boundaries and at the addresses set out in Schedule "A" [See map and listing set out in Schedule "A" of the Amended Notice of Motion] attached hereto, and who have been affected by the occupation by protestors of the Douglas Creek Estates, the closure of Argyle Street, or the closure of Highway 6 between Green Road and the junction of Argyle Street South."

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, who carried on a business, whether for profit or non-profit, with business addresses along Highway 6 from Highway 3, to Haldibrook Road, whose businesses have been affected by the closure of Highway 6 between Green Road and the junction of Argyle Street South, excluding members of the Caledonia Business Class."

Amended Notice of Motion, Supplementary Motion Record, Tab 1
Schedule A, Supplementary Motion Record, Tab 2
Affidavit of Margaret McCarthy, Supplementary Motion Record, Tab 4, para. 22

23. **The Anns/CooperTest**

24. In *Anns v. Merton London Borough Council*, the House of Lords said that a duty of care required a finding of proximity sufficient to create a *prima facie* duty of care, followed by consideration of whether there were any factors negativing that duty of care. The Supreme Court has repeatedly affirmed that approach as appropriate in the Canadian Context. (*Cooper v. Hobart* [2001] S.C.J. No. 76 per McLachlin, C.J. and Major, J.)

***Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.), Book of Authorities, Tab 33**

25. Anns has been adopted by the Supreme Court of Canada in the case of *Cooper v. Hobart*, and what is commonly referred to as the "Anns/Cooper Test" has been formulated by the court. The test is:

"1. Was the harm that occurred the reasonably foreseeable consequence of the defendant's act?

2. Are there reasons, notwithstanding the proximity between the parties established in the first part of the test, that tort liability should not be recognized here?"

***Coopers v. Hobart* [2001] S.C.J. No. 76, Book of Authorities, Tab 34**

26. In *Cooper v. Hobar*t, McLachlin, C.J. and Major, J. expand on the test, at para. 31:

> "On the first branch of the Anns test, reasonable foreseeablility of the harm must be supplemented by proximity. The question of what is meant by proximity. Two things may be said. The first is that 'proximity' is generally used in the authorities to characterize the type of relationship in which a duty of care may arise. The second is that sufficiently proximate relationships are identified through the use of categories. The categories are not closed and new categories of negligence may be introduced. But generally, proximity is established by reference to these categories. This provides certainty to the law of negligence, while still permitting it to evolve to meet the needs of new circumstances."

***Coopers v. Hobart, supra*, per McLachlin C.J. and Major J. at para. 31**

27. **The First Stage – Proximity**

28. Some of the categories where proximity has been recognized:

- where the defendant's act foreseeably causes physical harm to the plaintiff or the plaintiff's property.

- Negligent misstatement (*Hedley Byrne & Co. v. Heller & Partners Ltd.* [1963] 2 All E.R. 575 (H.L.)).

- Misfeasance in public office.

- A duty to warn of the risk of danger (*Rivtow Marine Ltd. v. Washington Iron Works* [1974] S.C.R. 1189).

- Duty of a municipality to prospective purchasers of real estate to inspect housing developments without negligence (*Anns, Kamloops (City of) v. Nielsen* [1984] 2 S.C.R. 2).

- Government authorities who have undertaken a policy of road maintenance have been held to owe a duty of care to execute the maintenance in a non-negligent manner (*Just v. British Columbia* [1989] 2 S.C.R. 1228; *Swinamer v. Nova Scotia (Attorney General)* [1994] 1 S.C.R. 445).

- Relational economic loss related to a contract's performance as where the claimant has a possessor or proprietary interest in the property.

***Coopers v. Hobart*, supra, per McLachlin C.J. and Major J., at para. 36**

29. Where a case falls within one of these situations, or an analogous one, and reasonable foreseeability is established, a prima facie duty of care may be posited.

***Coopers v. Hobart*, supra, per McLachlan C.J. and Major J., at para. 36**

30. There is proximity between Commissioner Boniface and Inspector Haggith and the members of the Classes as set out in the Fresh as Amended Statement of Claim as follows:

a. There is a contractual obligation between the OPP and Haldimand County under the Police Service Agreement dated October 1, 2003, to provide police services for the benefit of the residents of Haldimand County, which includes members of the Caledonia Business Class, the Contractors Class, the Property Occupiers Class and the Highway 6 Class;

b. The Sheriff of the Superior Court of Justice at Cayuga has requested the assistance of the OPP to enforce the injunctions that were issued for the benefit of the members of the Contractors Class;

