

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N: )  
)  
KRP ENTERPRISES INC. and ) John W. Findlay, and Margaret  
1643078 ONTARIO INC. ) McCarthy, counsel on behalf  
) of the Plaintiffs/Respondents  
)  
Plaintiffs/Respondents )  
)  
- and - )  
)  
THE CORPORATION OF HALDIMAND ) Dennis W. Brown, Q.C., and  
COUNTY, ONTARIO PROVINCIAL ) Orlando V. DaSilva, counsel  
POLICE COMMISSIONER GWEN M. ) on behalf of the Crown  
BONIFACE, ONTARIO PROVINCIAL ) Defendants  
POLICE INSPECTOR BRIAN HAGGITH )  
and HER MAJESTY THE QUEEN IN )  
RIGHT OF ONTARIO )  
)  
Defendants/Applicant )  
)  
)  
) HEARD: September 25, 2007  
) And Reserved  
) (at Hamilton)  
)

CRANE J.

[1] The issues of law raised in the Statement of Claim, now challenged under this Rule 21 motion by the Crown, are complex in the extreme. On the allegations in this action and the related actions that are also challenged by the Crown by Rule 21 motions may lead a reasonable person to conclude that the residents of Caledonia have had many adverse consequences

from the events that occurred from February to June, 2006, through the blockades and occupations of public property and to the present occupations of Crown-owned Henco lands. The overarching issue is whether these many and diverse individuals have common law rights of action.

[2] It is noteworthy to observe that a common feature of municipal policing was absent in these cases, namely that the police would be under the jurisdiction and authority of the municipality. In this case the Corporation of Haldimand County (a former defendant in this action) contracted out those services pursuant to s. 10 of the *Police Services Act* and in so doing transferred all authority and discretion to the Ontario Provincial Police as administered through the defendants Gwen M. Boniface and Brian Haggith, and indirectly to the defendant, Her Majesty the Queen in Right of Ontario. Essentially this dispute arises from the belief, by the plaintiffs and those they seek to represent in this class proceeding, that statutorily mandated police services were not provided to them by the defendants.

[3] The issue before me on this motion is whether the plaintiffs have framed their complaints into legally recognized causes of action by the pleading of the required constituent factual elements and legal ingredients and, more largely,

whether the complaints are causes of action when properly pleaded.

[4] The plaintiffs have amended their Statement of Claim a number of times. The amended pleading of 9 July, 2007 is attacked by the applicants in this motion. There is, however, a further draft Amended Statement of Claim, for which counsel for the plaintiffs seeks leave of the Court. This draft has been served on all counsel and is part of the materials forming the Record herein.

[5] Counsel have agreed that the present Rule 21 motion applies to s. 5(1)(a) of the *Class Proceedings Act* certification process.

[6] The grounds cited by the applicant Crown on this motion may be summarized as follows, that:

1. the Statement of Claim fails to plead the *tort* of misfeasance in public office;
2. the Statement of Claim fails to plead the requirements of the *tort* of negligence;
3. a duty of care of the OPP to the plaintiffs cannot co-exist with its duty to the public at large;

4. that the Statement of Claim is, in essence, a complaint against police discretion during a native protest, a discretion that is not, by law, fettered by the private law of negligence and of nuisance; and
5. that the claims of the proposed business class and property owners classes seek damages in pure economic loss in circumstances that are not recognized as a category for recovery in law.

[7] A thumbnail chronology, taken from the Statement of Claim, is as follows:

- 28 February, 2006 - First occupation of Douglas Creek Estate by three Clan Mothers of the Haudenosaunee Confederacy;
- 3 March, 2006 - Interlocutory Injunction issued to remove occupants;
- 9 March, 2006 - A permanent Injunction together with findings of contempt and orders for arrest of those occupying Douglas Creek Estates;
- 20 April, 2006 - OPP action into Douglas Creek Estates;

20 April, 2006 - Native push back with barricading of Argyle Street and Highway 6 - burning of the Sterling Street railway bridge, vehicle thrown onto Highway 54 - various cases of reckless driving of motorized vehicles - vandalizing of the local Hydro facility with the interruption of power - blockage of the Railink Railway right-of-way tracks;

The laying of 53 charges involving breaches of the peace;

