

**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,

physically obstructing or otherwise impeding the operations of the Applicant or its employees or agents, or the Applicant's contractors or subcontractors, or their agents, in the performance of work relating to the construction of the Douglas Creek Estates subdivision ('the subdivision') within the area, set out at Schedule 'A', until the trial of this matter or until such time as this Honourable Court may direct;

3. THIS COURT FURTHER ORDERS that an interim mandatory Order requiring the Respondents to remove any vehicles and to tear down and remove any barricades owned, placed or maintained by them, constructed across Thistlemoor Drive and Surrey Street, the public highway and/or roadway, or any other obstruction on the public highway and/or roadway, owned and maintained by the Respondent, The Corporation of Haldimand County, preventing access to the Douglas Creek Estates;
4. THIS COURT FURTHER ORDERS that any peace officer of the Ontario Provincial Police shall, at the request of the Sheriff, accompany the Sheriff and assist in the execution of the Order, including the removal of any persons who refuse the request of the Sheriff to obey the provisions of the interlocutory Order.
5. THIS COURT FURTHER ORDERS that posting of the Notice of Application, Notice of Motion and any Court Orders at Thistlemoor Drive and Surrey Street in Douglas Creek Estates and at the municipal offices at The Corporation of Haldimand County at 45 Munsee Street North, P.O. Box 400, Cayuga, Ontario, and by delivery of one copy, of the Notice of Application and Court Orders to any persons manning the barricades, shall be good and sufficient service of the Notice of Motion, Notice of Application and any Court Order on the Respondents, Haudenosaunee Six Nations Confederacy Council, Janie Jamieson, Dawn Smith, Tom Deer, or any agent or person acting under their instruction, John Doe, Jane Doe and other persons unknown;
6. THIS MOTION is returnable before this Court at 55 [sic] Munsee Street North, Cayuga, Ontario on March 9, 2006 at 10:00 a.m."

Affidavit of Margaret McCarthy, Motion Record, Tab 6

55. By Order dated March 9, 2006 Justice D. Marshall made permanent the interim and interlocutory injunction of Justice Matheson.

Affidavit of Margaret McCarthy, Motion Record, Tab 7

56. The sheriff, who is required to execute the injunction, may require a police officer to assist in the execution of the injunction.

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 141(2), Book of Authorities, Tab 29

57. The sheriff requested the assistance of the OPP in the enforcement of the Orders of Justice Matheson and Marshall.

Amended Statement of Claim, Plaintiff's Compendium, Tab 1, para. 37

58. Where the enforcement of an order may give rise to a breach of the peace, the sheriff may require a police officer to assist in the execution. No order is required to gain this assistance.

Ogden Entertainment Services v. United Steelworkers of America, Local 440 [1998] O.R. (3d) 448 (C.A.), Book of Authorities, Tab 30

59. The rationale of the equitable remedy of injunction is to ensure that the obligations of the Attorney General are discharged in such a way as to provide the required protection to citizens injured by the conduct of others.

MacMillan Bloedel Ltd. v. Simpson [1996] S.C.J. No. 83, per McLachlin C.J. at para. 35, Book of Authorities, Tab 31

60. In the same case, in the British Columbia Court of Appeal, Chief Justice McEachern stated:

“Like Wood J.A., I would much prefer a regime where those who disobey court orders, or seek to set them at naught, would be dealt with appropriately by peace officers acting under instructions from the Attorney General. Experience in countless cases of obvious widespread contempt (pre-dating the Clayoquot cases), demonstrates that peace officers have not received instructions to ensure compliance with court orders or with the law.

Neither society nor the court can tolerate willful disobedience of or interference with court orders and it is not necessary in these brief concurring reasons to discuss why that must be so. The response that has been developed not just for this case, but in many, many other cases is to add an arrest authorization in an injunction order when it becomes apparent that the order will not be enforced without such a provision. I hasten to add, however, that the arrest provision does not direct the police to arrest anyone, nor does it, in my view, imperil the impartiality of the court. It merely "authorizes" police officers to do what they already have authority to do, that is to ensure that the orders of the court are not put at naught. With respect, I see no reason why the court should not, in proper cases, furnish that kind of authority to police officers who, absent proper instruction from the Attorney General, may honestly be in doubt about what response they should make to breaches of court orders made in civil proceedings."

