

**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

**RESPONDENTS' FACTUM  
(Re Decertification Motion – January 25, 2017)**

Date: January 10, 2017

**DENTONS CANADA LLP**

Barristers & Solicitors  
1420 - 99 Bank Street  
Ottawa ON K1P 1H4

**K. Scott McLean**

LSUC # 16455G  
Tel: (613) 783-9665  
Fax: (613) 783-9690  
scott.mclean@dentons.com

**James M. Wishart**

LSUC # 58794G  
Tel: (613) 783-9651  
Fax: (613) 783-9690  
james.wishart@dentons.com

Lawyers for the Plaintiffs

TO: **GOODMANS LLP**  
Barristers and Solicitors  
Bay Adelaide Centre  
333 Bay Street  
Suite 3400  
Toronto ON M5H 2S7

**Alan H. Mark**  
LSUC # 21772U  
Tel: (416) 216-4865  
Fax: (416) 979-1234  
amark@goodmans.ca

**Melanie Ouanounou**  
LSUC # 55336S  
Tel: (416) 979-4264  
Fax: (416) 979-1234  
mouanounou@goodmans.ca

Lawyers for the Defendant

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

GRAHAME PLAUNT and KENNETH L.W. BOLAND

Plaintiffs/Responding Parties

and

RENFREW POWER GENERATION INC.

Defendant/Moving Party

**RESPONDENTS' FACTUM**

**TABLE OF CONTENTS**

PART I - INTRODUCTION .....	1
PART II – LEGAL PRINCIPLES .....	4
A.    Decertification of class proceedings .....	4
B.    Commonality and preferable procedure.....	5
C.    The CPA encourages the Court to find a way.....	7
Part III - ARGUMENT .....	7
A.    Certification Motion.....	8
B.    Response by RPG to the Certification Motion .....	8
1.    Responding Motion Record .....	8
2.    RPG’s factum on the Certification Motion.....	10
C.    Features common to both motions .....	11
D.    Certification Reasons .....	13
1.    Consideration of the allegations and issues at stake .....	14
2.    Section 6 of the CPA.....	15
3.    Common Issue .....	15

4.	The Parties have proceeded in conformity with the Certification Reasons and the Certification Order .....	20
5.	Expert opinion evidence relied upon by RPG.....	21
E.	There is no relevant evidence now adduced by RPG that was not available on the Certification Motion.....	23
F.	The defendant’s “new evidence” does not support decertification.....	25
1.	Defendant’s evidence of properties that are not affected by the 108 Contour is suspect .....	25
2.	Closure and grant of the Shore Road Allowance.....	29
3.	Further evidence of properties bounded by the 108 Contour .....	31
4.	Opinion evidence regarding water side boundaries .....	34
5.	Defendant’s math does not justify decertification .....	35
6.	The potential challenges involved in locating the 108 contour are irrelevant to the determination of the Common Issue.....	36
G.	Importance to the Class of interpreting the Licence(s) of Occupation and the 108 Contour .....	38
	PART VI – ORDER REQUESTED .....	41

## PART I - INTRODUCTION

1. Renfrew Power Generation Inc. (“RPG” or the “defendant”) moves to decertify this action as a class proceeding, on the grounds set out in its notice of motion dated May 31, 2016. As a matter of law, RPG is entitled to bring this motion always assuming good faith. However this motion (“the Decertification Motion”) is patently motivated for purposes other than the proper administration of claims certified under the *Class Proceedings Act*, 1992, S.O.1992, c. 6 (“the CPA”) in the interests of the goals and objectives set out in the CPA, because:

- (a) the defendant mischaracterizes the reasons of the Court upon certification (the “Certification Reasons”)<sup>1</sup>, and in actuality brings a disguised appeal from the Certification Order;
- (b) in so doing, the defendant pretends that material evidence, issues and grounds have developed in the period since the Certification Reasons so as to give reasonable cause for challenging the Certification Order;
- (c) in so doing, the defendant distorts the process and procedure flowing out of the Certification Reasons (the construct of the Reasons) when fairly read and applied in context, and as applied to date by the parties, and seeks to avoid the modified trial ordered by the Court; and
- (d) in so doing, the defendant misunderstands the first common issue (the “Common Issue”) as it was stated by the Court in the Certification Reasons and ultimately ordered by the Court following consultation with the parties.

2. The grounds relied upon in support of the Decertification Motion have no functional relationship to the Certification Reasons, the Certification Order, or the adjudicative process that has subsequently evolved. In summary:

---

<sup>1</sup> *Plaunt v. Renfrew Power Generation Inc.*, [2011] O.J. No. 2995 (Ont. SCJ) (the “Certification Reasons”), MRD Vol.I, Tab 6, p 147

- (a) the importance placed by RPG on the counting of the appropriate members of the class is misplaced under any interpretation of the evidence proffered or the CPA;
- (b) the importance placed by RPG on the “necessity” to discount and retrace all existing historical boundaries in order to recreate a “physical identifiable boundary line” is against the evidence and misapprehends the construct defined by the Court and the Common Issue; and
- (c) the emphasis on the alleged absence of a “single contour line that is common to all class member’s properties” is also against the evidence and suffers from the same deficiencies.

3. These grounds, it may be noted, seek to erase, for the purposes of the motion, over 100 years of operational and commercial reliance by RPG and its predecessors on contour lines and surveys thereof that it now asks this Court to wholly reject (“on paper”).

4. As set out in more detail below, the plaintiffs are also concerned that issues arising from the opinion evidence filed by RPG in support of its submissions on these grounds will not accommodate critical review unless the intention of the Court to conduct a modified hearing on the Common Issue is adhered to.

5. Finally, the reasons motivating Grahame Plaunt and Kenneth L.W. Boland in their own behalf and on behalf of other owners at Round Lake to commence the action in the first place and to seek to have it certified as a class proceeding, and the justice in their position, are not directly refuted by the defendant on this Motion but are simply ignored as having neither relevance nor meaning. Owners of lands contiguous to Round Lake sought the assistance of this Court in understanding the limits to which RPG is subject regarding the storage of water in Round Lake. RPG acknowledges the existence of limits, but characterizes them, at its convenience from time to time, as unfixed, unstable or impossible to determine with certainty or to comply with. In the face

of these positions, each and all of the members of the class as defined by this Court (the “Class”) need and are entitled to know whether there is some “line in the sand” beyond which RPG can never cause or allow water to flow.<sup>2</sup>

6. The plaintiffs have alleged that in the first instance, the determination of RPG’s flooding limits requires an interpretation of RPG’s flooding licences. This Court, in the interest of what is just, has defined and ordered a process to do precisely this, which the Decertification Motion seeks to disrupt. The process defined by the Court is only just begun – RPG seeks to unjustly fracture the multi-step process which the Court has constructed.

7. In summary, and to be blunt, rather than cooperating to come to a determination of a *bona fide* issue regarding its rights vis-à-vis the Class, RPG brings this Motion in an effort to prevent the matter of its flooding limits from *ever* being adjudicated on its merits. RPG failed in its efforts to oppose Certification. It then failed in its efforts to oppose the process proposed by the plaintiffs. This Motion attempts to obscure yet another effort to derail the careful process enabled by earlier decisions of this Court.

8. It must also be noted at the outset, that these efforts by RPG, and this effort in particular, have been expensive and time consuming to the prejudice of the plaintiffs and the Class that they represent.

9. These themes are more fully developed below.

---

<sup>2</sup> In this regard the plaintiffs once again draw the Court’s attention to the evidence submitted by the plaintiffs on the Certification Motion, and in particular the photographs attached as exhibit A to the affidavit of Graham Plaunt sworn March 26, 2010, Motion Record of the Defendant (“**MRD**”) Tab 8(A)(2)(A), pp 191-196

## PART II – LEGAL PRINCIPLES

### A. Decertification of class proceedings

10. Decertification motions under section 10(1) of the CPA, though occasionally initiated by defendants seeking to overturn a certification order or otherwise derail a class action, are very rarely successful.

11. Fundamentally, a defendant cannot use a decertification motion as a surrogate route to appeal a certification order.<sup>3</sup>

12. The defendant as moving party bears a burden to establish, on the basis of **newly-discovered** evidence, post-certification developments in the course of the litigation, or post-certification changes to the law, that the requirements of section 5 of the CPA are no longer satisfied.<sup>4</sup> Put otherwise, the moving party must show that the certification decision could not have been made in light of new facts revealed as the evidentiary record evolved.

13. Courts invariably refuse to decertify a class where there was no “material change or fresh evidence” raised by the defendant.<sup>5</sup>

14. Where a defendant raises issues on a decertification motion that were or ought to have been raised on the certification motion, or are inextricably tied to matters dealt with on the certification motion, issue estoppel may also bar the motion.<sup>6</sup>

---

<sup>3</sup> *Pearson v Inco Ltd*, [2009] OJ No 780, 42 CELR (3d) 310 (ONSC) at para 24, Defendant’s Book of Authorities (“DBA”) Tab 1

<sup>4</sup> *Crooks v CIBC World Markets Inc.* 2016 NSSC 145 at para. 39, DBA Tab 8; *Pearson*, *supra*, DBA Tab 1

<sup>5</sup> *Ducharme v Solarium de Paris Inc.*, 2014 ONSC 1684 at para 15, Plaintiffs’ Book of Authorities (“PBA”) Tab 1; *Barbour v University of British Columbia*, 2007 BCSC 800 at paras 32-34, PBA Tab 2

<sup>6</sup> *Harrington v Dow Corning Corp.*, 2002 BCSC 511 at paras 26-27, 31-32, 35, PBA Tab 3; *Toms Grain & Arcola Livestock Sales*, 2006 SKQB 373 at paras 17-21; PBA Tab 4

15. The level of changed circumstances required to justify decertification is illustrated by the reasons of the Court in the single successful decertification motion relied upon by the defendant in its submissions. In that Nova Scotia case, following certification the defendant conceded liability (but not causation or damages) on a class basis, and there were significant changes to the prevailing law. Upon review of the effects of these dramatic developments on the remaining certified common issues, the Court held that there was no further benefit to the litigants in continuing the action as a class proceeding.<sup>7</sup>

16. It follows that the threshold to decertify a proceeding is high, requiring evidence of fundamental changes in the circumstances of the action which undermine the certification order and which cannot be managed through other remedies available to the Court, such as case management, the creation of subclasses, amendment of the common issues, and so on.<sup>8</sup>

### **B. Commonality and preferable procedure**

17. Courts managing class proceedings in Canada are highly tolerant of the existence of individual issues that may remain following the determination of one or more common issues. Indeed, the common issues need not predominate over the individual issues in order for class proceedings to remain the preferable procedure. As explained by the Ontario Court of Appeal in *Cloud*:

53 In other words, an issue can constitute a substantial ingredient of the claims and satisfy s. 5(1) (c) even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution. In such a case the task posed by s. 5(1) (c) is to test whether there are aspects of the case that meet the commonality requirement rather than to elucidate the various individual issues which may remain after the common trial. This is

---

<sup>7</sup> *Crooks, supra* at paras, 21-24, 174, DBA Tab 8

<sup>8</sup> *Webb v 3584747* [2005] OJ No 449 (OSCJ) at para 27, leave to appeal ref'd 2005 CarswellOnt 3394, [2005] O.J. No. 3306 (Div. Ct.) **see, esp.** paras 28-29, DBA Tab 8

consistent with the positive approach to the CPA urged by the Supreme Court as the way to best realize the benefits of that legislation as foreseen by its drafters.

...