22 May, 2006 - Power restored following repair of the damaged Hydro facility;

12 June, 2006 - This action commenced;

13 June, 2006 - Native blockade of Argyle Street, Highway 6 and RaiLink right-of-way lifted;

mid-June, 2006 - Purchase of Douglas Creek Estates by the Crown in settlement of claims of the owner and injunction applicant, Henco Limited; - Permission granted by the Crown In Right of Ontario as the owner of Douglas Creek

Estates to the native protestors to remain  
in occupation;

For a more detailed discussion of events, one may see the proceedings in **Henco Industries Limited v. Haudenosaunee Six Nation Confederacy Council**, Docket: C45859 and C45933

[8] 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 implicitly 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 by 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.

[9] There have been many judges in many cases who have engaged the analysis of proximate or special relationship under the first stage of ***Anns/Kamloops***, followed by the policy considerations of the second stage, for determination of duty of care and for determination of the possibility of a novel category in actions for damages in pure economic loss. Given that this action is under the ***Class Proceedings Act***, the policy considerations are very much an issue. However, a certification motion has not occurred to date and accordingly there is no determination of the definition of classes and sub-classes. I observe that often the definitions proposed by plaintiff's counsel are reduced in scope by the Court.

[10] The Statement of Claim through the various amendments proposes the following classes: the Caledonia Business Class; the Property Owners Class; the Contractors Class and the Highway 6 Class. The definition of those who would comprise the various classes is broad. It might be said generally speaking, to

encompass, the Town of Caledonia and environs. This is a Rule 21 motion. I am required to read the Statement of Claim so as to see the substance from the form. Should I do so, I would see the Caledonia Business Class to be restricted to those persons owning or operating businesses on Argyle Street within the blockaded section, who, due to the alleged OPP enforced blockade, were deprived of an opportunity to carry on their businesses in the period of 20 April to 13 June, 2006. The damage claims of this group is for loss of business revenues, clearly a claim in pure economic loss. It is uncertain whether there is a claim for property damage.

[11] Similarly, the Contractors Class is specifically defined as:

*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 Estate Subdivision on February 28, 2006.*

[12] This again is a discreet, specific group of claimants claiming damages upon the alleged OPP failure to enforce the Henco injunction depriving them the benefits of their contracts. There is a quantitative number of claimants claiming a quantitative sum of specific damages over a specific period of time. Once again, this is a claim in pure economic loss.

[13] The proposed Highway 6 Class is broadly defined. Should the definition be more constricted to those persons owning or carrying on a business in the geographic area within the Highway 6 closure, allegedly enforced by the OPP from Green Road and the junction of Argyle Street South, from the period 20 April to 13 June, 2006, such a claim may fall within the same considerations as the Caledonia Business Class for the purposes of this motion.

[14] The most problematic proposed class is that of the property owners. The plaintiffs have not offered, and I do not see, a legal structure for this claim that links the alleged wrongful conduct of the defendants as the cause of a declining property value throughout the Region. It would seem to be the logical consideration that once the native protest was initiated, whether the response of the Crown was passive or the most extreme alternative of total enforcement of the injunctions by arrests and removal through the overmatching of force by greater force, the market values of properties in the area, both within the Haldimand Tract and adjacent to the Tract, would be adversely affected. This motion, however, is not to test the factual strength of the claim.

[14] The alternative to the above analysis would be a pleading that alleges that had the OPP immediately enforced the Interim Injunction it would have diffused the manifested protest before any momentum developed. This approach then leaves the issues of a novel claim in pure economic loss.

[15] Our courts have come to the view that it is a dangerous policy to expand the common law based on motions upon alleged facts that are whatever the plaintiffs' solicitors drafting the Statement of Claim state them to be. The Supreme Court of Canada has most recently cautioned the courts of this danger and to avoid other than incremental and progressive developments in the common law. It is in this regard that one might see with profit the comments in *Hill v. Hamilton-Wentworth Regional Police Services Board*, (2007) C.C.C. 41, Docket: 31227, para. 27.

#### **PURE ECONOMIC LOSS**

[16] Do these claims for pure economic loss fall within the recognized categories? An argument may be made under the performance of a service and under relational economic loss categories.