Greenpeace Canada Ltd. V. MacMillan Bloedel Ltd. [1994] B.C.J. No 2148 (B.C.C.A.) per McEachern, C.J.B.C., at paras. 82 and 83, Book of Authorities, Tab 32

61. Commissioner Boniface and Inspector Haggith failed in their duty in the following regard:
- a. they failed to preserve the peace;
 - b. they failed to provide for common passage over Argyle Street;
 - b. they failed to provide for common passage over Highway 6;
 - c. they instructed their officers not to charge protestors on the Douglas Creek Estates which resulted in several criminal acts of violence as set out in para. 40 of the Amended Statement of Claim; and
 - d. they failed to carry out the Orders of Justice Matheson and Marshall.

Amended Statement of Claim, Plaintiffs Compendium, Tab 1, paras. 61

62. To Whom is the Duty Owed?
63. The Anns/Cooper Test
64. 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 negating 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**

65. 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**

66. In *Cooper v. Hobart*, McLachlin, C.J. and Major, J. expand on the test, at para. 31:

“On the first branch of the Anns test, reasonable foreseeability 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

67. 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**

68. 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**

69. There is proximity between Commissioner Boniface and Inspector Haggith and the members of the Classes as follows:

- a. Section 41(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 and the members of the Caledonia Business Class and the Property Owners Class are users of Argyle Street;
- b. 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 and the Property Owners Class;
- c. Section 41(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 and the members of the Highway 6 Class are users of Highway 6;
- d. In addition to the obligation under subparagraph c. above, 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;

- e. 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 and the Property Owners Class.

Amended Statement of Claim, Plaintiffs Compendium, Tab 1, paras. 19, 20, 21, 56, 61 and 62

70. 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**

71. The Supreme Court of Canada has held that the second stage of the Anns test will arise 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**

72. Even if the second stage of the test was held to apply, it is at this stage that the distinction is made between government policy and execution of policy. Government actors are not liable in negligence for policy decisions, but only operational decisions. However government actors can be liable for the manner in which the policy is executed or carried out.

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

73. In *Just v. British Columbia* [1989] 2 S.C.R. 1228, Cory J. discusses the difference between administrative decisions and policy decision and the circumstances where a government agency would be exempt from liability for the exercise of policy decisions:

“¶ 28 It may be convenient at this stage to summarize what I consider to be the principles applicable and the manner of proceeding in cases of this kind. As a general rule, the traditional tort law duty of care will apply to a government agency in the same way that it will apply to an individual. In determining whether a duty of care exists the first question to be resolved is whether the parties are in a relationship of sufficient proximity to warrant the imposition of such a duty. In the case of a government agency, exemption from this imposition of duty may occur as a result of an explicit statutory exemption. Alternatively, the exemption may arise as a result of the nature of the decision made by the government agency. That is, a government agency will be exempt from the imposition of a duty of care in situations which arise from its pure policy decisions.

¶ 29 In determining what constitutes such a policy decision, it should be borne in mind that such decisions are generally made by persons of a high level of authority in the agency, but may also properly be made by persons of a lower level of authority. The characterization of such a decision rests on the nature of the decision and not on the identity of the actors. As a general rule, decisions concerning budgetary allotments for departments or government agencies will be classified as policy decisions. Further, it must be recalled that a policy decision is open to challenge on the basis that it is not made in the bona fide exercise of discretion. If after due consideration it is found that a duty of care is owed by the government agency and no exemption by way of statute or policy-making decision is found to exist, a traditional torts analysis ensues and the issue of standard of care required of the government agency must next be considered.”

Just v. British Columbia [1989] 2 S.C.R. 1228 per Cory J., Book of Authorities, Tab 35

74. In *Henco Industries Ltd. V. Haudenosaunee Six Nations Confederacy Council*, Laskin J. of the Ontario Court of Appeal, in considering whether or not Marshall J. had improperly interfered with the OPP's operational discretion, expressed that a wide latitude to law enforcement officers with respect to the immediate enforcement and prosecution of violations of the law. They recognized that considerations may be at play beyond the obligation to enforce the law. These 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 the government's obligation to bring about the reconciliation of Aboriginal and non-Aboriginal peoples through negotiation. It **may** be held, after an entire review of the evidence, that the immediate enforcement and prosecution of violations of the law may not be the wise course of action or the course of action that best serves the public interest.

