

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

**GRAHAME PLAUNT, PETER PLAUNT
and ALAN PLAUNT**

Plaintiffs

- and -

RENFREW POWER GENERATION INC.

Defendant

Proceeding Under the Class Proceedings Act, 1992

**FACTUM OF THE PLAINTIFFS
(Certification Motion)**

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PART I - THE MOTION

1. This is a motion for, among other things, certification of this action as a class proceeding under ss.2 (2) of the Class Proceedings Act, S.O. 1992, c.6.

Representative Plaintiffs

2. As initially presented, this motion (consistent with the state of the pleading at that time) identified the plaintiffs Grahame Plaunt, Peter Plaunt and Alan Plaunt as representative plaintiffs.

3. However, Peter Plaunt and Alan Plaunt are no longer owners along with Grahame Plaunt of the lands described by Grahame Plaunt in his affidavit. Grahame Plaunt is now sole owner of those lands. While Peter and Alan Plaunt continue to be potential members of the Class referred to in paragraph 3(i) of the amended notice of motion in their capacity as former owners, it is proposed that they be removed as representative plaintiffs.

4. In their stead, it is proposed that Kenneth L.W. Boland, whose affidavit was also filed in support of the motion, be named as a representative plaintiff along with Grahame Plaunt.

5. The notice of motion was accordingly amended at paragraph 2 to deal with these changes. The amended notice of motion therefore seeks an order appointing Grahame Plaunt as representative plaintiff; an order amending the title of proceedings by removing Peter Plaunt and Alan Plaunt as representative plaintiffs; and an order appointing Kenneth L.W. Boland as a representative plaintiff in their stead, and amending the title of proceedings by adding Kenneth L. W. Boland as a representative plaintiff.

The Amended Amended Statement of Claim

6. The statement of claim as originally issued has been amended on two occasions. The first amendment broadened certain allegations in the claim and added other factors. The second amendment brought the damages claim in line with the evidence that had developed and removed a request for relief in respect of the Bonnechere River Water Management Plan. The effect of this amendment was to reduce the Common Issues from 4 four (a-d) to three³ (a, b, d). The amended amended statement of claim is hereinafter referred to as the "statement of claim".

PART II - OVERVIEW

7. As expanded upon below, this claim is brought against the defendant in intentional and continuous trespass. Here, the plaintiffs claim that through its operation of a dam, the defendant has over many years and on many occasions caused water stored for its own purposes to intrude upon and to do damage to their lands. The plaintiffs say that their rights as riparian owners are intentionally and continuously trespassed against each time that the defendant, in operating its dam, exceeds limits set out in Licences of Occupation granted to the defendant by the Ministry

of Natural Resources (Ontario) and causes water to flow onto their lands. Since this trespass *prima facie* arises each and every time the limit prescribed in the Licences is exceeded, all potential members of the Class defined in the statement of claim are affected in the same way insofar as his aspect of the claim is concerned: all prospective Class members have suffered a *prima facie* trespass.

8. In advancing this claim, the plaintiffs invoke the ancient common law principle expressed in the 18th-century English case *Tenant v. Goldwin*: “Every one must so use his own, as not to do damage to another.” The principle rests not just upon foundations of neighbourliness and good common sense, but upon the “sacred” inviolability of one person’s land against virtually any intrusion by another.

**Salmond & Heuston, *Law of Torts* 21st Ed. (London: Sweet and Maxwell, 1996) at pp. 40-41
PLAINTIFFS' BOOK OF AUTHORITIES, Tab 1**

***Tenant v. Goldwin* (1704) 92 E.R. 222
PLAINTIFFS' BOOK OF AUTHORITIES, Tab 2**

***Entick v. Carrington* (1765) 95 E.R. 807 at 818
PLAINTIFFS' BOOK OF AUTHORITIES, Tab 3**

9. The circumstances giving rise to this claim would have been familiar to the judges who decided those early cases. Despite the efforts of many affected persons to resolve this issue without litigation, the defendant has refused to respect its neighbours’ property rights and continues its wrongful use of private lands around the lake. In line with the long history of cases wherein persons have received the court’s assistance against overreaching neighbours, the plaintiffs now ask this court to compel the defendant to cease its trespass and to compensate them for their losses.

10. The systemic nature of the trespass complained of is such that many are harmed but few have the resources to pursue a remedy. As a first step to such remedy, the plaintiffs thus seek certification of this action as a class proceeding under the *Class Proceedings Act 1992*, S.O. 1992, c.6 ("CPA").

PART III - STATEMENT OF FACTS

11. The following statement comprises facts which this Court is entitled to treat as true on the motion.

Round Lake

12. Round Lake is located about 60 km west of Renfrew, Ontario on the Bonnechere River, and is a natural lake. Until the interference by the defendant and its predecessors referred to below, however, water flowed naturally into and out of Round Lake. As a result of the activities of the defendant, water now flows naturally *into* Round Lake but the flow of water *out of* Round Lake, and therefore the level of Round Lake at any given point in time is controlled by the defendant.

13. Round Lake is the most important of several hydro reservoirs along the Bonnechere River system, which also supports significant cottage and residential communities. Areas around Round Lake in particular, where there are in excess of 450 property owners, have considerable seasonal and year round development.

14. The proposed representative plaintiffs (the "plaintiffs") Grahame Plaunt and Ken Boland own cottage property on Round Lake. Don Bohart and Doug Fraser, who have likewise filed affidavits in support of this motion, are also property holders on Round Lake and as such are members of the putative Class.

The Defendant Renfrew Power Generation Inc.

15. Renfrew Power Generation Inc. (“RPG” or the “Defendant”) owns and operates a dam (the “Tramore Dam”) on the Bonnechere River at the outlet of Round Lake near Tramore, Ontario, about 60 km upstream from the Town of Renfrew. It also operates other structures on the Bonnechere River system, as can be seen by reference to the descriptions of Reaches 8 through and including Reach 3 on the River, as described in the Bonnechere River Water Management Plan (“the Plan”) referred to below.

