

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

**GRAHAME PLAUNT and KENNETH L.W. BOLAND**

**Plaintiffs**

**- and -**

**RENFREW POWER GENERATION INC.**

**Defendant**

**Proceeding Under the Class Proceedings Act, 1992**

**FRESH STATEMENT OF CLAIM**

**TO THE DEFENDANT**

**A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU** by the plaintiff. The claim made against you is set out in the following pages.

**IF YOU WISH TO DEFEND THIS PROCEEDING**, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service in this court office, **WITHIN TWENTY DAYS** after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: September 15 , 2008

Issued by:

" T. G. Goley "  
Local Registrar  
161 Elgin Street  
OTTAWA, ON K2P 2K1

TO: RENFREW POWER GENERATION INC.  
32 Bridge Ave. W  
Renfrew, Ontario K7V 3R2

## CLAIM

1. The plaintiffs, on their own behalf, and on behalf of the members of the class of persons (defined below as “the Class”) described in paragraph 2 (“the Class Members”) claim:

(a) an Order certifying this action as a class proceeding and appointing the plaintiffs as representative plaintiffs;

(b) damages in the amount of \$4,000,000.00 for intentional and continuous trespass by the defendant on private lands owned by the plaintiffs and Class Members being:

(i) General damages for loss of value and for loss of use and enjoyment of their lands as pleaded herein;

(ii) Special damages to compensate for monies expended as pleaded herein; and

(iii) Aggravated damages for intentional trespass;

(c) punitive damages in the amount of \$500,000.00;

(d) a declaration that the rights of the plaintiffs and Class Members and the obligations of the defendant concerning management of the level of Round Lake are governed and determined by Licences of Occupation granted to the defendant by the Ministry of Natural Resources (Ontario) (“the MNR”) as hereinafter described;

(e) pre-judgment and post-judgment interest pursuant to the Courts of Justice Act, R.S.O. 1990, c. C.43;

(f) costs of this action on a substantial indemnity scale together with applicable Goods and Services Tax in accordance with the Excise Tax Act, R.S.C. 1985, c.E-15, as amended; and

(g) such further and other relief as to this Honourable Court may appear just.

### **The Class**

2. This action is brought on behalf of:

(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; or

(c) such other Class definition or Class Period as this Honourable Court may ultimately determine on a motion for certification of this action.

### **The Plaintiffs**

3. The plaintiffs, Grahame Plaunt, Peter Plaunt, and Alan Plaunt are the owners of private land contiguous to Round Lake, and have owned and occupied their lands, whose legal description is Part of Lot 24 and the IV Concession of the Township of Richards, being Parts 1,2,3,4,5 and 6 on Plan 49R-14282, now the Township of Killaloe, Hagarty & Richards (“the Township”), in the County of Renfrew, during the Class Period, for recreational purposes.

4. During the Class Period the defendant has trespassed upon the lands owned by the plaintiffs in the manner and with the consequences described in this statement of claim. The plaintiffs are riparian owners, and are entitled to the use of the natural flow of the water in Round Lake and to the quiet enjoyment of their lands free of unnatural interference from water or ice. Since 1990, these rights have continuously been breached by the defendant’s intentional trespassing on the plaintiffs’ land. The plaintiffs have accordingly suffered and continue to suffer damages by reason of the wrongful conduct of the defendant as described in this statement of claim.

### **The Defendant and its Operations**

5. The defendant Renfrew Power Generation Inc. (“RPG”) is a hydro-electricity utility which owns and operates, for the purpose of generating hydro-electricity, a

holding dam located on the Bonnechere River at the outlet of Round Lake near Tramore, Ontario (“the Tramore dam”).

6. Round Lake is the primary hydro reservoir along the Bonnechere River system. It has the largest water storage capacity on the system. The cottager and residential community is significant throughout the Bonnechere River watershed. Areas around Round Lake in particular, where there are in excess of 450 property owners, including the plaintiffs, have considerable seasonal and year round development. Residents on and abutting Round Lake, including the plaintiffs, and residents on the Bonnechere River between Round lake and the Tramore Dam enjoy the recreational benefits of the River and the Lake throughout the year.

7. RPG has owned and operated the Tramore dam since 1971. Prior to 1971 the Tramore dam was owned and occupied by Ontario Hydro, as it was then known.

