

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

GRAHAME PLAUNT and KENNETH L.W. BOLAND

Plaintiffs

- and -

RENFREW POWER GENERATION INC.

Defendant

Proceeding Under the Class Proceedings Act, 1992

AFFIDAVIT OF IZAAK DE RIJCKE

(sworn October 24, 2016)

I, Izaak de Rijcke, of the City of Guelph, in the Province of Ontario, MAKE OATH AND SAY:

1. Since 1978, I have been licensed as an Ontario Land Surveyor by the Association of Ontario Land Surveyors. I am also licensed by the Law Society of Upper Canada to practice law in the Province of Ontario and am certified as a Specialist in Real Estate Law. I delivered an affidavit sworn May 31, 2016, and this affidavit is supplementary thereto.
2. I remain retained by Goodmans LLP on behalf of Renfrew Power Generation Inc. (“RPG”) to provide my opinion in respect of, among other things, the methodology for determining legal waterfront boundaries, the effect erosion (or accretion) may have on the legal waterfront boundary, the nature of licences of occupation and their impact, if any, on the legal boundaries of class members’ properties around Round Lake. To this end, I have now prepared three reports:

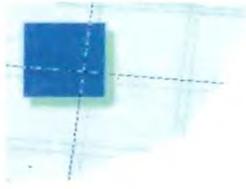
- a) My original report dated March 25, 2014;
- b) My supplementary report dated June 1, 2016, prepared in support of RPG's decertification motion; and,
- c) My reply report dated October 13, 2016, and delivered October 14, 2016, a true copy of which is attached hereto as Exhibit "A".

3. I swear this affidavit for no improper purpose.

SWORN before me at the City of Guelph,
in the Province of Ontario on October 24,
2016.


A Commissioner for taking affidavits
Name: Kevin Wahba


Izaak de Rijcke



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October 13, 2016

Goodmans LLP
Barristers and Solicitors
333 Bay Street, Suite 3400
Toronto, ON M5H 2S7

Attention: Alan Mark and Melanie Ouanounou

Dear Mr. Mark and Ms. Ouanounou:

Re: *Plaunt v. Renfrew Power Generation Inc.*
Court File Number 08-CV-42639CP
Your File Reference Number 131064

This is Exhibit A referred to
in the Affidavit of Izaak de Rijcke
Sworn before me this 24 day
of October 2016
[Signature]
A Commissioner, etc.

I acknowledge receipt of a copy of the reply report from Mr. R.J. Stewart, OLS, dated August 19, 2016 ("Stewart August Report"), and the affidavit of Gordon McCay, sworn July 28, 2016 ("McCay Affidavit"). This is my further reply report in respect of my review of same, and at your request.

1.0 McCay Affidavit – Property numbers

1.1 I have considered the McCay Affidavit as it relates to listing the tax roll parcels around the perimeter of Round Lake, for property taxation by the municipality, and as would have been prepared by Municipal Property Assessment Corporation ("MPAC"). Referencing tax roll numbers is a less reliable source of property ownership than using Block maps related to parcels that have been identified with a "PIN" from ServiceOntario. The listing in the McCay Affidavit is based on MPAC mapping. MPAC information is compiled for a different purpose and may ignore information that is relevant for the determination of a boundary, or create erroneous information. For example, MPAC creates separate tax roll numbers within a single property if it has notice of leases or trusts and so one legal parcel would appear as two or more assessment parcels.

2.0 Certain Properties do not Reference a Contour Line

2.1 The problem addressed in my earlier report dated June 1, 2016 ("de Rijcke June Report") is that the property owners in the Plaintiff class do not share any commonality of approach in

locating boundaries, and hence the extent and impact of flooding. Rather than explain how there may be a uniformity of approach (which the Stewart August Report appears to try and do¹), the Stewart August Report in fact highlights further the differences and unique treatment for individual properties as evidenced and explained in my de Rijcke June Report. For example, the colour-coded plan at Tab 6 of the Stewart August Report confirms the basic differences between the methods Hydro Electric Power Commission (“HEPCO”) used for the acquisition of rights. The Stewart August Report identifies at least five different legal methods:

1. Crown Grant;
2. Private Grant and Transfer;
3. Licence of Occupation for a Flooding Right;
4. Flooding Easement; and
5. Quit Claim Deed.