84 This assessment is not quantitative so much as qualitative. *It is not driven by the mere number of individual adjudications that may remain after the common trial.* (emphasis added)<sup>9</sup>

18. Critically, although the resolution of a common issue should advance the litigation in some way for all class members, the Supreme Court of Canada has endorsed the principle that an issue may be common and a class action may yet be the preferable procedure where the answers that may be given to common issue are likely to be different from one member of the class to another.

45 Having regard to the clarifications provided in *Rumley*, it should be noted that the common success requirement identified in *Dutton* must not be applied inflexibly. A common question can exist *even if the answer given to the question might vary from one member of the class to another. Thus, for a question to be common, success for one member of the class does not necessarily have to lead to success for all the members.* However, success for one member must not result in failure for another.

46 *Dutton* and *Rumley* therefore establish the principle that a question will be considered common if it can serve to advance the resolution of every class member's claim. As a result, the common question *may require nuanced and varied answers based on the situations of individual members. The commonality requirement does not mean that an identical answer is necessary for all the members of the class, or even that the answer must benefit each of them to the same extent. It is enough that the answer to the question does not give rise to conflicting interests among the members.*<sup>10</sup> [emphasis added]

19. Contrary to the main thrust of the defendant's arguments on this motion, it is not necessary that every member of the class receive the same answer from the Court to a common issue, indeed, it is clearly acceptable under the CPA regime for the determination of a common issue to result in success for some class members and disappointment for others, or a full answer for some and a

---

<sup>9</sup> *Cloud v. Canada (Attorney General)* 2004 CarswellOnt 5026 at paras. 53 and 84, PBA Tab 5

<sup>10</sup> *Dell'Aniello c. Vivendi Canada Inc.* SCC 2014 1 at paras. 45-47, PBA Tab 6; *Wright v United Parcel Service Canada Ltd.* 2015 ONSC 2220 (Div Ct) at paras 22-23 and 37, PBA Tab 7

partial answer for others. This is, in essence, what the defendant argues may happen if the Common Issue is determined in this proceeding.

**C. The CPA encourages the Court to find a way**

20. Consistent with the heavy burden on the defendant on a decertification motion, even if a court finds that a class proceeding no longer meets the conditions for certification, decertification is not the inevitable outcome. A broad discretion is conferred on the presiding judge to ensure “a fair and expeditious determination” of class proceedings and, to do so, a judge may make any order or impose any terms she deems appropriate.<sup>11</sup>

21. In exercising this discretionary power in support of certification, the Court may choose to continue the action as certified, to amend the certification order or the common issues, or to create new classes or subclasses so as to better manage the proceeding.<sup>12</sup> There is therefore a clear statutory policy in favour of providing, wherever possible, a procedural route for class members to determine common claims.

**PART III - ARGUMENT**

22. The plaintiffs’ argument herein is structured as follows:

- (a) Parts A through D argue that the defendant’s motion misconstrues and mischaracterizes the, the Court’s reasons on certification, the adjudicative approach to this Action set out therein, and the Common Issue, in an impermissible attempt to appeal the Certification Order and to avoid the adjudication of the defendant’s flooding limits;

---

<sup>11</sup> *Class Proceedings Act*, 1992, SO1992, c 6, s 12, Appendix “B”

<sup>12</sup> *Smith v Inco Ltd.* 2009 CarswellOnt 8019 at paras 35-36, DBA Tab 2

- (b) Parts E and F address the evidence put forward by the defendant on this Motion, arguing that even if this is a proper motion, the evidence supporting it does not meet the threshold for decertification; and
- (c) Part G reviews, in conclusion, the underlying issues in this litigation and the importance to the entire class of adjudicating the Common Issue.

### **A. Certification Motion**

23. The Certification Motion sought an order identifying four common issues (as reviewed in the Certification Reasons):

- (a) Whether RPG is responsible for the intentional and continuous trespass by RPG on private lands owned by the representative plaintiffs and the Class;
- (b) Whether the rights of the representative plaintiffs and the Class and obligations of RPG are governed and determined by Licences of Occupation granted to RPG by the Ministry of Natural Resources;
- (c) Relief related to the validity of the Bonnechere River Water Management Plan dated September 8, 2004, as amended [subsequently withdrawn]; and
- (d) Determination and apportionment of damages.<sup>13</sup>

24. The remaining three issues were referred to and adopted in part by the Court in framing the Common Issue(s) in the Certification Reasons.

### **B. Response by RPG to the Certification Motion**

#### ***1. Responding Motion Record***

25. In its Responding Record, RPG filed affidavits from Peter Boldt (former Superintendent and at that time Special Projects manager at RPG), who provided historical background and

---

<sup>13</sup> Notice of Motion dated March 29, 2010 at para 10, Motion Record of the Defendants (“MRD”) Vol 2, Tab 8(A)(1), p 176

operational detail, and Terry Winhold, who provided an opinion “on the causes of shoreline erosion and flooding on Round Lake and how the causes of erosion and flooding would be investigated”.<sup>14</sup>

26. Mr. Boldt gave detailed evidence regarding the licences of occupation which, he acknowledged, authorized and governed RPG’s operation of the Tramore Dam at Round Lake (and a dam at Golden Lake), and attached four such licences to his affidavit as exhibits.<sup>15</sup>

27. Mr. Winhold opined on relevant background features, physical characteristics and environmental influences with respect to Round Lake, shoreline erosion and flooding and variation in the effects of possible causes with respect to Round Lake and the Bonnechere River. Under discussion in this responding material from RPG was the existence of a “108 foot contour”.

28. In his expert report, Mr. Winhold referred to the contour issue as follows:

- (a) “The Plaintiffs claim that operation of the Tramore Dam, specifically operation above the 107.5 foot contour level (known for convenience as the 108 foot contour line) referred to in the LOC for the dam has caused erosion and flooding damages to their shore front property, as well as loss and enjoyment of their lands” (at para. 1.2);
- (b) “It should be noted that the lake level on the date of the reconnaissance was at elevation 170.94 m (as reported by RPG), which is approximately 0.3 m below the LOC level mentioned previously. This is approximately one foot below the “108 contour line”” (at para 2.3);
- (c) “In the event that the court were to find that water level excursions in excess of the “108 contour level” as a result of improper actions by RPG had contributed to some

---

<sup>14</sup> Affidavit of Peter Boldt sworn October 19, 2010 (“**Boldt Affidavit**”), MRD Vol 2 Tab 8(B)(1), p. 313; Report of Terry Winhold, “Factors Affecting Shoreline Erosion and Flooding on Round Lake and Bonnechere River” dated October 18, 2010 (“**Winhold Report**”) at para 1.1, MRD Vol. I Tab 8(B)(2)(B), p. 672

<sup>15</sup> Boldt Affidavit at paras 23-27, MRD Vol. 2 Tab 8(B)(1), pp 318-319

erosion of the properties of the three representative plaintiffs, it would be unreasonable for the courts to imply similar conclusions for all the other property owners. Rather, the court would have to investigate either individual properties or sub-groups where some degree of commonality in the effects is to be expected amongst property owners located on the same area of the lake...” (at para. 4.0);

- (d) It is possible that certain properties could have been affected by certain excursions above the “108 contour”...” (at para. 4.0); and
- (e) “whether or not RPG’s management of water levels contributed to erosion damage at a particular property or properties would have to be examined on an event by event basis”(at para. 4.0.4).<sup>16</sup>

29. These and other supporting pieces of evidence adduced by RPG on the Certification Motion were carefully addressed by the Court in the Certification Reasons.

## ***2. RPG’s factum on the Certification Motion***

30. RPG filed a 62-page factum on the Certification Motion (the “Certification Factum”), which included the following arguments and positions:

- (a) para. 6: RPG submitted that “The Plaintiffs rest their case on an allegedly inviolable contour line which they contend was established by a Licence of Occupation...they say in effect that the Licence fixed a permanent shoreline...”;
- (b) para. 7: RPG put the characterization of the Licences of Occupation and the 108 Contour<sup>17</sup> into contest, indicating that the plaintiffs “specify a point of elevation above which the dam operator is not permitted to raise the water level (the “Limit”) and which is entirely independent of the shoreline as it may exist from time to

---

<sup>16</sup> Winhold Report at paras 1.2, 3.2, 4 and 4.04, MRD Vol 2, Tab 8(B)(1)(B), pp 674, 680, 684

<sup>17</sup> The term “108 Contour” is used herein for convenience to refer to the fixed horizontal flooding limits that the plaintiffs allege governs RPG’s exercise of its Licences of Occupation. It is a matter of record that one prevailing Licence of Occupation (#8281) refers to a 107.5 contour while the remainder refer to a 108 contour. While this distinction may be relevant to the determination of the Common Issue, is not relevant for the purposes of this motion. See Report of Ron Stewart dated August 19, 2016 at paras 2.2 and 2.3, SuppMRD Vol 3, Tab 2(B), p 559

time.” RPG states that “the Licences specify no such contour line – it is an entirely fictional notion without basis in any instrument whatsoever” – in other words, that the Licences do not define anything “on the ground”;

- (c) para. 13: RPG submitted that “there is no commonality amongst the class members in any relevant respect...there is no uniformity...the court would have to engage in a property-by-property examination of both liability and damages. It is impossible to answer any question which would significantly advance the litigation on a class-wide basis”;
- (d) para. 16: RPG argued that the litigation “will be a monster of complexity. It will involve studying every one of the 450+ properties...”;
- (e) paras. 40 through 46: RPG again approached the Licences of Occupation and the 108 Contour as to their proper characterization;
- (f) paras. 75-76: RPG indicated that it fully understood, before the hearing of the Certification Motion, the plaintiffs’ claim and the basis for what ultimately became the Common Issue, and explained this to the Court;
- (g) paras. 82 through 85: RPG reviewed the evidence of Mr. Winhold, including the excerpts referred to above.<sup>18</sup>

### **C. Features common to both motions**

31. What is to be made of this? The plaintiffs submit that the Court is entitled to note the following:

- (a) on the Certification Motion RPG knew that it was addressing the proper characterization and application of the Licences of Occupation, including the existence or otherwise and proper characterization of a “108 contour line”;<sup>19</sup>

---

<sup>18</sup> Factum of Renfrew Power Generation dated March 6, 2011 (“**RPG Certification Factum**”), Motion Record of the Plaintiffs (“**MRP**”) Tab 3, pp 52-55, 64-66, 77-81

- (b) it knew that the existence of a 108 contour line “on the ground” was relevant to the issue and allegations of trespass;
- (c) it appreciated all of this in the context of a motion seeking to certify that a class existed warranting certification; and
- (d) it understood that the class was said to be about 450 owners.

32. Understanding this to be the argument and the issues at stake, RPG argued, based on the evidence that it saw fit to put before the Court:

- (a) that the Licence(s) of Occupation could not be read as the plaintiffs intended – the plaintiffs’ position was a fiction;
- (b) that the Licences did not identify or define a contour line on the ground of any dimension;
- (c) that there was no commonality among the putative class members; that there was no commonality among and between parcels in relation to the 108 contour; and
- (d) that it would be necessary to conduct a parcel by parcel survey – “all 450 parcels”- in order to determine the plaintiffs’ claims.

33. RPG further argued that “the Plaintiff’s claim against RPG has a distinct air of unreality about it” and that “the theory behind the claim is incomprehensible.”<sup>20</sup> Despite these and similarly derisive submissions, the Court granted the motion, certified the Class and articulated the foundation for the Common Issue as it came to be.