16. RPG is a for-profit corporation owned by the Town of Renfrew for the purpose of generating of hydroelectricity. Prior to the enactment of the *Energy Competition Act, 1998* the Tramore Dam was controlled by Renfrew Hydro Electric Commission of the Town of Renfrew. After 1998, the Commission was restructured such that the privately-owned RPG became responsible for generation and Renfrew Hydro Inc., owned by the Town of Renfrew, became responsible for distribution.

17. RPG is licensed by the Ontario Energy Board and its current licence is valid until October 6, 2023 (a 20 year term). In 2010 RPG signed a long term contract with the Ontario Power Authority for the generation of electricity at 6.9 cents per kilowatt hour.

Licence of Occupation

18. The parties understand that the Tramore Dam was installed in 1913 in response to a demand for waterpower during the summer months to supply industrial operations in the Town of Renfrew. The Tramore Dam thus represented the first artificial interference with the level and flow of Round Lake.

19. In 1917 the Ontario government granted licences of occupation to permit Ontario Hydro, as it then was, to store water in Round Lake and thereby increase the level of the Lake for hydro generating purposes. The Plan notes that "Licences of Occupation have been issued to RPG, authorizing them to flood to certain elevations on these Lakes" (referring to Round Lake and other Lakes on the Bonnechere River System). The grant of these Licences of Occupation represented the first state sanctioned interference with the Lake.

20. The Licences of Occupation allowed Ontario Hydro to increase the lake level to a mark known for the purposes of this litigation as the "108-foot line". The 108-foot-line is a geodetic vertical measurement (actually 107.5 feet) which is based on a measurement taken from an Ontario Hydro assumed datum referring to a brass plug in a large boulder located on the right bank of the Bonnechere River, ten feet from the end of the Tramore Dam.

21. Relying on this vertical datum, a survey was prepared in 1917 by E.J. Boswell, O.L.S. in 1917 ("the Boswell Survey") which determined precisely which lands around the lake would be flooded when the water level reached the authorized maximum of 107.5 feet at the dam site. The boundary of the prospectively flooded lands was rendered as a contour line around the lake on the survey map.

22. At the time of these grants, the Ontario Crown went to some lengths to reserve as public lands all lands *on the water side* of this 108-foot contour as shown in the Boswell Survey.

23. The prevailing Licences of Occupation were granted to what is now RPG on October 18, 1972 pursuant to the *Public Lands Act*, R.S.O. 1970 c.380, s. 23. These Licences permitted the Hydro-Electric Commission of the Town of Renfrew to "enter upon, occupy, use and enjoy during the pleasure of the Crown for the purpose of water storage" certain public lands as

defined by the licences, specifically lands and lands under water below the elevation of 107.5, local datum (i.e. the 108-foot-line as described in the 1917 Boswell Survey).

24. The plaintiffs plead in paragraph 12 of the statement of claim that the public policy behind restricting the ability of Ontario Hydro and subsequently RPG to store water in Round Lake up to but not beyond the 108 foot contour level was to guarantee and protect the then existing shorelines from erosion and other consequences of water and ice rising beyond that level. They plead that this policy recognized the private rights, including but not limited to the riparian rights, of owners of lands, including the plaintiffs, contiguous to Round Lake, and on the Bonnechere River between Round Lake and the Tramore Dam.

25. The plaintiffs also plead (paragraph 13 of the statement of claim) that the Licences of Occupation were accordingly restricted to public lands, and granted no right or authority to Ontario Hydro or its successor RPG to occupy or to interfere with private lands. They plead that the Licences have the effect at law of allowing RPG to control the level of Round Lake, through operation of the dam, and only as reasonably required, up to but not in excess of the 108 foot contour line

26. Accordingly, the plaintiffs plead (paragraph 4 of the statement of claim) that they are riparian owners and that RPG has trespassed upon their lands. The trespass referred to by the plaintiffs is the breach by RPG of the terms and conditions of the Licences of Occupation, the Licences being the only authority on which RPG can rely in support of its interference with the natural drainage and therefore the level of Round Lake.

Bonnechere River Water Management Plan

27. Since 2004 the water storage regime in Round Lake and along the Bonnechere River has also been governed by the Plan, which was created pursuant to the *Lakes and Rivers Improvement Act* R.S.O. 1990, c. L3, s. 23.1(7). The Plan aims in part at reconciling and balancing the various interests at stake in the generation of hydroelectricity and has been amended several times in pursuit of that goal. However, when setting operating limits for Round Lake, the Plan expressly recognizes the flooding limits on Round Lake as originally imposed by the Licences of Occupation. Put another way, the upper limit for water storage in Round Lake enforced by the Plan is the 108-foot level granted by the Licence of Occupation.

28. This may be seen by reference to “Figure 8: Round Lake Operating Regime” as set out in the Plan, which demonstrates a maximum operating line or level of 107.5 feet local datum, which the Plan identifies as the “License of Occupation” or “LO”. This Figure 8 will be referred to in argument. It also identifies an “Upper Limit”, a “Lower Limit” and a “Typical Operating Line”, none of which go beyond the demarcation set by the Licence of Occupation.

**Bonnechere River Water Management Plan, Exhibit B to Affidavit of
Kenneth Boland
MOTION RECORD, Tab 3 B, p. 52.**

29. The plaintiffs say that regardless of the water level authorized by the Plan as measured at the dam, nothing in the Plan authorizes flooding of private lands beyond the 107.5 foot contour level identified in the Licences of Occupation and by the Boswell survey.