c. There is a statutory duty under s. 19 of the *Police Services Act* to provide policing on a King's Highway and the members of the Highway 6 Class are users of Highway 6, a King's Highway;

d. Subsection 42(1)(a) of the *Police Services Act* provides for a statutory duty on police officers to preserve the peace, which is for the benefit of the members of all of the Classes;

e. Subsection 42(1)(b) of the *Police Services Act* provides for a statutory duty on police officers to prevent crimes and other offences and to provide assistance and encourage other persons in their prevention, which is for the benefit of the member of all of the Classes;

f. Subsection 42(1)(c) of the *Police Services Act* provides a statutory duty on police officers to assist victims of crime which is the for the benefit of the members of all of Classes;

g. Subsection 42(1)(f) of the *Police Services Act* provides a statutory duty on police officers to execute warrants that are to be executed by police officers and perform related duties which is for the benefit of those who are protected by injunctive relief, such as the members of the Contractors Class;

h. Subsection 42(4) of the *Police Services Act* provides for a statutory duty as ascribes to a constable at common law, which includes the obligation to provide passage along Argyle Street for the benefit of the public and members of the Caledonia Business Class;

i. Subsection 42(4) of the *Police Services Act* provides for a statutory duty as ascribes to a constable at common law, which includes the obligation to provide passage along Highway 6 for the benefit of the public and the members of the Highway 6 Class who are users of Highway 6;

j. It would be reasonably foreseeable that the disabling of the Caledonia transformer station would cause an interruption of hydro services to the residents of Caledonia and that this would result in damage to the property of the members of the Caledonia Business Class.

Fresh as Amended Statement of Claim, Supplementary Motion Record Tab 14, paras. 18 to 20, 35, and 55 to 60.

31. **The Second Stage – Policy Considerations**

32. The second stage of the Anns/Cooper test is set out by McLachlin C.J. and Major J. at para. 37:

> "...These are not concerned with the relationship between the parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally. Does the law already provide a remedy? Would recognition of the duty of care create the spectre of unlimited

liability to an unlimited class? Are there other reasons of broad policy that suggest that the duty of care should not be recognized?"

***Coopers v. Hobart*, supra, McLachlin C.J. and Major J. at para. 37**

33. **Limited Liability, Limited Class, Limited Time**

34. In each of the proposed Classes the liability, class and time are clearly delineated.

a. *Caledonia Business Class* – Approximately 200 businesses with addresses along Argyle Street and Caithness Street whose businesses were affected by the closure of Argyle Street that took place within a defined time period;

b. *Property Occupiers Class* – 442 indentified households who were affected by clearly defined specific activity that took place on the Douglas Creek Estates;

c. *Contractors Class* – clearly defined members who are described in the wording of the injunction and who suffered damages during a clearly defined period of time from the date the injunction was issued until it was terminated by the purchase of the Douglas Creek Estates;

d. *Highway 6 Class* – Approximately 300 businesses with addresses along Highway 6 whose businesses were affected by the closure of Highway 6 which took place during a clearly defined period of time.

35. The Supreme Court of Canada has held that the second stage of the Anns test will only arise where the duty of care does not fall within a recognized category of recovery. In *Cooper v. Hobart*, the Court expanded upon the application of the second test, per McLachlin, C.J. and Major, J. at paragraph 39:

"The second step of Anns generally arises only in cases where the duty of care asserted does not fall within a recognized category of recovery. Where it does, we may be satisfied that there are no overriding policy considerations

that would negative the duty of care. In this sense, we agree with the Privy Council in Yuen Kun Yeu that the second stage of Anns will seldom arise and that questions of liability will be determined primarily by reference to established and analogous categories of recovery. ..."

***Coopers v. Hobart*, supra, McLachlin C.J. and Major J. at para. 39**

36. In any event, the determination of whether or not the defendants have a private law duty to individual members of the public, cannot be made at this preliminary stage, it requires both legal and factual findings. As stated by Justice Henry in the *Jane Doe v. Toronto (Metropolitan) Commissioners of Police:*

"In all cases, it is apparent that the court decide, on the particular circumstances of the case having regard to both statutory and common law duties imposed and the facts of the case, whether a private law duty is owed to an individual member of the public, the breach of which is actionable. Moreover, the private law duties do not necessarily arise from risks of harm created by the police themselves, but can also arise where the risk is created by a third party over whom they may or may not have any control."

***Jane Doe v. Toronto (Metropolitan) Commissioners of Police* [1989] O.J. No. 471 (Ont.H.C.), per Henry J., at page 22, Book of Authorities, Tab 40**