34. RPG did not appeal.

---

<sup>19</sup> Amended Statement of Claim amended January 4, 2010, at paras 8, 9, 13, 16, 22, MRD Vol. 2, Tab 8(A)(3)(A), pp 212-217

<sup>20</sup> RPG Certification Factum at paras 7 and 10, MRP Tab 3, pp 53-54

35. The common features between RPG's positions on the Certification Motion and its positions here ought not to be ignored, and make it clear enough that the Decertification Motion is in place of an appeal and is timed so as to disrupt the progress of the proceeding directed by the Court. These commonalities include but are not limited to the following positions:

- (a) that the Class is much smaller than the 450 identified on the Certification Motion – on both motions RPG challenges the significance and common interest of any class;
- (b) that the Owners have nothing in common with respect to RPG's flooding rights – on both motions RPG denies any commonality among owners and parcels of land;
- (c) that the 108-foot contour line does not exist – on both motions RPG challenges that there is a fixed line drawn on the land that limits RPG's rights; and
- (d) that a parcel by parcel investigation and survey must be conducted – on both motions RPG argues that granular investigation of every property will be required in order for any progress to be made in resolving any common issue raised by the plaintiffs.

36. RPG is re-arguing, if not in the same words then to the same effect, and without any meaningful distinctions being reasonably apparent, what it in fact argued on the Certification Motion or what it could have readily argued on the Certification Motion.<sup>21</sup>

#### **D. Certification Reasons**

37. Moreover, RPG's submissions in support of the Decertification Motion, and the grounds upon which it relies, misapprehend the Certification Reasons and are as a result unfair to the Court. The express submission made by RPG is that the Court erred or misunderstood ("presumed") the effect of its certification ruling going forward. Again, the language used by RPG is evocative of an

---

<sup>21</sup> *Barbour, supra* at paras 32-34, PBA Tab 2

appeal - it is unremittingly an allegation of error on the part of the Court. It is therefore useful to review the construct and disposition in the Certification Reasons with some care.

*1. Consideration of the allegations and issues at stake*

38. At paragraph 71 of the Certification Reasons the Court states as follows:

The main issue underlying the plaintiffs' claim is a determination of whether the licensing agreement, which permitted the predecessor of RPG to raise the level of Round Lake to 107.5 feet, created a property line between public and private lands in 1917. The plaintiffs submit that even if RPG and its predecessors never raised the level of Round Lake above the 107.5 feet level, its actions by operating the dam and maintaining the level of the lake at or below the 107.5 feet level have caused a trespass to occur. The plaintiffs submit that RPG's actions have caused the erosion to occur, which has allowed water to encroach on their lands, beyond the initial alleged contour line or property line established by the permitted flood level in 1917 of 107.5 feet.<sup>22</sup>

39. In paragraph 72 the Court states:

I agree with the plaintiffs' submission in their factum that if RPG's actions caused the level of Round Lake to rise above the 107.5 feet elevation and thereby caused water to flood onto property owners lands that this could be considered a trespass or nuisance.<sup>23</sup>

40. In paragraphs 73 and 74 the Court finds that the statement of claim discloses a cause of action in trespass. Relevant to this determination is the statement of law in paragraph 51 of the Certification Reasons that trespass is actionable without proof of damage. This puts to bed the assertion advanced by RPG that individual consideration of damages is at all relevant to consideration of the Common Issue as ultimately declared.<sup>24</sup>

41. As has been noted, although RPG had argued that the claim had no basis in reality, RPG did not challenge these findings on appeal.

---

<sup>22</sup> Certification Reasons at para 71, MRD Vol 1, Tab 6 p 157

<sup>23</sup> *Ibid* at para 72, MRD Vol 1, Tab 6, p 157

<sup>24</sup> *Ibid* at paras 51, 73 and 74, MRD Vol 1, Tab 6 pp 153, 157

## 2. *Section 6 of the CPA*

42. At several points the Certification Reasons highlight the importance of subsection 6.1 of the CPA, which provides that

The court shall not refuse to certify a proceeding as a class proceeding solely on any of the following grounds:

1. The relief claimed includes a claim for damages that would require an individual assessment after determination of the common issues.

Other subparagraphs of section 6 of the CPA are also noteworthy for the purposes of this Motion:

4. The number of class members or the identity of each class member is not known.

5. The class includes a subclass whose members have claims or defences that raise common issues not shared by all class members.<sup>25</sup>

## 3. *Common Issue*

43. At paragraph 92 of the Certification Reasons the Court catalogues the common issues proposed by the plaintiffs (as set out above). In doing so it notes the following:

Therefore, the plaintiffs must identify an underlying question, the resolution of which is necessary to the resolution of each member's claim and which is also a substantial ingredient of each class member's claim.

44. And at paragraph 96 the Court notes that "All members of the class must benefit from the successful prosecution of the action *although not necessarily to the same extent*" [emphasis added]. RPG now seeks to challenge this statement of the law as it applies to the Common Issue.

45. The Court went on at paragraph 106 to articulate the Common Issue as follows:

Are the plaintiffs entitled to declaratory relief as a result of interpreting the Licence of Occupation agreement, to determine whether it created a property line between public and private land in 1917, such that a contour line was created on that date.

---

<sup>25</sup> CPA paras 5.1. 5.4. 5.5, Appendix "B"

46. Based on what was before the Court, including the submissions of RPG, this formulation could have come as no surprise. As the Court noted in paragraph 99, this formulation “combines the first two proposed common issues contained in the notice of motion”.

47. Following the release of the Certification Reasons, the above formulation was restated by the parties, with the assistance of the Court, into the following:

Are the plaintiffs entitled to a declaration that the Licenses of Occupation granted to the defendant or its predecessors by the Ministry of Natural Resources *are to be interpreted* such that the contour line, if any, at the 107.5 foot elevation referred to therein *established a fixed property line between public and private lands*, which defines *the legal boundaries of the class members properties for the purpose of determining the claims of trespass advanced herein.*<sup>26</sup> [emphasis added]

48. RPG now seeks to challenge this formulation of the Common Issue, although it was a party to its evolution over several months following the release of the Certification Reasons, and together with the plaintiffs put it to the Court for consideration and approval.

49. In coming to its formulation as expressed in the Certification Reasons, the Court states at paragraph 100 that:

*An interpretation* of the Licence of Occupation agreement would *apply to all the class members* if the action is certified. This issue may be suitable for determination by a summary motion in the class proceeding [note that the Court as has been stated subsequently directed a trial of an issue]. This would be a fair and efficient way of determining whether or not the Licence of Occupation agreement created a property or contour line in 1917.

50. This statement seems unassailable, and in fact RPG did not then challenge it. It now seeks to do so, if not directly then indirectly, by ignoring the emphasis here on “interpretation” of the Licence(s), which, when not bent out of shape, would quite obviously apply to all Class members. Whatever the Court will say following the hearing on the Common Issue on what the Licence(s)

---

<sup>26</sup> Certification Order dated June 29, 2011 at para. 4, Motion Record Vol I, Tab 5, p.140-141.

*mean* and how they may be characterized as a matter of interpretation will apply to all Class members, even though it may support remedies against RPG for some members and not for others.

51. In paragraph 99 of the Certification Reasons, referred to above, the Court also states that:

“As a result interpreting of [sic] the Licence of Occupation agreement, the Court would then determine whether the defendant has trespassed on private lands owned by the class members”.

52. Not only does RPG now seek to challenge the application of this in its challenge to the Common Issue, it obscures the Court’s indication, picked up in following paragraphs of the Certification Reasons, that an iterative process was being defined. First, the Common Issue will be interpreted. Then comes a determination of whether trespass has occurred. As is made clear in this and other passages to be referred to, this latter determination is not part of the hearing of the Common Issue. It may, or may not, follow that hearing. RPG ignores this evolution and seeks to disrupt the initial and formative hearing.

53. To restate this, because it is important, in the plaintiffs’ respectful submission the Certification Reasons make it perfectly clear that the issue of whether the RPG has trespassed against each or any of the Class members will be dealt with after determination of the Common Issue, only as a result of interpreting the Licence(s) of Occupation. The Common Issue ultimately determined and pronounced by the Court is entirely consistent with this construct of the Certification Reasons, “... *for the purpose* of determining the claims of trespass advanced herein”.

54. With this progression in mind, we approach paragraph 104 of the Certification Reasons, which states as follows:

If the proposed common issue is resolved in favour of the plaintiffs, namely that a property line was created by the Licence of Occupation agreement in 1917 at the 107.5 feet elevation level, *there still remains* the following issues:

(a) *If the Licence of Occupation established a contour or a property line in 1917, did RPG's actions constitute a trespass by maintaining the water level in Round Lake at or below 107.5 feet level, causing erosion to occur, which caused water to cover lands which were owned by individual class members?*

(b) *If the Licence of Occupation agreement did not establish a contour line or a property line in 1917, is there a common issue for trespass as a result of the water eroding part of the lands surrounding Round Lake?*

(c) *What limitation period applies to all claimants or are these individual issues? [emphasis added]*

55. To emphasize the point, the Certification Reasons define a process with at least *three* steps. Determination of the Common Issue formulated by the parties and the Court is only the *first* step. RPG seeks to ignore this construct. It cannot be permitted to do so, when the process enabled by the Court has not yet begun to unfold, when the first of three iterative elements has yet to be determined.

56. In its submissions on this Motion, RPG places an untidy emphasis on part, but not all of the Court's language in paragraph 105 of the Certification Reasons:

I find that determining whether a property line was created by the Licence of Occupation agreement as submitted by the plaintiffs, or merely established an elevation to which RPG was permitted to raise the level of Round Lake as submitted by the RPG, is a common issue. Success for one member on this issue would mean success for all members, *but not necessarily to the same extent, as the damage caused and extent of the trespass would require an individual assessment.* [emphasis added]

57. At paragraph 5 of its herein notice of motion, RPG states as a ground for the Motion that the Court, in setting the Common Issue, "presumed that the Licence of Occupation referring to the 107.5 foot elevation is common to a determination of all class members' property rights". In

support of this, RPG refers to paragraph 105 of the Certification Reasons, set out above, but without the italicized portion.<sup>27</sup>

- (a) First, as has been stated, in taking this position, RPG is arguing that the Court committed an error of law, or mixed fact and law, i.e. grounds for an appeal (not taken);
- (b) Second, as will be dealt with in more detail below, the statement in paragraph 105 regarding commonality is correct and in accordance with the law, in particular when seen as part of the construct which the Certification Reasons prescribes; and
- (c) Third, RPG again ignores the iterative construct of the reasons and paragraphs 104 and 105 in particular.

58. At paragraph 120 of the Certification Reasons the following summation appears:

*If the 1917 Licence of Occupation established a legal property boundary then it is the position of the plaintiffs that even if RPG complied with the licence agreement and maintained the level of Round Lake at or below 107.5 feet, then its actions have caused water to trespass on their lands for which they seek damages. I find that a determination of this largely legal issue, which involves interpreting the Licence of Occupation agreement, would move this action forward and perhaps be determinative for all class members. I find it would promote access to justice and allow the costs involved for all parties to be kept to a minimum. [all emphasis added]*

59. This summation is consistent with the internal construct of the Certification Reasons (which RPG misapprehends), with the formulation of the Common Issue, and with the iterative process set out in paragraphs 104 and 105, which RPG seeks to disrupt. It is, in our respectful submission, also correct. Interpreting the Licenses of Occupation *will* move the action forward and *may* be determinative for all – or some - Class members. Asserting otherwise is to declare an error by the Court. RPG did not so assert then, and it cannot do so now.