Wrongful Conduct of RPG: Trespass

30. As part of its power generation activities, RPG holds water behind the dam in Round Lake to assist in its generation of power. At all material times, RPG controlled water levels in the

lake by the periodic insertion and removal of one or more 12-inch-high stop-logs in the dam itself.

31. The plaintiffs plead in paragraph 16 of the statement of claim that since approximately 1990 and continuing to the present day, RPG has intentionally increased the amount of water which it stores in Round Lake so as to raise the level of the Lake so that water and ice breach the 108 foot contour line. They further plead that in so doing, RPG has knowingly acted in breach of the Licences of Occupation and where applicable of the Plan and has knowingly committed actionable trespass on the private land owned and occupied by the plaintiffs and each member of the Class.

32. It is both express and implicit in the statement of claim that RPG chooses to act in this manner in order to enhance its ability to generate electricity for profit.

33. The statement of claim also pleads (para. 18) that RPG has knowingly failed to implement mitigating operational improvements which would allow it greater precision in its control of the Lake, and that this failure or refusal of RPG to modernize and improve its practices and procedures exacerbates the continuous trespass by RPG on the subject lands (para. 20).

Wrongful Conduct of RPG: Damages

34. The affidavits of Mr. Grahame Plaunt, Mr. Fraser, Mr. Boland and Mr. Bohart, filed in support of this motion, describe in detail the consequences to these persons of the trespass committed by RPG. The plaintiffs will refer to these affidavits in argument on the motion.

35. There is no evidence on the record challenging the harm described by these affiants.

36. This harm is also described in paragraphs 23 through 26 of the statement of claim. The plaintiffs plead for example that the wrongful conduct of RPG has, among other things, caused further erosion of the shoreline of the Lake and River by water and /or ice, leading to loss and diminishment of the value of the lands owned by the plaintiffs and each member of the Class resulting, among other things, from instability and degradation of the shoreline (paragraph 25).

37. The record contains a number of photographs which will be of assistance to the Court in this respect.

38. The plaintiffs also plead (paragraph 24) that they and members of the proposed Class have been required to take remedial steps in order to buttress and protect their shorelines, and in order to preserve the development and integrity of their properties including wells and septic systems. They further plead that they and member of the proposed Class have incurred the cost of doing so, and have expended considerable sums and personal efforts in their attempts to protect and preserve the intended use and value of their lands from further trespass at the hands of RPG.

Expert Evidence

39. The plaintiffs have not filed expert evidence on this motion.

40. The plaintiffs do have evidence on this motion, however, that a qualified land surveyor would be able to conduct the following inquiry in support of this claim:

- (a) Locate the position of the upland boundary of the original shore road allowance;
- (b) Retrace the 1917 Boswell surveys;
- (c) Locate the normal ordinary position of the shoreline prior to artificial flooding, which first occurred in or about 1917 as noted above;

- (d) Determine the extent of flooding rights, where acquired by RPG or its predecessors;
- (e) Identify where erosion has occurred subsequent to artificial flooding, if any, and
- (f) Determine whether RPG has raised water levels in Round Lake above the original flooding limit (the 108 foot contour line).

**Affidavit of Doug Fraser sworn March 24, 2010
MOTION RECORD, Tab 4, pp. 65-66, paras. 14-17**

41. The plaintiffs propose to engage this and other expert evidence at the trial of the matter to assist the Trial Judge. However, it is to be noted that the plaintiffs also plead that any breach by RPG of the 108 foot contour line (as expressed in the Licences of Occupation) is a *prima facie* trespass.

42. On this latter point it is also to be noted that RPG admits numerous breaches over a period of years of the 108 foot line.

43. RPG has not so far acknowledged, however, that these breaches constitute a trespass.

PART IV - STATEMENT OF ISSUES AND LAW

44. Pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c.6 (the "CPA") subsection 5(1) a court shall certify an action as a class proceeding where:

- (a) The pleadings disclose a cause of action.
- (b) There is an identifiable class of two or more persons that would be represented by the representative Plaintiff.
- (c) The claims of the class members raise common issues.
- (d) A class proceeding would be the preferable procedure for the resolution of the common issues.
- (e) There is a representative Plaintiff 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.
- (iii) Does not have on the common issues for the class an interest in conflict with the interests of other class members.

45. In line with section 6 of the *CPA*, a court shall not refuse to certify a class proceeding solely on the grounds that, *inter alia*,

- (a) The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;
- (b) Different remedies are sought for different class members;
- (c) The number of class members or the identity of each class member is not known; or
- (d) The class includes a subclass whose members have claims or defences that rise common issues not shared by all class members.

46. The evidentiary principles to be applied on a certification motion are well established. The test to be applied to determine whether an action may be struck for disclosing no reasonable claim is to consider, assuming that the facts as stated in the statement of claim can be proved, whether it is “plain and obvious” that the plaintiff’s statement of claim discloses no reasonable cause of action. If there is a chance that the plaintiff could succeed, then the plaintiff should be allowed to proceed to have the action tried.

47. In respect of the other four elements of the test, the plaintiff must establish that there is “some basis in fact” to support the particular element.

***Hollick v. Metropolitan Toronto (Municipality)* 2001 SCC 68 at para. 25
PLAINTIFFS’ BOOK OF AUTHORITIES, Tab 4**

***Cloud v. Canada (Attorney General)* 2004 CarswellOnt 5026 at para. 41
PLAINTIFFS’ BOOK OF AUTHORITIES, Tab 5**

The Pleadings Disclose a Cause of Action in Trespass

48. The plaintiffs submit that their pleadings disclose a cause of action in trespass which on the facts as pleaded has a reasonable chance of success and so meets the threshold for certification.

49. The tort of trespass to land arises where a party directly encroaches or discharges a substance onto another person's land without legal authority. The entering upon land possessed by the plaintiff; the remaining on such land; or the placing of any object or substance on the land, in each instance without lawful authority, are all acts of trespass. Trespass to land is actionable *per se* without proof of fault or injury, and liability is therefore strict.