2.2 However, as explained in my de Rijcke June Report, for some properties the contour line is irrelevant and in fact it does not represent boundaries for all of the properties. Mr. Stewart agrees with me in the Stewart August Report.²

3.0 Contour Line may not be identified Uniformly for all Class Members

3.1 It is not possible to use a single contour line as a uniform method for locating the boundaries of rights acquired by HEPCO around the entire perimeter of Round Lake. In addition, the Stewart August Report fails to explain how the contour is or can be re-established when, in most instances, there are no measurements available regarding the location of the contour when any of these five devices were used by HEPCO to acquire rights at different points in time.

3.2 To illustrate the general absence of measurements, the measurement ties in Figure 3 in the Stewart August Report are used by Mr. Stewart as an example of how measurements are available and can be used. However, the example in Figure 3 is not only just an exception and is not the general rule regarding the availability of measurements, but in fact does not show the measurements that Mr. Stewart says it does for the entirety of the contour line. The sketch in Figure 3 on the right hand side is coloured red and shows a series of measurements obtained from a traverse station number 266+56. From that traverse station there appear measurements 276+00, 277+00, etc., representing 100’ intervals and from each, there are left hand measurements of 420’, 435’, 460’ – *etc.*

3.3 In fact the 1917 sketch reproduced in part in Figure 3 highlights the *absence* of any measurements for two of the three contour line segments which also appear and must be taken

¹ See the Stewart August Report at paras. 4.4, 5.2, and 5.3.

² Stewart August Report at paras. 3.2, 6.2, 6.6 and 6.9.

into consideration. Accordingly, I consider the example in Figure 3 as demonstrative of the more common depiction of contour lines by Mr. Boswell on his various survey plans: there are no ties and there are no measurements. In Figure 3 of the Stewart August Report there are measurements to only one of three straight-line segments to the flooding contour; he has highlighted the area in question by red colour.

3.4 In the Stewart August Report there is no explanation given of what to do if there is no measurement available from Boswell of where the contour was. No field notes are available today of Mr. Boswell's survey work on the ground and no measurements appear in many places on his plans. The inference is that he drew the line in on his survey plan in 1917 and on other plans using free hand as a mere approximation.

4.0 Individual or Bespoke Approach must be taken to Boundaries

4.1 I also note that the Stewart August Report does not address the lack of consistency in the approach taken by land surveyors in attempting to retrace the contour line over the past several decades. The many examples of the varieties in approach used by previous land surveyors, as described in the de Rijcke June Report, are surveys of the past which a land surveyor today must consider as a mandatory approach to the retracement of a legal (cadastral) boundary.

4.2 What this means, is that the statement at paragraph 5.2 of the Stewart August Report³ must be read in the context of what an Ontario Land Surveyor is expected to do today when going out on the ground in attempting to determine how much land has been flooded. An Ontario Land Surveyor in answering that question would be performing what is known as a "cadastral survey" or a legal survey in the retracement of an existing boundary. Sometimes, but not always, that existing boundary is a contour line. Depending on the nature of the legal interest acquired by HEPCO, that line may have moved slowly and imperceptibly and almost always, the topography at the waterfront has altered since the acquisition of an interest by HEPCO.

4.3 Land surveyors in Ontario are mandated to adhere to the *Standards of Practice* found in a Regulation under the *Surveyors Act* as O.Reg. 216/10 ("Standards"). Among other things, the Standards define a cadastral survey to mean a survey performed by a licensed member while engaged in the practice of cadastral survey. The practice of cadastral surveying is defined in the *Surveyors Act*. Project is defined as meaning a plan, map, drawing, file, **report** or any other form or transmittal by which a professional member advises or gives an opinion as to:

³ Paragraph 5.2 of the Stewart August Report states,

"5.2 As noted above at section 4 of this report, it is my professional opinion that the original position of all Contour boundaries at Round Lake can be retraced based on the best available evidence. Each landowner fronting the lake can, (a) with the assistance of an Ontario Land Surveyor, (b) with reference to water level records, (c) with reference to their individual land tenure documents (and those of adjoining properties), and (d) with reference to related survey records, determine whether the waters of Round Lake have at any time extended beyond the original 108-foot contour."