---

<sup>27</sup> Notice of Motion at para 5, Motion Record of the Defendants (“MRD”) Vol 2, Tab 8(A)(1), p 176

***4. The Parties have proceeded in conformity with the Certification Reasons and the Certification Order***

60. Between June 29, 2011 and March 16, 2016, the date on which RPG advised of an intention to bring this motion, the following significant steps occurred:

- (a) The parties conferred and then met with the Court by teleconference to work out the final language of the Common Issue, and the Certification Order was signed and entered on December 7, 2011;
- (b) Costs were argued and judgment released on October 3, 2011;
- (c) Plaintiffs' counsel delivered Notice of Certification to the Class and administered the opt-out procedure, which concluded as of July 11, 2012;<sup>28</sup>
- (d) The pleadings were finalized:
  - (i) Contrary to what RPG now suggests, the plaintiffs' Fresh Statement of Claim added no allegations about RPG's flooding limits that could have been surprising to RPG.<sup>29</sup>
  - (ii) In its statement of defence, RPG reiterated its position that nothing in the Licences of Occupation purports to "speak to the property rights of class members, nor do the boundaries of the class members' properties depend on those Licences".<sup>30</sup> This is the Common Issue to be determined as ordered by the Court, as step one of the iterative process.
- (e) Written submissions were required in 2012 to define the process that would be followed in determining the Common Issue. Judgment on these opposing

---

<sup>28</sup> Affidavit of Kristina Tam sworn July 24, 2012 at para 4, MRD Vol 1, Tab 4, p 130

<sup>29</sup> Amended Statement of Claim amended January 4, 2010, MRD Vol. 2, Tab 8(A)(3)(A), pp 212-217; Fresh Statement of Claim amended December 7, 2011, Supp MRD Vol. 4 Tab 7, p 799; RPG Certification Factum at paras 75-76, MRP Tab 3, pp 77-78

<sup>30</sup> Statement of Defence dated January 20, 2012, SuppMRD Vol. 4 Tab 8, p 814

submissions was released on March 20, 2013 (“Procedure Reasons”).<sup>31</sup> The Court ordered that a modified trial procedure, similar to that authorized under Rule 20.05 as proposed by the plaintiffs was appropriate: “I find that this procedure would give the Court a full appreciation of the evidence and ultimately, be the most expeditious and least expensive proceeding to achieve a just determination of the common issue.”<sup>32</sup> The Court outlined a detailed, step by step process, which in relation to the modified trial, anticipated that witnesses *other than the experts* may also testify. The process defined by the Court is *en route*. The Decertification Motion is patently an effort to avoid the modified trial ordered by the Court, in favour of a summary motion procedure (which the Decertification Motion effectively is) as was argued by RPG in its process submissions.

- (f) The plaintiffs, in moving towards the modified trial, delivered an opinion report from Ronald J. Stewart dated August 31, 2013 (the “Stewart 2013 Report”).
- (g) RPG delivered a responding opinion report from Izaak de Rijcke dated March 25, 2014 (the “de Rijcke 2014 Report”).
- (h) The plaintiffs delivered a draft agreed statement of facts on January 5, 2016.
- (i) On March 16, 2016 RPG advised of its intention to bring the Decertification Motion, supported subsequently by further reports from Mr. de Rijcke.

##### ***5. Expert opinion evidence relied upon by RPG***

61. In the Procedure Reasons the Court adopted the plaintiffs’ proposition that if a case is sufficiently complex that its adjudication required expert evidence, summary proceedings are rarely appropriate. As such, the process ordered by the Court itself expressly contemplates that experts will give evidence and be cross-examined at the modified trial (in addition, as has been noted, to other potential witnesses to be determined).

---

<sup>31</sup> Reasons of Smith J. dated March 20, 2013 re. Decision on Procedure to Determine First Common Issue (“Procedure Reasons”), SuppMRD Vol 4, Tab 6, p 795

<sup>32</sup> Procedure Reasons at para. 10, SuppMRD Vol 4, Tab 6, p 798

62. The plaintiffs submit that there is good reason for the Court to hear directly and assess the testimony of Mr. de Rijcke and for that matter Mr. Stewart at the modified trial ordered by the Court and not on a paper motion. Mr. de Rijcke elected to present his opinion evidence to the Court as both an Ontario Land Surveyor and an Ontario lawyer certified as a specialist in real estate law.<sup>33</sup> His opinion evidence is commingled in that regard and he cannot opine to the Court in both capacities. This is a problem that cannot be resolved on this motion.

63. Further, Mr. de Rijcke, as would be expected, responded in his various reports to questions put to him by counsel to RPG. As will be argued, these questions, certainly in part, are not germane to the Common Issue, and the plaintiffs submit that the opinion delivered is skewed as a result. In other words, they are loaded instructions. For example, Mr. de Rijcke was asked to opine on the following question:

5. Can the waterfront property boundaries of class members' properties be determined *on a universal basis* and *solely* by reference to the Licence of Occupation?<sup>34</sup> [emphasis added]

64. The answer supplied to this question: “no”, is no surprise. No one has argued that locating RPG’s flooding limits is simply a matter of looking at a Licence of Occupation and a map of Round Lake. Mr. de Rijcke was subsequently tasked by RPG to identify specific (“sufficient”) examples to support his “summary answer”.<sup>35</sup> He acknowledged that this was a direction to him for the purpose of his opinion report, i.e. the “identification” was to comply with the direction

---

<sup>33</sup> Cross-Examination of Isaak de Rijcke dated November 30, 2016 (“de Rijcke Cross”) at pp 36-37, q 133-136, SuppMRD Vol 4, Tab 3, pp 644-645

<sup>34</sup> Report of Izaak de Rijcke dated June 1, 2016 (“de Rijcke June 2016 Report”) at para 1.1, MRD Vol 1, Tab 2(B), pp 46-47

<sup>35</sup> de Rijcke June 2016 Report at para 1.2, Tab 2(B), p 47

given.<sup>36</sup> This too is problematic and requires further consideration than is available on this Motion.

65. Finally, for present purposes, following his cross-examination Mr. de Rijcke was (over the objections of counsel for the plaintiffs) subjected to a detailed re-examination which, in context, will be argued as further evidence that his opinions must be looked at carefully at a modified trial.

**E. There is no relevant evidence now adduced by RPG that was not available on the Certification Motion**

66. The gravamen of the “new evidence” relied upon by the defendant on this Motion can be summarized as follows:

- (a) the process of determining the location of the 108 Contour and whether it in fact pertains to each individual Class property will be challenging, requiring some degree of property-by-property analysis, and may ultimately require further judicial determination for some properties;
- (b) surveyors have not used a consistent methodology over time to identify or locate the 108 Contour (this is a subset of the above point); and
- (c) for some properties falling within the Class definition, the 108 Contour does not now or might not ultimately be determined to constitute a boundary for the purposes of determining trespass by RPG.

67. With respect to the alleged necessity for property-by-property analysis in relation to the proposed common issues, as set out above, this formed a substantial portion of the defendant’s argument on the Certification Motion.

---

<sup>36</sup> de Rijcke Cross at pp 33-34, q 123-126; SuppMRD Vol 4, Tab 3, pp 641-642

68. With respect to the arguments that the 108 Contour has not been consistently dealt with by surveyors over time and that the 108 Contour (and therefore the Common Issue) does not or may not apply to certain Class properties, the defendant and its current expert witness base these positions primarily on a selected sample of publicly-available land registry documents, at least some of which were in the possession of RPG itself at the time of the Certification Motion and were disclosed in its Affidavit of Documents shortly thereafter. There is no reason why the defendant could not have placed this evidence before the Court on the Certification Motion.

69. There have been no discoveries of the parties, or admissions, or changes of circumstances that have brought forward previously hidden facts or generated new defences for RPG. The plaintiffs submit based on the legal principles set out herein, that a defendant that fails to put its best foot forward on the Certification Motion does not get another kick at the can in a Decertification Motion.

70. Even if, as RPG now claims, the plaintiff's case was not sufficiently set out prior to the Certification Motion to allow RPG to properly respond (but see paras. 74-75 of the defendant's Certification Factum), there can be no suggestion that the defendant required until March 2016 (when it announced an intention to proceed with this Motion) to understand the Common Issue and the evidence that it now says it has uncovered. The reasonable implication is that the defendant sat on this Motion until a juncture that it deemed to be strategically useful.

71. At this stage of the proceedings, the appropriate and only route for RPG was and is to proceed to the trial of the Common Issue and to argue its "new evidence" there in accordance with the direction of this Court.<sup>37</sup>

---

<sup>37</sup> *Smith, supra* at para 49, DBA Tab 2

**F. The defendant's "new evidence" does not support decertification**

72. If this Honourable Court finds that the defendant is entitled to and has in fact submitted new and relevant material evidence on this Motion, which was unavailable at the time of the Certification Motion, the plaintiffs submit that such evidence does not meet the high threshold required to derail the adjudicative procedure ordered by this Court to determine the Common Issue. Specifically, the defendant's "new evidence":

- (a) has indicia of unreliability and can only be tested in the modified trial process ordered by this Court; and
- (b) even if accurate, does not overrule the Court's determination on the Certification Motion that an interpretation of the Licence(s) of Occupation will advance the litigation for all class members.

***1. Defendant's evidence of properties that are not affected by the 108 Contour is suspect***

73. In support of this Motion, Mr. de Rijcke was asked to "identify a sample of the class members' properties for whom [sic] the contour line associated with the Licenses of Occupation does not constitute the legal boundary of the property". He was further asked to identify a "sufficient number of properties which, having regard to their nature and title history, would allow you to draw inferences as to whether the sampled properties are representative of what would be found if you had examined all class members' properties."<sup>38</sup>

74. In carrying out his assignment, Mr. de Rijcke conducted a paper review in which he:

- (a) did not consider or determine how many class members' properties are or may be legally bounded by the 108 Contour;<sup>39</sup>

---

<sup>38</sup> Letter dated April 26, 2016, being Appendix 1 to the June 2016 Report, MRD Vol 1 Tab 1(B)(1), pp 59-60

<sup>39</sup> de Rijcke Cross at pp 44-45, q 172, SuppMRD Vol 4, Tab 3, p 653

- (b) did not determine where the boundaries of any class members' properties are in relation to the 108 Contour; and
- (c) limited his review to selected land title documents obtained from public sources and the parties' productions.<sup>40</sup>

75. In Section 5.3 of his June 2016 Report, the defendant's expert duly claims to have identified 98 "properties that are located inland from the Original Shore Allowance ... for which the water, at the 108 foot contour line, never crossed the Shore Road Allowance and never encroached onto the property".<sup>41</sup> Put otherwise, he posits that for these 98 properties, the owners' title does not reach as far as the 108 Contour, but rather ends at the inland boundary of the Shore Road Allowance ("SRA").

76. On this basis he opines that the 108 Contour is irrelevant to determining the extent of those Class members' properties<sup>42</sup>, and RPG argues that the determination of the Common Issue cannot assist those Class members and indeed cannot be "common".

77. Notably, Mr. de Rijcke does *not* opine (as requested by RPG) that these selected 98 properties are "representative of what would be found" if he had examined all properties within the class definition. More importantly, however, it appears that the selected properties are not even representative of the proposition for which they were selected.

78. To illustrate, at tab 9 of his June 2016 Report, the defendant's expert identifies 18 reference plans which he says demonstrate his conclusion in his section 5.3. Given that these 108 plans are specially selected for reproduction, it might be expected that they would be clearly indicative of the opinion given.

---

<sup>40</sup> de Rijcke Cross at pp 24-31, q 87-113; pp 33-34, q 123-126; SuppMRD Vol 4, Tab 3, pp 632-642

<sup>41</sup> de Rijcke June 2016 Report at section 5.3, MRD Vol 1 Tab 2B, pp 56-57

<sup>42</sup> *Ibid.*

79. However with a few exceptions, the selected reference plans at tab 9 appear to compel a *diametrically opposite conclusion*. On fourteen of the 18 selected plans the 108 Contour, as depicted by the respective surveyor, is shown to be partly or wholly co-extensive with the water side boundary of the properties covered by the respective surveys. The logical conclusion is that the water side boundary of these parcels, wherever it may be properly located on the ground, is the 108 Contour.