***Grace v. Fort Erie (Town)*, [2003] O.J. No. 3475, 2003 CarswellOnt 3366 at para. 86 (Ont. S.C.J.)
PLAINTIFFS' BOOK OF AUTHORITIES, Tab 6**

***Liflock Coach Lines Ltd. v. 902609 Ontario Ltd.*, [1999] O.J. No. 4821, 1999 CarswellOnt 4132 at para. 67 (Ont. S.C.J.)
PLAINTIFFS' BOOK OF AUTHORITIES, Tab 7**

50. Canadian courts have certified several recent class proceedings wherein trespass by discharged materials or substances was pleaded.

***Pearson v. Inco*, 2005 CarswellOnt 6598 (Ont. C.A.), leave denied [2006] SCCA 1
PLAINTIFFS' BOOK OF AUTHORITIES, Tab 8**

***Windsor v. Canadian Pacific Railway Limited*, 2006 ABQB 348 at paras. 63-65, aff'd 2007 ABCA 295
PLAINTIFFS' BOOK OF AUTHORITIES, Tab 9**

51. The common law has accepted since its early days that a riparian owner has a right, *inter alia*, to a remedy against flooding or other discharge of water caused by the actions of another.

***Qualley v. Day* [1929] 2 D.L.R. 928, 1928 CarswellSask 164 (SKCA)
PLAINTIFFS' BOOK OF AUTHORITIES, Tab 10**

***Rideau Falls Generating Partnership v. Ottawa (City)* [1997] O.J. No. 2794 at paras. 37-40 (Ont. S.C.J.) (QL), aff'd [1999] O.J. No. 1066 (Ont. C.A.)
PLAINTIFFS' BOOK OF AUTHORITIES, Tab 11**

**G.V. La Forest & Associates, *Water Law in Canada: The Atlantic Provinces*, (Ottawa: Information Canada, 1973), pp. 210-214,
PLAINTIFFS' BOOK OF AUTHORITIES, Tab 13**

52. Further, it is actionable trespass where a defendant possesses a licence to carry water onto or through a portion of the plaintiff's land, and that water escapes onto the plaintiff's land contrary to the terms of the licence.

***Engemoen Holdings Ltd. v. 100 Mile House (Village)* [1985] 3 W.W.R. 47,
1985 Carswell BC 730 at para. 25
PLAINTIFFS' BOOK OF AUTHORITIES, Tab 13**

53. The plaintiffs further rely upon the doctrine of continuing trespass, which arises where a series of encroachments of the same kind occur for which an original action was or could have been brought. Injury to the plaintiff subsists as long as the encroachment or interfering substance remains wrongfully on the plaintiff's land.

***Archibald v. Truro (Town)* [1901] 31 S.C.R. 380; 1901 CarswellNS 65
PLAINTIFFS' BOOK OF AUTHORITIES, Tab 14**

**G.H.L. Fridman, *The Law of Torts in Canada* (Toronto: Thomson Reuters, 2010) at pp. 32-34.
PLAINTIFFS' BOOK OF AUTHORITIES, Tab 15**

54. On the facts as pleaded, RPG was licenced to occupy certain *public lands* around the edge of Round Lake that were clearly delimited in the Boswell Survey, for the purposes of storing water for hydroelectric power generation.

55. It is uncontested that RPG intentionally and continuously over many years placed stop-logs in the Tramore Dam with the intention of holding back and storing water, and that it at all material times exercised control over the level of the water through periodic addition and removal of such stop-logs.

**Affidavit of Peter Boldt sworn October 19, 2010
RESPONDING MOTION RECORD, Tab 1, paras. 13 and *passim***

56. It is also uncontested that from time to time – at least 17 times since records have been kept and at least 3 times in the last 7 years - the water stored in Round Lake rose well above the 108-foot line as recorded at the dam and that during these incidents it overflowed the RPG's Licences of Occupation and onto the plaintiff's lands. During these incidents, flooding and incursion by ice persisted for days or weeks at a time. The plaintiffs say that this is clearly sufficient to establish a claim in trespass on the low threshold of the test for certification. It certainly identifies at a minimum an actionable cause of action that survives the threshold.

**Affidavit of Peter Boldt sworn October 19, 2010
RESPONDING MOTION RECORD, Tab 1, p. 8, para. 40**

57. The plaintiffs further plead that the breaches of the Licences of Occupation recorded by RPG and its predecessors are neither a complete count of nor the limit of the total number of excursions of water onto the plaintiffs' lands during the period at issue. The evidence as pleaded demonstrates that even where the water level as measured at the Tramore Dam has remained below the 108-foot level, RPG's interference with the natural drainage of Round Lake has caused water and ice to overflow the Boswell survey line and to discharge onto the *private lands* beyond, thus further violating the Licences of Occupation. In every such case RPG has committed a separate actionable trespass by causing water to be discharged onto the plaintiffs' lands.

58. Further still, such frequent overflows and movements of ice have had the arguable effect of causing severe erosion along the edge of the Lake. The expert evidence referred to above is likely to demonstrate that a consequence of this ongoing erosion is that in many places, including

on the lands of the representative plaintiffs and affiants, the land on which the Boswell contour line originally fell is now *continually under water* for most of the year. The plaintiffs assert that in such circumstances, RPG has stored and continues to store water on the plaintiffs' land in violation of the licences of occupation, constituting further and continual trespass.

The pleadings disclose damages arising from the trespass

59. The doctrine of inviolability of private property grounds the principle that trespass is actionable without proof of damage. As such, a mere finding of liability may entitle a plaintiff to nominal pecuniary damages or a declaration of right. However the plaintiffs also assert claims for damages under a number of other heads.