8. In 1917 Licences of Occupation were granted by the MNR to permit Ontario Hydro to store water for electricity generating purposes in Round Lake. These Licences of Occupation permitted Ontario Hydro to increase the level of Round Lake for that limited purpose to a geodetical vertical measurement identified at a contour level of 108 feet, and identified more particularly in the Licences as 107.5 feet (referred to for convenience as “the 108 foot contour line”), but not beyond that level.

9. The 108 foot contour line was 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, 10 feet from the end of the Tramore Dam. This contour

line was located on the shores of Round Lake by Ontario Land Surveyor E.J. Boswell in 1917 and rendered as a red line on his plan of survey dated March 8, 1917.

10. Since 1971 RPG has been permitted to store water in Round Lake under the authority of and subject to the conditions of these or re-issued Licences of Occupation (referred to collectively herein as the “Licences of Occupation”).

11. Managing the risk of large-scale floods, the formation and movement of ice, and the protection of human life and property is known to RPG to be an important part of its role on the system and of its responsibility under the Licences of Occupation.

12. The public policy behind restricting the ability of Ontario Hydro and subsequently RPG to store water in Round Lake 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. 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.

13. 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 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.

14. For greater certainty, the Licences of Occupation by reference to the 108-foot contour line establish a geographically fixed and permanent property line between the private lands of the plaintiffs and the public or Crown lands on which RPG is permitted to store water. This fixed property line, as shown on the Boswell survey, delineates the outer boundary of RPG's water storage rights as granted by the Licences of Occupation and for the purpose of the claims in trespass advanced herein.

15. The Bonnechere Water Management Plan ("the Plan") was enacted pursuant to s. 23(1)(7) of the Lakes and Rivers Improvement Act (Ontario). As a dam operator, RPG is statutorily required to ensure that its facility is operated in accordance with the Plan. RPG is also responsible for self-monitoring and is required to report any deviation from operating requirements.

16. The Plan recognises the legitimacy and paramountcy of the flooding limits on Round Lake as imposed by the Licences of Occupation. RPG is mandated by the Plan to maintain the water level within the upper and lower limits of the operating regime established by the Plan for Round Lake. The upper flooding limit recognised and authorised by the Plan is the fixed property line established at the 107.5 foot contour level as identified in the Licences of Occupation and on the Boswell Survey. The Plan specifically provides that it does not authorize RPG to enter upon or use private lands and further recognizes that the Licenses of Occupation convey only a right to occupy Crown lands.



### **Wrongful Conduct of the Defendant**

17. Since 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 to levels beyond the 108 foot contour line. In doing so, RPG has knowingly acted in breach of the Licences of Occupation and where applicable of the Plan and has knowingly committed an actionable trespass on the private land owned and occupied by the plaintiffs and each member of the Class. This actionable trespass by RPG which has continuously resulted in water and/or ice extending beyond the 108 foot contour line, has been on-going and continuous since 1990, and has been perpetrated by RPG to enhance its commercial opportunities. The plaintiffs and Class Members have suffered from its cumulative and aggravated effect.

18. In the course of this trespass, RPG has wrongfully and without authority altered and continues to alter the state of flow, quantity and quality of the waters and/or ice in Round Lake. In doing so RPG has interfered with and continues to interfere with the plaintiffs' riparian rights. This wrongful and intentional interference by RPG with the state of flow, quantity and quality of the waters and /or ice in Round Lake by RPG has been on-going and continuous since 1990.

19. The on-going and repetitive consequences of this intentional breach are known to RPG and have been known since at least 1990. Despite this knowledge RPG has failed to implement mitigating operational improvements which would allow RPG greater precision in its control of Lake levels, thereby providing greater protection to the plaintiffs and Class Members while at the same time allowing RPG to operate

closer to the maximum level and maximize its efficiency. Mitigating operational improvements which RPG has failed to implement include the following:

- (a) regularly measure the Winter/Spring snow depth in the Bonnechere Watershed in order to provide a more reliable assessment of what may be expected in the spring;
- (b) installation of additional gauges at the inflow points on Round Lake to improve the ability of RPG to be proactive in its management of the flow;
- (c) develop faster response times for major rain storms and winter thaws;
- (d) provide more accurate disclosure of water levels; and
- (e) construct weirs or small control dams on McKaskill, Basin and Paugh lakes to help control and even out flows.