80. For example, Plan 49R-9169, which the defendant's expert identifies as depicting a property **not** bounded by the 108 Contour, clearly identifies the water side boundary of Part 2 of the surveyed area as the "108' contour".<sup>43</sup> In an explanatory note which - with slightly varying wording - is common to many reference plans relating to Round Lake properties (hereinafter, the "108 Benchmark Note"), the plan also states:

**Note:** the 108' contour as shown hereon is derived from Ontario Hydro Datum and is referred to an Ontario Hydro bench mark which is located on top of a brass plug in a big boulder on the right bank of the Bonnechere River 10.0' downstream from the end of the Round Lake dam and has an elevation of 112.45'.

81. The "brass plug" was installed in or about 1911 to create a local benchmark elevation from which to establish, among other things, the 108 Contour.<sup>44</sup> The plaintiffs submit that the inclusion of the 108 Benchmark Note in conjunction with a boundary line identified as the "108 Contour" (or words to that effect) is further *prima facie* evidence that the subject property **is in fact** bounded by RPG's flooding limit at the 108 Contour, wherever that contour may be properly located on the ground.<sup>45</sup> In any event, based only on a review of this reference plan it cannot be definitively

---

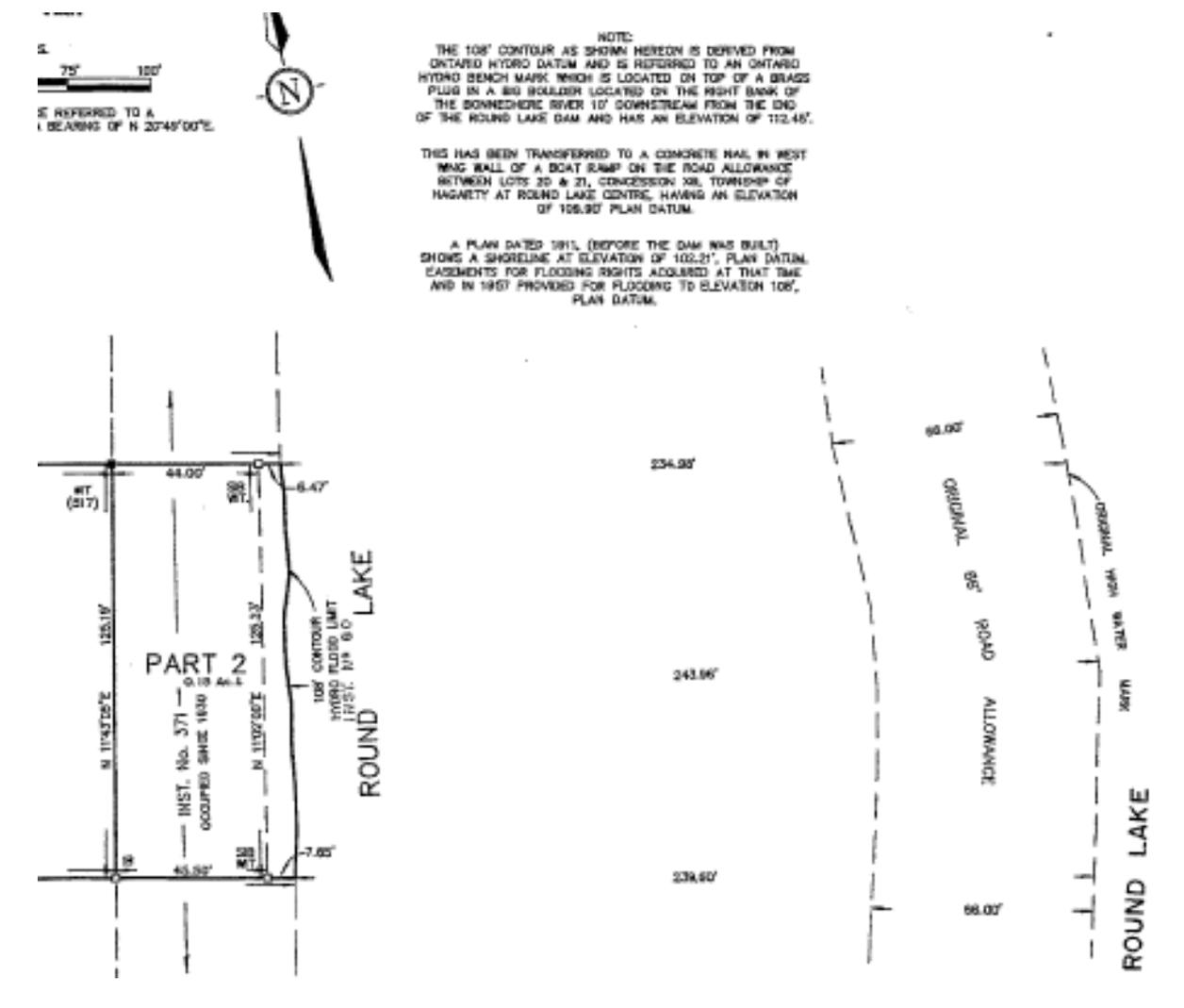
<sup>43</sup> Plan 49R-9169 deposited December 4, 1988, MRD Vol 1 Tab 2(B)(9), p 112; de Rijcke Cross at pp 84-85, q 325-334, Supp MRD Tab 3, pp 692-693

<sup>44</sup> Report of Ronald J. Stewart dated August 31, 2013 at paras B.11 and D.5.9, SuppMRD Vol 1, Tab 2(A), pp 120 and 147.

<sup>45</sup> Many survey plans which refer to the 108 Contour also identify the 102.21' contour (the 102 Contour) as the water level in March 1911, and identify the source of the location of that

concluded – as Mr. de Rijcke does in his report – that the property shown on plan 49R-9169 is **not** bounded by the 108 Contour.

82. Similarly, in the following excerpt of reference plan 49R-11286, which is identified by Mr. de Rijcke in Tab 9 of his report as depicting lands for which the 108 Contour is “irrelevant”, the water side boundary of Part 2 of the subject parcel is clearly shown to be the “108 Contour Hydro Flood Limit”, as described in the Benchmark Note.<sup>46</sup> The SRA is here shown to be submerged.



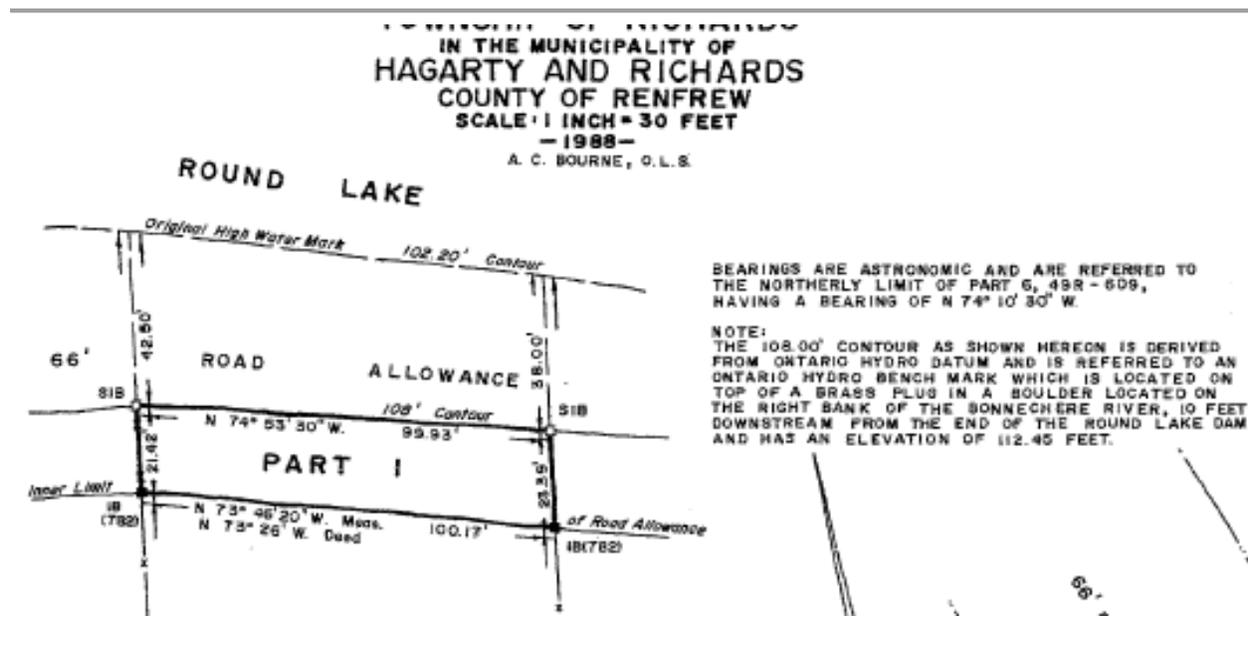
<sup>46</sup> The entirety of plan 49R-11286 is reproduced at MRD Vol 1, Tab 2(B)(9), p 111.

83. Appendix A hereto describes each of the other plans reproduced in Mr. de Rijcke's June 2016 Report that depicts a line identified as the "108 contour" (or words to that effect) as constituting all or part of the waterside boundary of the depicted parcel.

84. Mr. de Rijcke did not reproduce reference plans for the other 80 or so properties for which he claims the 108 Contour is "irrelevant". The foregoing review supports a strong inference that the majority of those plans do not support this assertion.

## 2. Closure and grant of the Shore Road Allowance

85. In attempting to locate samples of property plans to fulfill the defendant's requests, Mr. de Rijcke also apparently overlooked or failed to distinguish situations where a landowner applied to the municipality to close the SRA and to obtain the lands located *between the 108 Contour and the inland boundary of the SRA*. For instance, reference plan 49R-8936, excerpted immediately below, is identified by Mr. de Rijcke as a property for which the 108 Contour was "irrelevant"<sup>47</sup>:



<sup>47</sup> Plan 49R-8936, MRD Vol 1 Tab 2(B)(9), p 112F



88. Here, Part 2 represents the portion of the original SRA which is **upland** from the “contour of elevation 108’ [assumed] 562.25 (GSC Datum)”. Assuming that the SRA closure and grant were completed, the water side boundary of Part 2 is, as shown on the plan, the 108 Contour, as properly located on the ground.

89. It appears, therefore, that in preparing plans for road closure applications at Round Lake, surveyors have identified the water side boundary of the targeted parcel as the *upper limit of RPG’s flooding rights*, usually described on plans the 108 Contour. Mr. de Rijcke did not determine which or how many properties around Round Lake fall into this latter category, but as detailed in Appendix “A” hereto, at least seven of the reference plans referred to by Mr. de Rijcke appear to have been prepared for the purpose of applications to close and obtain a grant of the portion of the SRA above the 108 Contour.<sup>51</sup>

90. In such cases, the 108 Contour and RPG’s rights in relation thereto are clearly not, as Mr. de Rijcke suggests, “irrelevant” to the owners of those parcels.