Henco Industries Limited v. Haudenosaunee Six Nations Confederacy Council [2006] O.J. No. 4760 (C.A.), *Book of Authorities, Tab 36*

75. In the *Henco* case, Justice Laskin refers to a quotation of Lord Slynn of the House of Lords in the *International Trader's Ferry Ltd.* case:

"In a situation where there are conflicting rights and police have a duty to uphold the law the police may, in deciding what to do, have to balance a number of factors, not the least of which is the likelihood of a serious breach of the peace being committed. That balancing involves the exercise of judgment and discretion."

R. v. Chief Constable of Sussex, ex parte International Trader's Ferry Ltd. [1999] All E.R. 129 (H.L.), *Book of Authorities, Tab 37*

76. However, the *International Trader's Ferry Ltd.* case was distinguished by the House of Lords from a line of cases that successfully reviewed operational decisions of the authorities. There is a reference by Lord Slynn in that case to Lord Justice Simon Brown's reasons in *Phoenix Aviation v. Coventry Airport*, who stated:

"... One thread runs consistently throughout all the case law: the recognition that public authorities must beware of surrendering to the dictates of unlawful pressure groups. The implication of such surrender for the rule of law can hardly be exaggerated. Of course, on occasion, a variation or even short-term suspension of services may be justified. As suggested in certain of the authorities, that may be a lawful response. But it is one thing to respond to unlawful threats, quite another to submit to them – the difference, although perhaps difficult to define, will generally be easy to recognize. Tempting though it may be for public authorities to yield too readily to threats of disruption, they must expect the courts to review any such decision with particular rigour – this is not an area where they can be permitted a wide measure of discretion. As when fundamental human rights are in play, the courts will adopt a more interventionist role."

Phoenix Aviation v. Coventry Airport [1995] E.W.J. No. 4488, Book of Authorities, Tab 38

77. The line of cases which impose upon the Province of Ontario a duty to consult with Aboriginal peoples and accommodate their interest where Aboriginal claims are being made stops short of imposing a duty upon the Crown to act in the Aboriginal group's interest, as a fiduciary, and does not in any way sanction breaches of the law or authorize Crown authorities to abrogate their duties.

Haida Nation v. British Columbia (Minister of Forests) [2004] S.C.J. No. 70, Book of Authorities, Tab 39

78. The Supreme Court of Canada has made it clear that third parties to Aboriginal treaty claims have no duty to consult or accommodate the group that is making the claim. Further, third parties are not subject to any duty or are required to make any accommodation to enable the Province to obtain a remedy to an Aboriginal claim. It is up to the Province to find that remedy without affecting or compromising third party interests.

Haida Nation v. British Columbia (Minister of Forests), supra., per McLachlin C.J. at paras 52 to 56

79. 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

80. *Misfeasance in a Public Office*

81. Further, the plaintiffs in this action have pleaded that Commissioner Boniface and Inspector Haggith knowingly allowed their officers to violate their duties, have willfully frustrated the enforcement of orders of the court, and have failed to carry out their duties for improper purposes, which constitutes misfeasance.

Amended Statement of Claim, Plaintiffs Compendium, Tab 1, paras. 65 and 66

82. The elements of the tort of misfeasance in public office are, first, the public officer must have engaged in deliberate and unlawful conduct in his or her capacity as a public officer, and, second, the public officer must have been aware both that his or her conduct was unlawful and that it was likely to harm the plaintiff.

***Odhavji Estate v. Woodhouse* [2003] 3 S.C.R. 263, per Iacobucci, J., at para. 23, Book of Authorities, Tab 41**

83. In order for the conduct to fall within the scope of the tort, the officer must deliberately engage in conduct that he or she knows to be inconsistent with the obligations of the office.

***Odhavji Estate v. Woodhouse*, supra., per Iacobucci J., at para. 28**

84. It is pleaded that Commissioner Boniface and Inspector Haggith owed their duty under s. 42 of the *Police Services Act* to members of all of the classes.

Amended Statement of Claim, Plaintiffs Compendium, Tab 1, para. 64

85. It is pleaded that Commissioner Boniface and Inspector Haggith, willfully ignored their duties and instructed their officers not to carry out their lawful duties.

Amended Statement of Claim, Plaintiffs Compendium, Tab 1, para. 61 and 63

86. It is pleaded that the failure on the part of Commissioner Boniface and Inspector Haggith to carry out their duties 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, 90 and 91

87. *Negligence*

88. On May 22, 2006 the Hydro One transformer station on Argyle Street, just south of the DCE was vandalized resulting in interruption of hydro services in Haldimand County for 3 to 24 hours.