60. First, when a trespass consists in some wrongful use of the plaintiff's land, even if it causes no damage to the plaintiff or gives any benefit to the defendant, the plaintiff is entitled to claim by way of damages a reasonable remuneration for that use, as if it had been had under an agreement. This "user principle" is an exception to the general rule that only nominal damages can be recovered if no loss has been proved.

**Salmond & Heuston, *supra*, at p. 50
PLAINTIFFS' BOOK OF AUTHORITIES, Tab 1**

***Inverugle Investments Limited v. Richard Hackett* [1995] 1 W.L.R. 713 at 718
(U.K.P.C.)
PLAINTIFFS' BOOK OF AUTHORITIES, Tab 16**

61. The plaintiffs plead that RPG has, without legal authority, used the plaintiffs' lands and those of the class members for the storage of water for hydro-electric generation, in some cases constantly for a period of many years. They claim compensation for this wrongful use and for their resources expended to prevent such use.

62. Second, when a trespass has caused physical damage to the land, damages are measured by the loss thereby caused to the plaintiff, including loss of enjoyment, use and value, and for expenditures undertaken in alleviating such losses.

**Fridman, *supra* at pp. 57-60
PLAINTIFFS' BOOK OF AUTHORITIES, Tab 15**

63. As described above, the plaintiffs claim that erosion, ice push and flooding caused by the defendant's interference with the natural drainage of Round Lake have caused such losses. Prior to the filing of the within motion for certification, certain of the members of the putative class undertook research as to the feasibility of demonstrating that the claimed losses are attributable to the defendant's trespass. This research included consulting the expert witness referred to above, who as noted confirmed that a number of key steps helpful in determining liability and damages can be performed.

**Affidavit of Doug Fraser sworn March 24, 2010
MOTION RECORD, Tab 4, pp. 65-66, paras. 14-17**

64. The plaintiffs and other putative class members, along with RPG itself, have also kept extensive photographic records of damage caused by incursions of water and ice on the private lands around the lake, which records will be of assistance to the court in assessing the damages claims.

**Series of Photographs, Exhibit A to Affidavit of Grahame Plaunt
MOTION RECORD, Tab 2A, pp. 19-24**

**Series of Photograph, Exhibit A to Affidavit of Doug Fraser
MOTION RECORD, Tab 4A, pp. 71-89**

**Transcript of Cross-Examination of Peter Boldt dated February 1, 2011
SUPPLEMENTARY MOTION RECORD, Tab 3, p. 98, q. 398-402**

65. The expert evidence filed by RPG (Winhold-Golder Associates Report) confirms, among other things, that the factors governing water levels include "level regulation/management".

**Section 3.2, Expert Report dated October 18, 2010, Exhibit A to Affidavit of Terry Winhold
RESPONDING MOTION RECORD, Tab 2B, pP. 367-368**

66. Further, an independent engineering report adduced by RPG and provided to its expert confirmed that RPG's "hydraulic management" of water levels on Round Lake is a significant contributing factor to the movement of ice affecting the plaintiffs' lands. The report concluded that high lake levels contribute to a greater likelihood of damage from ice push.

**BMT Fleet Technology Limited, "Investigation of Ice-Related Damages to Private Properties on Round and Golden Lake: Final Report" (October 2005), Exhibit H to Peter Boldt Affidavit
RESPONDING MOTION RECORD, Tab 1H, pp. 44-45**

There is an identifiable class

67. A proposed class must be objectively defined and presently ascertainable, and its definition must bear a rational connection to the proposed common issues. In *Hollick, McLachlin C.J.C.* held that this requirement is not an onerous one, all that is required is "some showing" that the class is not "unnecessarily broad".

***Hollick, supra* at para. 21
PLAINTIFFS' BOOK OF AUTHORITIES, Tab 4**

***Pearson, supra* at para. 57
PLAINTIFFS' BOOK OF AUTHORITIES, Tab 8**

68. The proposed class in this claim is defined as follows:

- (a) all persons who own or who have owned lands contiguous to Round Lake, an Ontario Lake fed by the Bonnechere River ("the Class"), during the period between 1990 and the date this claim is certified by this Honourable Court as a class proceeding ("the Class Period"), including lands contiguous to Round Lake where a narrow strip of notionally reserved land (false road allowance) exists or, where applicable, reserved land (a road allowance) exists between the legal description of the lands and the Lake edge; and
- (b) all persons who own or have owned lands contiguous to the Bonnechere River from Round Lake to the Tramore Dam ("the Class"), during the period between

1990 and the date this claim is certified by this Honourable Court as a class proceeding ("the Class Period"), including lands where a narrow strip of notionally reserved land (false road allowance) exists or, where applicable, reserved land (a road allowance) exists between the legal description of the lands and the Lake edge.

69. Presently there are in excess of 450 owners/residents around Round Lake, in addition to a smaller number of landholders along the inlet of the Bonnechere River upstream from the Tramore Dam who are also members of the putative class. Membership in the class is strictly bounded by the geographical and temporal limits set out in the statement of claim.

**Affidavit of Kenneth L.W. Boland sworn March 26, 2010
MOTION RECORD, Tab 3, p. 28, para. 13**

70. In *Hollick* the Supreme Court of Canada said approvingly with respect to the proposed class in that case:

The appellant has defined the class by reference to objective criteria; a person is a member of the class if he or she owned or occupied property inside a specified area within a specified period of time. Whether a given person is a member of the class can be determined without reference to the merits of the action.

***Hollick, supra* at para 17
PLAINTIFFS' BOOK OF AUTHORITIES, Tab 4**

***Western Canadian Shopping Centres v. Dutton* 2001 SCC 46 at para. 38
PLAINTIFFS' BOOK OF AUTHORITIES, Tab 17**

71. The Ontario Court of Appeal in *Pearson v. Inco* relied upon the reasoning in *Hollick* to find that the plaintiff in that case had met the identifiable class requirement by defining its proposed class in similar terms.