### ***3. Further evidence of properties bounded by the 108 Contour***

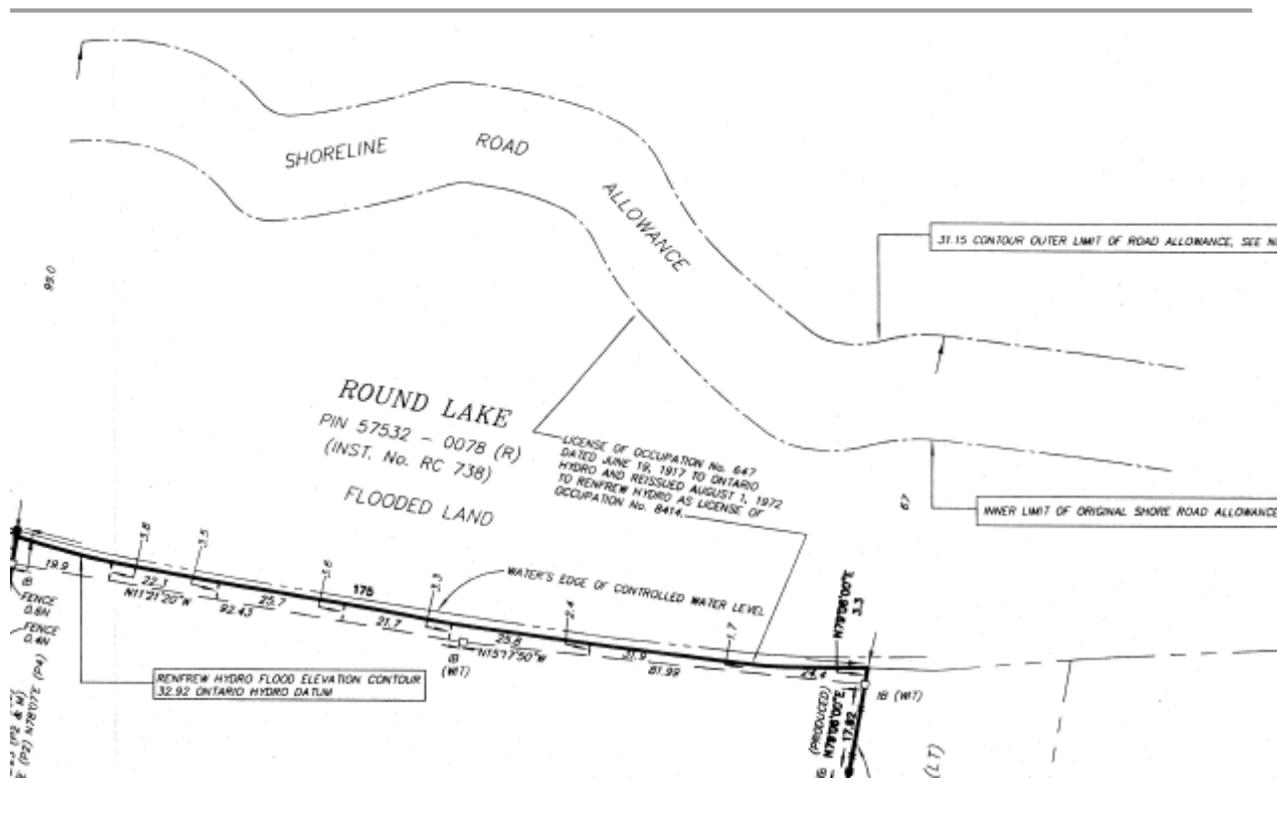
91. The parties’ productions to date in this proceeding contain numerous other reference plans which appear to depict the water side boundary of properties contiguous to Round Lake as being the 108 Contour, meaning the upper limit of RPG’s flooding rights. A sample of these plans is included in the plaintiffs’ responding motion record at Tabs 8 through 41 and is catalogued at Appendix “B” hereto.

92. For example, the below extract of plan 49R-17360 for part of Lot 25 Con 3 Richards Twp., dated September 2, 2010, clearly identifies the water side property line of this parcel as

---

<sup>51</sup> See, e.g. MRD Vol. 1 pages 107, 109, 111, 112B, 112C, 112F, and 116. See also de Rijcke Cross pp. 76-78, q 289-296; pp 87-92, q 341-367; SuppMRD Vol 1, Tab 3, pp 684-686; 695-700

coextensive with what is shown as the “Renfrew Hydro Flood Elevation Contour 32.92 Ontario Hydro Datum,” and specifically adverts to the applicable Licence of Occupation.<sup>52</sup> The SRA is shown to be covered by the waters of Round Lake.



93. The lands belonging to both representative plaintiffs also fall into this category of lands apparently defined with reference to RPG’s flooding limits. Mr. Boland’s property is located in Lot 12, Concession 13, Hagarty Twp.<sup>53</sup> A 1912 fee simple grant from James Foy McIntyre to the Hydro-Electric Power Company of Ontario (“HEPC”) for flooding purposes, registered as Instrument 1938, included all of the lands in Lot 12, Concession 13 of Hagarty Township, lying **below the contour** having an elevation “six (6) feet above the low water level of Round Lake as

<sup>52</sup> The entirety of Plan 49R-17360 is reproduced in MRP Tab 21, p 149. Please note that this plan is in metric, and that 32.92 metres is equal to 108 feet. See de Rijcke Cross p 91, q 362-364, SuppMRD Vol 1, Tab 3, p 699

<sup>53</sup> PIN 57526-0038(LT), MRD Vol 3 Tab 8(D)(2)(A), pp 1096-1097.

established in the month of March of the year 1911”. According to Mr. Stewart’s evidence, this was intended to refer to the 108 Contour, which therefore became fixed as the water side boundary for this lot at the time of execution of the document.<sup>54</sup> Plan 49R-3768 showing Part 1 of Mr. Boland’s lands therefore depicts the water side boundary as the 108 Contour, with reference to the HEPC Licence of Occupation.<sup>55</sup>

94. Grahame Plaunt’s property is located in Lot 25, Concession 4, Richards Twp.<sup>56</sup> This lot was subject to a quit claim granted by August Summer, a locatee, to HEPC in 1912.

- (a) The quit claimed area constitutes the lands below a contour line “six feet above shore line in March 1911”, in other words the 108 Contour, as shown on a 1917 Boswell survey.<sup>57</sup> The quit-claimed lands, measuring 8.6 acres, are upland from the SRA.
- (b) Subsequent Letters Patent granting the remainder of Lot 25 in fee simple referred to the relevant Boswell survey as the water side boundary of the granted lands.<sup>58</sup>
- (c) Licence of Occupation 647 (replaced by LO 8414) permits the licence holder to flood only the lands specified in the relevant Boswell survey.<sup>59</sup>
- (d) The reference plan depicting Mr. Plaunt’s property in Lot 25, Con. 4 refer specifically to the 108 Contour as the water side boundary.<sup>60</sup>

---

<sup>54</sup> Report of Ronald J. Stewart dated August 18, 2016 (“Stewart 2016 Report”) at para 3.3, SuppMRD Vol. 3, Tab 2(B), p. 560. Mr. Stewart notes that Instrument 1938 does not state a specific elevation for the selected contour, but rather employs the 108-foot contour indicated on the 1911 overall plan, as traced on the sketch attached to the deed.

<sup>55</sup> Reference Plan 49R-3768 deposited October 23, 1978, MRP Tab 33, p 161

<sup>56</sup> PIN 57532-0094(LT), MRP Tab 7, p 134

<sup>57</sup> Plan of Part Lot 25 – Concession IV by EJ Boswell OLS dated March 8, 1917, being Appendix 33 to the Report of Ronald J. Stewart 2013 dated August 31, 2014 (“Stewart 2013 Report”), SuppMRD Vol 3 Tab 2A(33) p. 482

<sup>58</sup> Letters Patent issued to August Summer dated April 30, 1920, being Appendix 34(A) to Stewart 2013 Report, SuppMRD Vol 3 Tab 2A(34A)

<sup>59</sup> Stewart 2013 Report at para D.3.14, SuppMRD Vol 1, Tab 2A, p 142

<sup>60</sup> Plan 49R-14282, MRP Tab 26, p 154

95. The apparent frequency with which the boundaries of Class members' lands – including the representative plaintiffs - are defined or appear to be defined with reference to the upper limit of RPG's flooding rights on plans of survey is strongly supportive of the Court's conclusion in the Certification that an interpretation of those flooding rights as granted by the Licenses of Occupation is of common interest to the Class.

#### ***4. Opinion evidence regarding water side boundaries***

96. Finally, Mr. Stewart has opined that in many locations around Round Lake, the water side boundary of private lands is the 108 Contour, either because the lands were granted with reference to the HEPC's flooding rights, or because the HEPC obtained flooding rights from landowners with reference to the 108 Contour. Critically for the purposes of this action, he has also opined that where the 108 Contour becomes the boundary of private property, it is fixed at that point regardless of subsequent erosion that may change the contours of the land.<sup>61</sup>

97. An annotated version of a 1911 HEPC contour plan (the "Annotated 1911 Plan") prepared by Mr. Stewart shows the shoreline extent of flooding rights acquired by HEPC along the shore of Round Lake.<sup>62</sup> The Annotated 1911 Plan depicts, among other things:

- (a) lands acquired for flooding by the HEPC through fee simple grant from private landowners, coloured orange. Mr. Stewart has opined that the upper limit of the acquired lands was defined as the 108 contour as it was located in Boswell's 1911 survey work.<sup>63</sup>
- (b) lands for which HEPC acquired the right to flood from the Crown by License of Occupation, coloured pink. Mr. Stewart has opined that where (currently) LO 8330,

---

<sup>61</sup> Stewart 2016 Report at para 2.6, SuppMRD Vol 3, Tab 2(B), p 560.

<sup>62</sup> 1911 HEPC Contour Plan as annotated by Ronald Stewart, being Appendix 6 to 2016 Stewart Report, SuppMRD Vol 3, Tab 2(B)(6), p. 582

<sup>63</sup> Stewart 2016 Report at para 6.3, SuppMRD Vol 3, Tab 2(B), p 563

LO 8414, LO 8445 and LO 8446 apply, the flooding limit is bounded on the landward side by the 108 contour as defined in the 1917 OLS Boswell plans that form parts of those respective License documents.<sup>64</sup>

- (c) lands for which the HEPC acquired flooding easements from private landowners, shown in blue. Mr. Stewart has opined that in each such case, the upper limit of the acquired easement was defined as the 108 contour as it was located in the 1911 survey work.<sup>65</sup>

98. The Annotated 1911 Contour Plan together with Mr. Stewart's report are further *prima facie* evidence that a significant portion of the private properties contiguous to Round Lake have waterside boundaries defined by reference to the 108 Contour.

#### ***5. Defendant's math does not justify decertification***

99. The defendant's expert estimates that there are "about 400 separate properties around the perimeter of the lake", and subtracts the 78 opt-outs and his estimated 100 further properties which meet his criteria for exclusion, presumably leaving up to 222 for which the 108 Contour is or may be a property line.<sup>66</sup>

100. However affidavit evidence from Gordon McCay, a property owner familiar with the lake, indicates that based on his systematic review of Provincial Assessment Maps there are approximately 513 properties falling within the Class definition.<sup>67</sup> A listing of each of these properties by municipal address, tax roll number and owner's name is attached as an exhibit to Mr. McCay's affidavit. While the defendant's expert suggested that assessment maps might produce inaccurate tally results, he did not identify any such errors and the defendant did not cross-examine

---

<sup>64</sup> *Ibid* at para 6.4, SuppMRD Vol 3, Tab 2(B), p. 563

<sup>65</sup> *Ibid* at para 6.5, SuppMRD Vol 3, Tab 2(B), pp 563-564

<sup>66</sup> de Rijcke 2016 Report at para 1.3, MRD Vol 1, Tab 2(B), p 47

<sup>67</sup> Affidavit of Gordon McCay sworn July 28, 2016 at para 5, MPR Tab 1, p. 2

Mr. McCay.<sup>68</sup> The plaintiffs submit that the results of Mr. McCay's systematic review are therefore to be preferred over the defendant's "estimate".