Amended Statement of Claim, Plaintiffs Compendium, Tab 1, para. 41

89. In the alternative to the plea of misfeasance of public office, it is pleaded that Commissioner Boniface and Inspector Haggith were negligent in carrying out their duties under the *Police Service Act*.

Amended Statement of Claim, Plaintiffs Compendium, Tab 1, para. 67

90. The Amended Statement of Claim pleads that Commissioner Boniface and Inspector Haggith failed to take reasonable precautions to ensure that the transformer station was protected during the occupation.

Amended Statement of Claim, Plaintiffs Compendium, Tab 1, para. 67

91. The Amended Statement of Claim pleads that as a result of the breach of duty damages were suffered by members of the Caledonia Business Class and members of the Property Owners Class.

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

92. **Liability of the Crown**

93. The liability of the Crown is set out in section 5 of the *Proceedings Against the Crown Act*;

“5 (1) Except as otherwise provided in this Act, and despite section 11 of the Interpretation Act, the Crown is subject to all liabilities in tort to which, if it were a person of full age and capacity, it would be subject,

- (a) in respect of a tort committed by any of its servants and agents;
- (b) in respect of a breach of the duties that one owes to one’s servants or agents by reason of being their employer;
- (c) in respect of any breach of the duties attaching to the ownership, occupation, possession or control of property; and

- (d) under any statute, or under any regulation or by-law made or passed under the authority of any statute.

* * *

- (3) Where a function is conferred or imposed upon a servant of the Crown as such, either by a rule of the common law or by or under a statute, and that servant commits a tort in the course of performing or purporting to perform that function, the liability of the Crown in respect of the tort shall be such as it would have been if that function had been conferred or imposed by instructions lawfully given by the Crown.

* * *

- (6) No proceeding lies against the Crown under this section in respect of anything done or omitted to be done by a person while discharging or purporting to discharge responsibilities of a judicial nature vested in the person or responsibilities that the person has in connection with execution of judicial process.”

Proceedings Against the Crown Act, R.S.O. 1990, c. P.27, s. 5, Book of Authorities, Tab 42

94. *Liability of Minister of Public Infrastructure and Renewal (Nuisance)*

95. On July 4, 2006, the Minister of Public Infrastructure and Renewal became the legal registered owner of the Douglas Creek Estates.

Amended Statement of Claim, Plaintiffs Compendium, Tab 1, para. 45

96. Since July 4, 2006, the Minister of Public Infrastructure and Renewal has allowed the protestors to occupy the Douglas Creek Estates.

Amended Statement of Claim, Plaintiffs Compendium, Tab 1, para. 46

97. The protestors have engaged in activity that has disturbed the quiet enjoyment of neighbouring properties.

Amended Statement of Claim, Plaintiffs Compendium, Tab 1, para. 47

98. The damage to proprietary interest which is sufficient to found an action in nuisance may consist either of (1) some physical interference with the beneficial use of the premises occupied by the plaintiff, or (2) some physical injury to those premises, or to the property of the plaintiff situated thereon.

Walker et al. v. Pioneer Construction Co. (1967) Ltd. (1975), 8 O.R. (2d) 35 per Morden, J., at page 3, Book of Authorities, Tab 43

99. The Crown in right of the Ontario is responsible for the conduct of the occupiers of Douglas Creek Estates, as recognized by the Court of Appeal in Henco Industries Ltd.:

“The Province owns Douglas Creek Estates. It does not claim that the protestors are on its property unlawfully. It does not seek a court order removing them. It is content to let them remain. We see no reason why it should not be permitted to do so. If the protestors cause a nuisance or other disturbance affecting neighbouring lands or residents of Caledonia, then action may be required. ...”

***Henco Industries Limited v. Haudenosaunee Six Nations Confederacy Council* [2006] O.J. No. 3411, at para. 19, Book of Authorities, Tab 44**

100. The Amended Statement of Claim pleads that the nuisance caused by the occupiers of the Douglas Creek Estates has resulted in a loss of quiet enjoyment of the property of the members of the Property Owners Class.

Amended Statement of Claim, Plaintiffs Compendium, Tab 1, paras. 47 and 89