***Pearson, supra* at para. 56
PLAINTIFFS' BOOK OF AUTHORITIES, Tab 8**

72. The proposed class in the within claim is defined using the same type of objective criteria and its members can thus be readily identified.

73. Further, and importantly, it is not a requirement of an acceptable class definition that each member of the class will ultimately be successful in establishing a claim for one or more remedies, and the possibility that some class members may not, in the end, be able to prove that they have suffered harm is no barrier to certification.

***Lambert v. Guldant Corp.*, 2009 CarswellOnt 2535 at paras. 102-104 (Ont. Sup. Ct.)**

PLAINTIFFS' BOOK OF AUTHORITIES, Tab 18

***Dumoulin v. Ontario*, 2005 CarswellOnt 4544 at para. 13**

PLAINTIFFS' BOOK OF AUTHORITIES, Tab 19

74. Finally, there is a clear connection between the proposed class and the proposed common issues, which are discussed more fully below. In brief, the proposed class members are limited to those who are affected by the systemic trespass that the plaintiffs claim RPG has committed.

The claims of the class raise common issues

75. The common issue requirement is a “low bar” to certification. The Supreme Court of Canada has identified the underlying question as whether certification will help to avoid duplication of fact-finding or legal analysis. Thus an issue will be common “where its resolution is necessary to the resolution of each class member's claim” and is a “substantial...ingredient” of each of the class members' claims.

***Cloud, supra* at paras. 51-53**

PLAINTIFFS' BOOK OF AUTHORITIES, Tab 5

***2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*, 2009 CarswellOnt 2533 at paras. 30-31 (Div. Ct.), aff'd 2010 ONCA 466**

PLAINTIFFS' BOOK OF AUTHORITIES, Tab 20

76. The plaintiffs propose the following Common Issues

- (a) whether the defendant trespassed on private lands owned by the representative plaintiffs and the class;

- (b) whether the rights of the representative plaintiffs and the class and the obligations of the defendant with respect to water storage on Round Lake are governed and determined by Licences of Occupation granted to the defendant by the Ministry of Natural Resources; and
- (c) the determination and apportionment of damages to the representative plaintiffs and the class through a reference or an accounting.

77. As has been pleaded, “trespass” in the context of these issues is defined as the incursion of water from Round Lake onto *private lands* contrary to RPG’s Licence of Occupation.

78. It is evident from the proceedings to date that at least one of RPG’s positions in response to the motion for certification, and as advanced in particular by Mr. Boldt in his affidavit and by the Winhold–Golder Associates report, is that causation of damages cannot be determined without a case by case, property by property analysis, and so there are insufficient common issues to ground a class proceeding. In response to this issue, the plaintiffs say the following:

- (a) This argument misapprehends the true nature of this claim, which includes the inherent utility of a determination of trespass, the liability issue, to all potential members of the Class, and
- (b) This argument puts more faith in the Boldt affidavit and in the Winhold-Golder Associates Report than is warranted.

The plaintiffs will expand on these points in argument with the benefit of RPG’s factum.

79. In any event, the law does not take the requirement for “common issues” quite so far. In *Rumley v. British Columbia McLachlin*, C.J.C. observed in respect of that case that the determination of the defendant’s general liability, where such a determination will aid the plaintiffs in pursuing their individual claims, is a sufficient issue to ground certification:

While the issues of injury and causation will have to be litigated in individual proceedings following resolution of the common issue (assuming the common issue is decided in favour of the class, or at least in favour of some segment of the class), in my view the individual issues will be a relatively minor aspect of this case. There is no dispute that abuse occurred at the school. The essential question is whether the school should have prevented the abuse or responded to it

differently. I would conclude that the common issues predominate over those affecting only individual class members. (emphasis added)

Rumley v. British Columbia, 2001 SCC 69 at para. 36
PLAINTIFFS' BOOK OF AUTHORITIES, Tab 21

80. This *dicta* was followed by the Ontario Court of Appeal in *Pearson v. Inco*, *supra* at para. 73:

The same can be said here. There is no dispute that the refinery emitted nickel. The essential question is whether Inco is liable in tort for those emissions and whether the emissions affected property values of the class members. Just as injury and causation would have to be litigated in individual proceedings following resolution of the common issues in *Rumley*, so too will there have to be individual litigation of the relatively narrow issue of quantifying the effect on particular properties. Furthermore, the individual issues of injury and causation in *Rumley* would seem to me to be much more substantial than the individual issues of causation and damages that would remain in this case. (emphasis added)

81. In *Cloud*, the Ontario Court of Appeal further emphasized that certain issues could meet the common issues threshold, notwithstanding the fact that other significant individual issues may remain outstanding following the common trial.

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 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)

Cloud, supra at paras. 53 and 84
PLAINTIFFS' BOOK OF AUTHORITIES, Tab 5

82. In the instant claim, there is no relevant dispute at this stage that water and ice have entered onto the plaintiffs' lands from time to time and caused various types of damage, notably

by way of erosion and deprivation of use and enjoyment. There is likewise no relevant dispute that RPG has, by its operation of the dam, interferes with the natural drainage of Round Lake such that the water rises above its natural level. The “essential question” or “substantial common ingredient” for the entire class at the liability stage is whether by causing water to back up onto private lands of the plaintiffs and Class, contrary to its Licence of Occupation, RPG is liable in trespass, a cause of action that may be established *without* proof of damage. The issue of causation or damages has no relevance to the “common issue” requirement at liability stage, the first stage in determination of the claim.

83. Relying on the above authorities, the essence of the plaintiffs’ position is that a trial judge may determine a trespass that is applicable to all members of the Class without needing to know or to investigate individual circumstances to any significant degree. The plaintiffs note that certain remedies, for instance compensation for wrongful use or a declaration of right, may become available immediately upon a finding that the defendant’s actions in respect of the plaintiff constitute trespass.