20. RPG has also failed to improve the management of the Tramore Dam by implementing the following steps:

- (a) ensuring that it has access to training and the latest methodology;
- (b) installation of automatic sluice gates;
- (c) installation of 6 inch logs in place of 12 inch logs;
- (d) removing the 8 inch boards in the spillway; and
- (e) changing management of the dam to a flow regime.

21. The failure or refusal of RPG to modernize and improve its practices and procedures exacerbates the continuous trespass by RPG to the subject lands.

22. This intentional breach by RPG of the Licences of Occupation and where applicable of the Water Management Plan since 1990 culminated in a massive flooding of Round Lake in the spring of 2008, which caused additional erosion of the plaintiffs' shoreline and the shorelines of Class Members by water and/or ice, interfered with the use by the plaintiffs and each member of the Class of their lands and threatened the integrity of structures, wells and septic systems. The plaintiffs and each member of the Class were subject to a state of emergency declared by the Township and to a boil water advisory because of the flooding. Roads were inundated by Lake water and closed to access.

23. The plaintiffs say that the flooding of Round Lake in the spring of 2008 was a direct and foreseeable consequence of the decision of RPG in 2008 and earlier, and of the intentional practice of RPG since 1990, to maintain levels on the Lake from time to time in excess of the 108 foot contour line, and that the flooding of the Lake was accordingly an avoidable "man made flood". On April 22, 2008 RPG acknowledged to a Special Meeting of the Township that in its management of the system RPG had acted in breach of the Licences of Occupation.

#### **Damages and Declaratory Relief**

24. The plaintiffs and Class Members own and develop their lands on Round Lake and along the Bonnechere River for their personal enjoyment as recreational and

residential properties, and as investments capable of enhancing their enjoyment of Round Lake and the River system.

25. The repeated and significant trespass by RPG on private lands beyond the 107.5 foot contour level has significantly impacted the use and enjoyment by the plaintiffs and Class Members of their land. The wrongful conduct of RPG as pleaded herein 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. At some locations on the shoreline, including on lands owned by the plaintiffs, the 107.5 foot contour line representing the fixed outer limit of RPG's water storage rights is continually submerged beneath water or ice.

26. The particulars of these losses will be provided prior to trial.

27. As a direct consequence of the wrongful conduct of RPG, the plaintiffs and Class Members have been required to take remedial steps in order to buttress and protect their shoreline, and in order to preserve the development and integrity of their properties including wells and septic systems. The plaintiffs and each member of the 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. The particulars of these amounts will be provided prior to trial.

28. Further, the wrongful conduct of RPG as pleaded herein has interfered with the use and enjoyment by the plaintiffs and Class Members of their lands and has injured and damaged them thereby. RPG was aware of the cumulative effect of the trespass and failed to take available remedial steps. The plaintiffs and each member of the Class are accordingly entitled to general and aggravated damages against RPG for intentional trespass to their lands, in amounts to be determined at trial.

29. RPG has knowingly maintained levels on the Lake in excess of the 108 foot line and has therefore knowingly breached its obligations under the Water Management Plan where applicable and the terms of the Licences of Occupation, including its obligation to self report. The plaintiffs have on separate occasions provided notice to RPG of this breach and of the consequences of this breach on the plaintiffs and members of the Class. This notice has gone unheeded by RPG, culminating in the massive flooding in the spring of 2008 referred to in paragraphs 21 and 22 herein. Further, RPG has refused or failed to implement the measures or take the steps referred to in paragraphs 18 and 19 herein. The conduct of RPG in such circumstances is an affront to its public interest entitlement under the Licences of Occupation and warrants an award of punitive damages.

30. Wherefore the plaintiffs claim on their behalf and on behalf of the Class Members the relief set out in paragraph 1 herein.

September 15, 2008  
Amended December 7, 2011

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Plaintiffs

and  
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*

**FRESH STATEMENT OF CLAIM**

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ANNUAL REPORT 07 DAY / JOUR  
REQUISIT DE 20 11  
OU / DE 20 11  
PURSUANT TO RULE 26.02(1)  
CONFORMÉMENT À LA RÈGLE  
ON ORDER Justice Smith  
OU À L'ORDONNANCE 29 per  
DATED THIS / FAIT CE 20 11  
DAY / JOUR OF / DE 20 11  
LOCAL REGISTRAR, ONTARIO COURT (GEN. DIV.)  
LE REFERIER LOCAL, COUR DE L'ONTARIO (DIV. GEN.)



DEC 07 2008