- a) the establishment or determination of boundaries delineating any right or interest in land or land covered with water; or
- b) the determination or analysis of spatial attributes of natural or artificial features on, above or below the surface of the earth, whether or not the surface of the earth is situated below water.

4.4 The work needing to be done in determining the location of a boundary around the perimeter of Round Lake for several hundred parcels of land would be several hundred “projects” – each would attract the application of the Standards in performing a survey as is found in O.Reg. 216/10.

4.5 Section 2 of the Standards states that, when undertaking a project, a professional member shall ensure that the project meets all project requirements and specifications and that it complies O.Reg. 216/10. The hypothetical survey work described in the Stewart August Report at paragraph 5.2 to locate boundaries of properties must comply with the Standards, but the requirements of O.Reg. 216/10 make the perfunctory use of a single 108 feet contour line as a boundary impossible. The Regulation explains why.

4.6 Section 7 under Part II of the Regulation makes it clear that Part II applies to surveys performed by a licensed member while engaged in the practice of cadastral surveying. Section 8 of the Regulation is entitled, *Field Survey Standards*, and requires that, when undertaking a survey, a licensed member **shall** [emphasis added]:

- a) refer to the documentary evidence related to the land under survey and the land adjoining the land under survey;
- b) carry out a thorough field investigation for the best available evidence of all lines, boundaries, and corners of the land under survey; and
- c) give priority to the evidence in accordance with common law⁴ and statute law.

4.7 Land surveyors do not have discretion in the performance of a Project. The mandatory aspect of what must be considered and done is applicable to the several hundred parcels around Round Lake.

4.8 In the de Rijcke June Report, I have identified and included some 40 odd examples of where licensed Ontario Land Surveyors have actually tried to do a survey of the waterfront of Round Lake. Some may not be correct, but their work cannot be ignored. A land surveyor cannot summarily dismiss the work of prior land surveyors by adopting a single contour line without first considering the earlier work and evaluate what a previous surveyor has done.

⁴ The hierarchy of evidence at common law appears in the de Rijcke June Report at para. 3.4, and footnote 8. Mr. Stewart refers to this in the Stewart August Report at para. 4.6, and footnote 17, but he does not disagree with the statement as quoted in my de Rijcke June Report.

4.9 Even after obtaining all relevant evidence (as the Standards require a land surveyor to do), one must still assess and consider what is available using the priority of evidence in accordance with common law. This too is a requirement of the Standards. The priority of evidence at common law accords measurements (which Mr. Stewart appears to be prepared to utilize exclusively), as a least reliable form of evidence – it ranks at the very bottom. It is the least reliable item in the priority of evidence scale and this fact is acknowledged in the Stewart August Report.⁵

4.10 Nowhere in the hierarchy of evidence can land surveyors find any weight attributed to a line drawn by free hand, and with no measurement information, such as that found at Figure 3 of the Stewart August Report. Although Mr. Stewart refers to “best available evidence” in his report, he has, in my opinion, confused the difficulty that a surveyor may experience when encountering *nothing* of the type of evidence that appears in the hierarchy with “best available”, but *poor*, evidence.⁶ There is simply no authority for a surveyor in adopting a “guesstimated” line as a speculation of where a legal boundary is located on the ground.

5.0 Conclusion

5.1 In conclusion, the location of a boundary over which flooding may have occurred remains not only complex; it remains bespoke, individualized and must be considered on a property by property basis. It is impossible to simply take the 108 foot contour line or elevation as a “one size fits all” solution in locating the boundary from which flooding can be determined or measured.

Yours truly,



Izaak de Rijcke
Lawyer

Izaak de Rijcke Land Surveying Inc.

Per:



Izaak de Rijcke, O.L.S.

⁵ See Stewart August Report at para. 4.6.

⁶ See Stewart August Report at para. 4.6.

GRAHAME PLAUNT, et al - and - RENFREW POWER GENERATION
INC.
Plaintiffs Defendant

Court File No.: 08-CV-42639 CP

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Class Proceedings Act, 1992

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