84. Causation of damages in respect of subclasses or individuals in the Class, by contrast, may require more granular adjudication, but on the authorities this alone does not raise a bar to certification. A determination of RPG’s liability in trespass will as noted above serve all class members equally well as a basis for adding to their individual claims to damages.

85. The Supreme Court of Canada has further affirmed that the common issue requirement is not an onerous one, and it need not be shown that every class member shares exactly the same interest in the resolution of the issues. Even more importantly, as the above citations demonstrate, appellate courts have cautioned that certifying courts should not conflate the

common issue of the defendant's liability with the questions of the causation and quantum of damages. Here, the proposed class shares an interest in determining the fact of liability and the legal interpretation of their rights vis-à-vis the Licence of Occupation. These issues, determined on behalf of the entire class, will move the litigation forward significantly without the need for hundreds of different proceedings to determine the preliminary and determining issue of liability, an objective that lies near the heart of the *CPA* and class proceedings more generally.

***Hollick, supra* at para. 21
PLAINTIFFS' BOOK OF AUTHORITIES, Tab 4**

A class proceeding is the preferable procedure

86. This requirement reflects two core policy concerns. The first is that the class action should be a fair, efficient and manageable method of advancing the claim. The second is that the class action ought to be generally preferable to other reasonably available means of resolving the claims of class members, such as individual actions, joinder, test cases or consolidation of actions. The preferability analysis in turn adverts to the three principal advantages of class actions, namely judicial economy, access to justice, and modification of the behaviour of present and future defendants, and must consider the degree to which each would be achieved by certification.

***Hollick, supra*, at para 27
PLAINTIFFS' BOOK OF AUTHORITIES, Tab 4**

***Cloud, supra* at para 73
PLAINTIFFS' BOOK OF AUTHORITIES, Tab 5**

87. A class proceeding may well be preferable even where the resolution of common issues leaves significant judicial work to be done. As stated in *Pearson*, “[T]he preferability requirement can be met even where there are substantial individual issues; the common issues need not predominate over the individual issues.”

***Pearson, supra* at para. 57
PLAINTIFFS' BOOK OF AUTHORITIES, Tab 8**

88. A recent ruling by the Alberta Court of Queen's Bench in certifying an environmental class action is applicable to the instant case:

To the extent that any damages proved are small, as the Defendant alleges, the Court can take judicial notice of the fact that the cost of pursuing individual claims, relative to the potential recovery on an individual basis for a simple trespass, for example, would be prohibitive. This Court bases this assumption on the probability that each individual action would require the engagement of expert witnesses, protracted discovery and cross-examination, and much time spent at trial with respect to the liability issue alone. On a cost-benefit analysis, the commercially reasonable decision for many individual claimants with otherwise justiciable claims would be to avoid legal action. It is for this reason, not the alleged, but unsubstantiated, impecuniosity of class members, that access to justice would be inhibited if certification were not granted.

***Windsor, supra* at para. 141
PLAINTIFFS' BOOK OF AUTHORITIES, Tab 9**

89. The plaintiffs face similar hurdles in resolving their individual disputes with RPG. Although a few individuals have documented damages in the tens of thousands of dollars, the average claim among the 141 self-identified supporters of the action is significantly less. The issues arising in this case are well beyond the capacity of the average layperson to pursue in small claims court, and the costs of litigation would rapidly outstrip the potential recovery for any single plaintiff. The defendant itself has argued that extensive expert analysis will be required to establish causation and damages. The evidence of the plaintiffs is clear that they would not and could not undertake this challenge as individuals, despite their conviction in the merit of their claims. For that reason, as is set out in the Fraser affidavit, the plaintiffs have created an association of common interest and engaged the steps necessary to bring this process forward. It cannot reasonably be said that it is *more* fair or efficient to litigate the issue of RPG's liability for trespass on a property-by-property basis around the lake.

**Affidavit of Doug Fraser sworn March 24, 2010,
MOTION RECORD, Tab 4, pp. 64-65, 68-69, paras. 13-14, 25, 28-32**

90. In the absence of the ability to aggregate with other plaintiffs, many of the landholders in this the proposed class would likely resolve, upon a cost-benefit analysis, to simply live with the flooding, erosion and ice damage that they attribute to the Defendant's water management regime, or to give up and sell their lands. Grahame Plaunt adverts to this latter potential outcome in his affidavit in support of certification.

**Affidavit of Grahame Plaunt sworn March 26, 2010,
MOTION RECORD, Tab 2, p. 18, paras. 31-32 and *passim***

91. Evidence of numerous prior complaints by putative class members against a defendant's conduct mitigates in favour of certification, since it demonstrates the likelihood of multiple inefficient lawsuits that would be obviated by the class proceedings. Here, it is a matter of public record that RPG has for some years been the target of Round Lake landholders' complaints and concerns, particularly in years where the usual excursions of water and ice become extreme.

92. As noted, the initiation of class proceedings to resolve these stated issues is already supported by over 140 landholders from various parts of the lake who meet the criteria of the proposed class. The plaintiffs plead that the systemic nature of the alleged trespass is such that proposed class members have sustained damages that differ less in kind than in degree. If, financing aside, each member of the class were to advance their claim for a remedy arising out of the breaches of the Defendant, the result could be in excess of 450 separate proceedings, all intrinsically linked in fact and law, and each having precisely the same objective.

93. The plaintiffs further submit that multiple individual actions are unlikely to achieve the critical mass to ensure that RPG respects private property. As the legislature recognized in

creating the *CPA* regime, the size and force of class actions have the beneficial side effect of discouraging wrongdoers from believing that they can get away with minor infringements of individual rights. Here the plaintiffs expressly assert that their reason for banding together in these proceedings is to apply their collective efforts to protecting their individual rights against the overreaching of their common neighbour.