101. Of these 513 private properties, the owners of 78 have opted out of the class, leaving 435. Even if the defendant's expert is correct in his opinion that there are "at least 100" properties for which the 108 Contour cannot form the relevant boundary (an opinion that is subject to doubt, as discussed above), this still leaves 335 properties for which it does or may.

102. The take-away point under this subheading is that even if the Court accepts the defendant's argument that there are some Class members who have no interest in the determination of the Common Issue (which the plaintiffs deny), there are still more than enough individual landowners who have a direct and compelling interest in an interpretation of the Licence(s) of Occupation and the meaning of the 108 Contour as these pertain to their Round Lake properties to constitute a class ("two or more persons") for the purposes of the CPA.

***6. The potential challenges involved in locating the 108 contour are irrelevant to the determination of the Common Issue***

103. The defendant and its current expert place considerable emphasis on the difficulties that would be faced by a surveyor in locating the 108 Contour for the purpose of determining whether RPG has trespassed on individual private lands by causing water to flow thereon. RPG argues that the location of 108 Contour must be determined on a property by property basis and that Boswell's surveys, being to some extent inaccurate or incomplete, could not be relied upon for this activity. In the absence of a "one size fits all" approach to retracing the 108 Contour, RPG suggests that nothing can be gained from determining the Common Issue.

---

<sup>68</sup> Report of I. de Rijcke dated October 13, 2016 at para. 1.1, SuppMRD Vol. I, Tab 1, p.3; de Rijcke Cross at pp 41-44, q 157-171, SuppMRD Vol 4, Tab 3, pp 649-652

104. To the contrary, individual determination of the precise location of the 108 Contour is **not** necessary in order to adjudicate the Common Issue. The question underlying this proceeding is whether the Licence(s) of Occupation were intended to create and enforce a **fixed** flooding limit at a contour line of 108 feet (or 107.5 feet) local datum as established by survey work completed at or before the time of initial flooding. There is no requirement in law or logic for every class member to determine the precise location of that contour line before obtaining a determination of this issue.

105. As is also set out above, evidence and copious argument from RPG regarding the likely challenges in locating the 108 Contour was before the Court on the Certification Motion. Indeed, the affidavit of Doug Fraser submitted by the plaintiffs on the Certification Motion discloses that class members had, before launching this action, consulted an expert witness who had advised that significant field work would have to be done in order to retrace the Boswell survey and locate the 108 Contour.<sup>69</sup>

106. In the face of this evidence and argument the Court clearly accepted that there would be individual issues as to trespass and damages, but that the determination of the Common Issue could provide a basis for at least some Class members to understand and take further steps to enforce their rights against RPG.

107. In any event, there does not appear to be any dispute that a qualified land surveyor could, using the best evidence available, including but not limited to survey plans produced by Boswell,

- (a) locate the position of the upland boundary of the original SRA;
- (b) retrace the Boswell surveys where applicable;
- (c) locate the normal ordinary position of the shoreline prior to artificial flooding;

---

<sup>69</sup> Affidavit of Doug Fraser sworn March 24, 2010 at para. 15, MRD Vol. 2, Tab 8(A)(4), pp 237-238

- (d) determine the extent of flooding rights acquired by RPG or its predecessors;
- (e) identify where erosion has occurred subsequent to artificial flooding; and
- (f) determine where and to what extent the water stored in Round Lake has exceeded the rights granted to RPG.<sup>70</sup>

108. Moreover, there can be no serious dispute that although some properties would require individual treatment, in some or many cases adjacent properties share characteristics that would allow the application of common principles. This process may, in time, require further assistance from the Court.

**G. Importance to the Class of interpreting the Licence(s) of Occupation and the 108 Contour**

109. Based on the documents and opinion evidence on the record of this Motion, it is apparent

- (a) RPG's right to store water in Round Lake is authorized and governed by one or more Licences of Occupation which authorize flooding only of lands specifically identified in such Licenses;
- (b) some significant portion, if not the majority of the properties belonging to Class members are or appear to be bounded by something referred to by surveyors as a "108 (or 107.5) contour" or similar references, which either expressly or by reasonable implication refer to the flooding limit imposed on RPG by its Licence of Occupation.

110. The plaintiffs allege that the intent and effect of the Licences of Occupation is that the 108 Contour, properly located, is the basis for permanently fixed upper limits for RPG's flooding rights. Mr. Stewart has opined that in accordance with this intent, HEPC obtained from private

---

<sup>70</sup> *Ibid*; Stewart 2013 Report at para D.7.2, SuppMRD Vol 1, Tab 2A, p 151

landowners or locatees by various means the right to flood lands **below** the 108 Contour.<sup>71</sup> Likewise, many private landowners obtained their lands with the water side boundary defined as the 108 Contour. RPG and its predecessors have relied upon these defined flooding rights for the last 100 years.

111. The plaintiffs have therefore requested, on behalf of the Class, that the Licences of Occupation and the 108 Contour, which have never before been addressed by a Court, be interpreted for the purpose of determining the rights of Class members as against RPG's water storage practices. Those persons within the Class who do not wish to be bound by this determination or who believe they have nothing to gain from it have opted out.

112. RPG, through its expert, appears to concede in this proceeding that the 108 Contour does in fact constitute the boundary as between public (floodable) and private (non-floodable) lands at least where and to the extent lands have been granted or conveyed with reference to it.<sup>72</sup> However RPG has taken the position that even where the 108 Contour properly constitutes a boundary, it is not fixed but can move inland where erosion – even when caused by RPG itself - alters the contours of the shoreline, in effect expropriating more water storage capacity beyond what was allocated by the Licenses of Occupation. Put otherwise, RPG claims that its Licence of Occupation entitles it to raise the waters of Round Lake to an elevation of 107.5 feet local datum **as measured at the dam** without any consideration for where those waters may flow as a result.

113. The issue to be resolved on behalf of the Class is therefore whether on a proper interpretation of the Licences of Occupation, the 108 Contour represents a **fixed division** between land that RPG can flood and land that it cannot, for the purposes of the Class' claims of trespass.

---

<sup>71</sup> Stewart 2016 Report at sections 2, 3 and 6, SuppMRD Vol 3, Tab 2B, pp 558-561

<sup>72</sup> de Rijke Cross at pp 119-121, q 478-481; SuppMRD Vol 4, Tab 3, pp 727-729

114. This issue is fundamental and should be resolved before any individual class member is obligated to go to the effort and expense to determine precisely where or even whether the 108 Contour lies on his or her property.

115. Out of the modified trial of the Common Issue, the Court will make a determination as to the meaning and application of the Licence(s) of Occupation and their limits. The plaintiffs submit that this determination will provide grounds for some or all of the Class, individually or otherwise, to obtain tangible relief against RPG, be it in the form of an injunction requiring compliance with its flooding limits, a basis for seeking damages or other measures.

116. Following this determination, the Court may then move to the questions, as contemplated in the Certification Reasons, of whether incursions of stored water beyond the 108 Contour constitute *prima facie* trespass, whether the plaintiffs have been damaged by such trespass, and the limitations issue raised by RPG.

117. Some Class members or groups of Class members may need to obtain surveys of their lands or seek further assistance from the Court in order to establish their rights. Others still may be disappointed to discover that the Court's ruling does not assist them at all in their struggles with RPG. In any case the litigation will have been progressed for the class as a whole.<sup>73</sup>

118. The plaintiffs submit in conclusion that Round Lake is a water body shared by many hundreds of persons each with rights to quiet enjoyment of their property rights. RPG's actions in exercising of its licence to exploit the waters of Round Lake have the potential to detrimentally affect each of those other stakeholders. In accordance with the public trust placed in it through the issuance of the Licences of Occupation, RPG has a good faith obligation to cooperate in the proper

---

<sup>73</sup> *Dell'Aniello c. Vivendi Canada Inc.* SCC 2014 1 at paras. 45-47, PBA Tab 6

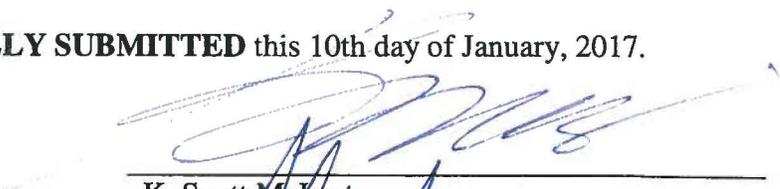
and fair adjudication of a *bona fide* legal issue raised in relation to its rights vis-à-vis other stakeholders around the lake. This Motion, it is submitted, is not only without merit but is contrary to that greater obligation.

#### **PART VI – ORDER REQUESTED**

119. The Plaintiffs respectfully request an Order

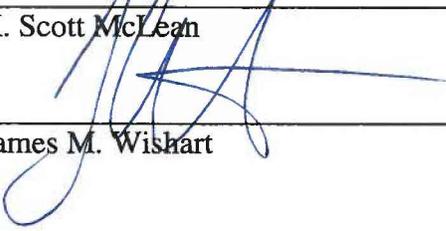
- (a) dismissing the herein Motion;
- (b) setting a timeline for the remainder of the steps set out in the Procedure Reasons;
- (c) extending the time for setting down for trial pursuant to Rule 48.14(1); and
- (d) granting their costs of the Motion, plus HST, on the substantial indemnity scale.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 10th day of January, 2017.



---

K. Scott McLean



---

James M. Wishart

Dentons Canada LLP  
Lawyers for the Plaintiffs

## APPENDIX “A”

### Reference Plans referred to in the de Rijcke June 2016 Report

Each of the following plans referenced in the defendant’s expert’s June 2016 Report depicts one or more parcels with a waterside boundary that is or is coincidental with the 108 Contour.

1. **Plan 49R-8518** (MRD Vol.1, p. 107): Part 2 on this plan, which appears to have been prepared for the purpose of an SRA closure application, lies between the upland limit of the Shore Road Allowance (the “SRA”) and the 108 Contour. The water side boundary of the property is shown as the 108 contour.
2. **Plan 49R-9873** (MRD Vol.1 p. 108): This plan depicts the water side boundary of Part 1 as the “normal ordinary water’s edge and contour of elevation 562.3’(GSC)”, which is shown to be coincident with the upland boundary of the SRA. A note confirms that 562.3’ (GSC) = Contour of Elevation 108 (Assumed).
3. **Plan 49R-15566** (MRD Vol.1 p. 109) Part 5 on this plan represents the land fronting Part 1 which lies between the upland limit of the SRA and the 108 Contour. It appears that Part 5 was laid out with a view to a road closing by the Township and a subsequent transfer to the upland property owner. The water side boundary of the property is described as the “water’s edge of controlled water level & 108 Contour”. This plan contains the 108 Benchmark Note.
4. **Plan 49R-4942** (MRD Vol.1 p. 110): The water side boundaries of Parts 1,2,3,4, and 7 are shown as the “HEPC Flood Limit 32.918 contour set from Plan 49R-3821”. Plan 49R-3821 has a surveyor’s note as follows: “the 32.918 contour as shown hereon is derived from Ontario Hydro Datum and is referred to an Ontario Hydro Bench Mark which is located on top of a brass plug in a big boulder on the right bank of the Bonnechere River 3.048 m downstream from the end of the Round Lake Dam and has an elevation of 34.275”.<sup>74</sup> This plan is measured in metric; 32.918 metres equals 108 feet. In other words, the water side boundaries of Parts 1-4 and 7 on Plan 49R-4942 are at the 108 contour.
5. **Plan 49R-11286** (MRD Vol.1 p. 111). Part 2 on this plan, which appears to have been prepared for the purpose of an SRA closure application, represents the land lying between the upland limit of the SRA and the 108 Contour. The water side boundary of the property is shown as the 108 contour. This plan contains the 108 Benchmark Note.
6. **Plan 49R-9169** (MRD Vol.1 p. 112) The water side boundary of Part 2 on this plan is shown as the 108 contour as per the note on the Plan. No SRA is shown on the plan. This plan contains the 108 Benchmark Note.