**Affidavit of Doug Fraser sworn March 24, 2010
MOTION RECORD, Tab 2, pp. 64-65, para. 13**

There is an appropriate representative plaintiff

94. Section 5(1)(e) of the C.P.A. requires that there be a representative plaintiff who would fairly and adequately represent the interest of the class, has produced a workable litigation plan and does not have a conflict with the interests of other class members.

95. A proposed representative plaintiff must show that he or she can fairly and adequately represent the class and cannot delegate these responsibilities to another person who is not answerable to the court.

***Lambert, supra* at paras. 136-138
PLAINTIFFS' BOOK OF AUTHORITIES, Tab 18**

96. The representative plaintiff need not enjoy an identical position to other class members or have typical experience to qualify. A paramount question is whether the representative plaintiff shares in the common issues with the class, which is a fact-driven inquiry. Fundamentally, he or she should have a horse in the race.

97. A lack of relevant knowledge of the legal and scientific nature of the claim is not grounds for disqualifying a plaintiff, nor, for example, is a plaintiff's confusion upon examination by

opposing counsel. With respect to plaintiff's testimony, the court is concerned primarily with the plaintiff's integrity and commitment to tell the truth.

***Lambert, supra* at paras. 153 - 156
PLAINTIFFS' BOOK OF AUTHORITIES, Tab 18**

98. Like all members of the proposed class, the representative plaintiffs Grahame Plaunt and Ken Boland are owners of private land contiguous to Round Lake. Each has a decades-long association with the lake and its environs and each claims that throughout the relevant period the defendant trespassed upon his lands in the manner and with the consequences described in the claim. They also affirm that they have each gone to considerable expense to prevent and ameliorate the damage caused by the alleged trespass and are concerned with the potential loss of value to the lands around the lake.

**Affidavit of Grahame Plaunt sworn March 26, 2010
MOTION RECORD, Tab 2, pp. 17-18, paras. 30-31**

99. These characteristics and interests of the plaintiffs are shared, at a minimum, by approximately 140 self-identified potential class members who have each contributed funds to the costs of litigation thus far in these proceedings in hopes of having the common issues, as described above, resolved.

100. Over the past several years, a group of putative class members including Mr. Boland have formed a committee to help keep the proposed class informed of developments and have raised money to support the pursuit of the herein action. Both representative plaintiffs have also contributed from their own funds. It is to be noted that Mr. Boland and several members of the steering committee are legally sophisticated individuals and have a strong grasp of the nature of

class proceedings and of the risks involved in any litigation. Both representative plaintiffs are in regular contact with, and are more than capable of instructing, class counsel.

**Affidavit of Kenneth L.W. Boland sworn March 8, 2010
MOTION RECORD, Tab 3, p. 26, para. 6**

**Affidavit of Grahame Plaunt sworn March 26, 2010
MOTION RECORD, Tab 2, pp. 14-15, paras. 20-21**

**Affidavit of Doug Fraser sworn March 24, 2010
MOTION RECORD, Tab 4, pp. 67-68, paras. 22-25**

101. It is a further requirement under the *Class Proceedings Act* that the representative plaintiff produce a workable litigation plan, the purpose of which is to assist in the determination of the preferable procedure and to demonstrate that manageable methods of conducting the litigation are feasible. The amount of detail will vary according to the circumstances of each case.

***Lambert, supra* at para. 160
PLAINTIFFS' BOOK OF AUTHORITIES, Tab 18**

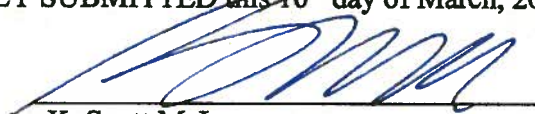
102. In fulfillment of this latter requirement and in consultation with class counsel, the representative plaintiffs have produced a comprehensive yet flexible litigation plan (filed in the Motion Record) which includes clear and effective procedures for notifying class members of developments. The plaintiffs submit that the instant proceedings are not ones of exceptional complexity and that their plan, subject to necessary amendments over time, is sufficient to demonstrate that conducting the litigation is both manageable and feasible.

PART V - ORDER SOUGHT

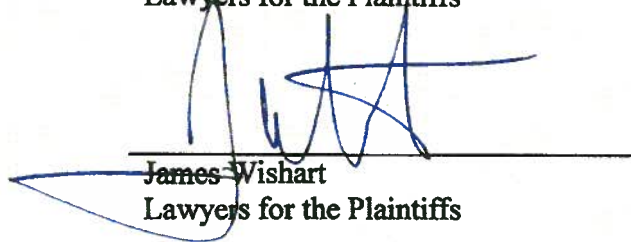
103. The plaintiffs seek an Order that the above proceeding be certified as a class proceeding pursuant to the Class Proceedings Act, 1992, S.O. 1992, c. 6, and seek further relief as specified in the Amended Notice of Motion, including an order appointing Grahame Plaunt as

representative plaintiff, an order amending the title of proceedings by removing Peter Plaunt and Alan Plaunt as representative plaintiffs; and an order appointing Kenneth L.W. Boland as a representative plaintiff in their stead, and amending the title of proceedings by adding Kenneth L. W. Boland as a representative plaintiff.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of March, 2011.



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19. *Dumoulin v. Ontario*, 2005 CarswellOnt 4544
20. *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*, 2009 CarswellOnt 2533 at paras. 30-31 (Div. Ct.), aff'd 2010 ONCA 466

21. *Rumley v. British Columbia*, 2001 SCC 69

**GRAHAME PLAUNT, PETER PLAUNT
and ALAN PLAUNT**
Plaintiffs

**RENFREW POWER GENERATION
INC.**
Defendant

Court File No: 08-CV-42639CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at OTTAWA

Proceeding under the
Class Proceedings Act, 1992

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