---

<sup>74</sup> Reference Plan 49R-3821, MRP Tab 22, p 150

7. **Plan 49R- 8280** (MRD Vol.1 p. 112A) Approximately half of the water side boundary of Part 1 on the Plan is coincident with the 108 Contour and with the upland boundary of the SRA. This plan contains the 108 Benchmark Note.
8. **Plan 49R-16331** (MRD Vol.1 pp. 112B and 116). Part 2 on this plan, which appears to have been prepared for the purpose of an SRA closure application, represents the land lying between the upland limit of the SRA and the 108 Contour. The water side boundary of the property is shown as the 108 contour. This plan contains the 108 Benchmark Note.
9. **Plan 49R-16449** (MRD Vol.1 p. 112C). Part 2 on this plan represents the land lying between the upland limit of the SRA and the 108 Contour. Part 2 appears to have been laid out with a view to a road allowance closing by the Township and a subsequent transfer to the upland property owner. This plan contains the 108 Benchmark Note, using metric measurements. The water side boundary of the property is shown as the 108 contour.
10. **Plan 49R-16960** (MRD Vol.1p. 112D). The upland boundary of Parts 5, 6, and 7 is shown to be the 108 Contour, with the entire SRA flooded. It follows that the 108 Contour is the upland limit of a flooding easement granted by the instrument numbers referenced on the plan.
11. **Plan 49R-8936** (MRD Vol.1 p. 112F Part 2 on this plan, which appears to have been prepared for the purpose of an SRA closure application, represents the land lying between the upland limit of the SRA and the 108 Contour. This plan contains the 108 Benchmark Note. The water side boundary of the property is shown as the 108 contour.
12. **Plan 49R- 1230** (MRD Vol.1 p. 112G). The water side boundary of Parts 2 and 3 on the plan is coincident with the 108 Contour **and** with the upland boundary of the SRA.
13. **Plan 49R- 4998** (MRD Vol.1p. 112I). The water side boundary of Parts 1,4,7 and 10 on the plan is coincident with the 108 contour. The SRA is not shown on the Plan. A note on the plan states that the 108 Contour was set from contour as shown on Plan RD-86, which in turn contains a note stating that the “108 ft. Contour [was] established from dam at outlet of Round Lake”.<sup>75</sup>
14. **Plan 49R-14557** (MRD Vol.1 p. 117) This plan depicts the original SRA completely flooded and describes Part 1 as subject to a flooding easement to RPG up to the 108 Contour pursuant to the instruments referenced on the plan.
15. **Plan 49R-16294** (MRD Vol.1 p. 118): The water side boundary of Part 4 appears to be coincident with the 108 Contour, with the original shore road allowance depicted as flooded. This plan contains the 108 Benchmark Note.
16. **Plan 49R-9960** (MRD Vol.1 p. 120): The water side boundary of parts 2, 4, 5, 6 and 7 on this plan is shown as coincident with the 108 Contour. This plan contains the 108 Benchmark Note.

---

<sup>75</sup> Reference Plan RD-86, MRP Tab 8, p 136

## APPENDIX "B"

### **List of Reference Plans in the parties productions which depict the 108 Contour as a water-side boundary**

1. Richards Twp., Concession 1, Lot 2, Plan RD86 dated October 24, 1969 (Plaintiffs' Affidavit of Documents ("PAOD") no. 151)
2. Richards Twp., Concession 1, Lot 2, Plan 416, dated October 27, 1971 (PAOD Document no. 152)
3. Richards Twp., Concession 1, Lot 22, Plan 49R-14278 dated January 11, 2000 (PAOD Document no. 216)
4. Richards Twp., Concession 1, Lot 23, Plan 49R-9873 dated February 16, 1990 (PAOD Document no. 184)
5. Richards Twp., Concession 1, Lot 24, Plan 49R-9325 dated March 31, 1989 (PAOD Document no. 182)
6. Richards Twp., Concession 2, Lot 2, Plan 49R-12364 dated September 30, 1994 (PAOD Document no. 206)
7. Richards Twp., Concession 2, Lot 11, Plan 49R-12389 dated October 19, 1994 (PAOD Document no. 207)
8. Richards Twp., Concession 2, Lot 25, Plan 49R-5011 dated August 13, 1980 (PAOD Document no. 167)
9. Richards Twp., Concession 2, Lot 25, Plan 49R-7098 dated September 18, 1984 (PAOD Document no. 173)
10. Richards Twp., Concession 3, Lot 2, Plan 49R-6290 dated December 20, 1982 (PAOD Document no. 171)
11. Richards Twp., Concession 3, Lot 12, Plan 49R-9150 dated November 29, 1988 (PAOD Document no. 180)
12. Richards Twp., Concession 3, Lot 13, Plan 49R-12362 dated September 30, 1994 (PAOD Document no. 205)
13. Richards Twp., Concession 3, Lot 25, Plan 49R-6345 dated January 17, 1983 (PAOD Document no. 172)
14. Richards Twp., Concession 3, Lot 25, Plan 49R-17360 dated September 2, 2010 (PAOD Document no. 192)
15. Richards Twp., Concession 3, Lots 25 and 26, Plan 49R-3821 dated November 14, 1978 (PAOD Document no. 55)

16. Richards Twp., Concession 4, Lot 25, Plan 49R-10378 dated December 6, 1990 (PAOD Document no. 189)
17. Richards Twp., Concession 4, Lot 25, Plan 49R-10423 dated January 8, 1991 (PAOD Document no. 190)
18. Richards Twp., Concession 4, Lot 25, Plan 49R-10505 dated February 28, 1991 (PAOD Document no. 191)
19. Richards Twp., Concession 4, Lot 25, Plan 49R-14282 dated January 14, 2000 (PAOD Document no. 217)
20. Richards Twp., Concession 5, Lot 12, Plan 49R-11933 dated October 27, 1993 (Defendant's Affidavit of Documents ("DAOD") no. 75)
21. Richards Twp., Concession 6, Lot 17, Plan 49R-1092 dated September 5, 1974 (PAOD Document no. 155)
22. Richards Twp., Concession 6, Lot 24, Plan 49R-1453 dated May 15, 1975 (PAOD Document no. 157)
23. Richards Twp., Concession 6, Lot 24, Plan 49R-10741 dated August 26, 1991 (PAOD Document no. 193)
24. Hagarty Twp., Concession 13, Lot 2, Plan 4R-4153 dated May 28, 1979 (PAOD Document no. 164)
25. Hagarty Twp., Concession 13, Lot 2, Plan 49R-10823 dated October 15, 1991 (PAOD Document no. 196)
26. Hagarty Twp., Concession 13, Lot 12, Plan 49R-3768 dated October 23, 1978 (DAOD Document no. 76)
27. Hagarty Twp., Concession 13, Lot 12, Plan 49R-4010 dated February 19, 1979 (PAOD Document no. 163)
28. Hagarty Twp., Concession 13, Lot 12, Plan 49R-7373 dated April 24, 1985 (PAOD Document no. 174)
29. Hagarty Twp., Concession 13, Lot 12, Plan 49R-7486 dated July 19, 1985 (PAOD Document no. 175)
30. Hagarty Twp., Concession 13, Lot 12, Plan 49R-11273 dated August 21, 1992 (PAOD Document no. 195)
31. Hagarty Twp., Concession 13, Lot 14, Plan 49R-1828 dated October 24, 1975 (PAOD Document no. 158)

32. Hagarty Twp., Concession 13, Lot 15, Plan 49R-10625 dated June 12, 1991 (PAOD Document no. 192)
33. Hagarty Twp., Concession 13, Lot 18, Plan 49R-10297 dated October 15, 1990 (PAOD Document no. 188)
34. Hagarty Twp., Concession 13, Lot 20, Plan 49R-12205 dated June 10, 1994 (PAOD Document no. 204)

## **SCHEDULE “A”**

### **LIST OF AUTHORITIES**

*Ducharme v. Solarium De Paris Inc.* 2014 ONSC 1684 (OSCJ)

*Barbour v. University of British Columbia* 2007 BCSC 800 (BCSC)

*Harrington v. Dow Corning Corp.* 2002 BCSC 511 (BCSC)

*Toms Grain & Cattle Co. v. Arcola Livestock Sales Ltd.* 2006 SKQB 373 (SCQB)

*Cloud v. Canada (Attorney General)* 2004 CarswellOnt 5026 (ONCA)

*Dell’Aniello v. Vivendi Canada inc.* 2014 SCC 1 (SCC)

*Wright v. United Parcel Service Canada Ltd.* 2015 ONSC 2220 (Div Ct)

*Webb v 3584747* 2005 CarswellOnt 499, [2005] OJ No 449 (OSCJ), leave to appeal ref’d  
2005 CarswellOnt 3394, [2005] O.J. No. 3306 (Div. Ct.)

## SCHEDULE “B”

### TEXT OF STATUTES, REGULATIONS & BY - LAWS

#### *Class Proceedings Act, 1992, SO 1992, c 6*

#### **Definitions**

- 1 In this Act,  
“common issues” means,
- (a) common but not necessarily identical issues of fact, or
  - (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts; (“questions communes”)

[...]

#### **Plaintiff’s class proceeding**

- 2(1) One or more members of a class of persons may commence a proceeding in the court on behalf of the members of the class.

[...]

#### **Certification**

- 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 discloses 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 the resolution of the common issues; and
  - (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 interests of other class members.

[...]

### **Certain matters not bar to certification**

6. The court shall not refuse to certify a proceeding as a class proceeding solely on any of the following grounds:
  1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.
  2. The relief claimed relates to separate contracts involving different class members.
  3. Different remedies are sought for different class members.
  4. The number of class members or the identity of each class member is not known.
  5. The class includes a subclass whose members have claims or defences that raise common issues not shared by all class members.

[...]

### **Where it appears conditions for certification not satisfied**

- 10(1) On the motion of a party or class member, where it appears to the court that the conditions mentioned in subsections 5 (1) and (2) are not satisfied with respect to a class proceeding, the court may amend the certification order, may decertify the proceeding or may make any other order it considers appropriate.

### **Proceeding may continue in altered form**

- (2) Where the court makes a decertification order under subsection (1), the court may permit the proceeding to continue as one or more proceedings between different parties.

### **Powers of court**

- (3) For the purposes of subsections (1) and (2), the court has the powers set out in clauses 7 (a) to (c).

### **Court may determine conduct of proceeding**

- 12 The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.

GRAHAME PLAUNT et al.  
Plaintiffs

- and -

RENFREW POWER GENERATION INC.  
Defendant

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT OTTAWA

**RESPONDENTS FACTUM**

**Dentons Canada LLP**

1420 - 99 Bank Street  
Ottawa ON K1P 1H4

**K. Scott McLean**

LSUC # 16455G  
Tel: (613) 783-9665  
scott.mclean@dentons.com

**James M. Wishart**

LSUC # 58794G  
Tel: (613) 783-9651  
james.wishart@dentons.com

Fax: (613) 783-9690

Lawyers for the Plaintiffs

Name, Fax number and Email for party served:

Alan H. Mark / (416) 979-1234 / amark@goodmans.ca

Melanie Ouanounou / (416) 979-1234 / mouanounou@goodmans.ca