



**SUPERIOR COURT OF JUSTICE                      COUR SUPÉRIEURE DE JUSTICE**  
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**DATE:** March 20, 2013

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**SUBJECT / OBJET:** Plaunt v. Renfrew Power Generation Inc. - Court File  
 No.: 08-CV-42639 CP

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**MESSAGE:**

Please refer to Justice Smith's attached Reasons for Decision on Procedure to Determine First Common Issue regarding the above-noted matter.

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**LOUISE TARDIF**  
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**CITATION:** Plaunt v. Renfrew Power Generation Inc., 2013 ONSC 1687  
**COURT FILE NO.:** 08-CV-42639 CP  
**DATE:** 2013/03/20

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**PROCEEDING UNDER THE CLASS PROCEEDINGS ACT, 1992**

|   |   |   |
|---|---|---|
| <b>BETWEEN:</b>                                 | ) |   |
|   | ) |   |
| GRAHAME PLAUNT, PETER PLAUNT<br>and ALAN PLAUNT | ) | K. Scott McLean/James M. Wishart, for the<br>Plaintiffs |
|   | ) |   |
| Plaintiffs                                      | ) |   |
|   | ) |   |
| - and -   | ) |   |
|   | ) |   |
| RENFREW POWER GENERATION INC.                   | ) | Alan H. Mark/Michael Kotrly, for the<br>Defendant       |
|   | ) |   |
| Defendant                                       | ) |   |
|   | ) | <b>HEARD:</b> By written submissions                    |

**REASONS FOR DECISION ON PROCEDURE TO DETERMINE  
FIRST COMMON ISSUE**

**R. SMITH J.**

[1] The plaintiffs propose a modified trial procedure as contemplated in Rule 20.05 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, incorporating an agreed statement of facts, the delivery of expert affidavits, with *viva voce* evidence by the experts. They further propose that timelines be set to determine the common issue.

[2] The defendant submits that the plaintiffs should file a notice of motion setting out in detail the basis of their claim, file an affidavit setting out the material facts relied on, and then file their expert report. The defendant would then be in a position to decide what additional evidence and expert opinion it required to respond. Presumably I would set timelines for responding material to be filed by the defendant and receive further submissions on the appropriate procedure to be followed.

[3] The defendant submits that a summary motion or application based on largely uncontested facts, with some discovery, would be the most efficient manner and least expensive method to determine the common issue.

[4] In *Precious Metal Capital Corp. v. Smith*, 2012 ONCA 298 at para. 8, the Ontario Court of Appeal summarized the new "full appreciation" test in the following terms:

The question whether there is a “genuine issue requiring a trial” must be answered in light of whether a full trial is required for the judge to get a “full appreciation” of the evidence and issues required to make dispositive positive findings. The ultimate question is whether a trial is required in the “interest of justice”.

[5] The plaintiffs submit that in order to determine the issue of whether the licences of occupation are to be interpreted such that a contour line was established creating a fixed property line between public and private lands, the expert opinion of surveyors will be required. The plaintiffs submit that because of the anticipated expert evidence, the “full appreciation” test demands that the Court hear and the parties be able to cross-examine the expert witnesses in a trial process.

[6] In *George Weston Limited v. Domtar Inc.*, 2012 ONSC 5001, 112 O.R. (3d) 190, D.M. Brown J. concluded that if a case was sufficiently complex that its adjudication required expert evidence, that summary proceedings were rarely appropriate. He stated as follows at para. 89:

The simple reality is that usually if a case is sufficiently complex that its adjudication requires resorting to expert evidence, then that case most likely is not a good candidate for a summary judgment motion. There may be exceptions, such as where the expert evidence is uncontested, but that is not this case.

[7] Rule 20.05(1) reads as follows:

*Powers of Court*

**20.05 (1)** Where summary judgment is refused or is granted only in part, the court may make an order specifying what material facts are not in dispute and defining the issues to be tried, and order that the action proceed to trial expeditiously. O. Reg. 438/08, s. 14.

*Directions and Terms*

(2) If an action is ordered to proceed to trial under subrule (1), the court may give such directions or impose such terms as are just, including an order,

- (a) that each party deliver, within a specified time, an affidavit of documents in accordance with the court’s directions;
- (b) that any motions be brought within a specified time;
- (c) that a statement setting out what material facts are not in dispute be filed within a specified time;
- (d) that examinations for discovery be conducted in accordance with a discovery plan established by the court, which may set a schedule for examinations and impose such limits on the right of discovery as are just, including a limit on the scope of

- discovery to matters not covered by the affidavits or any other evidence filed on the motion and any cross-examinations on them;
- (e) that a discovery plan agreed to by the parties under Rule 29.1 (discovery plan) be amended;
  - (f) that the affidavits or any other evidence filed on the motion and any cross-examinations on them may be used at trial in the same manner as an examination for discovery;
  - (g) that any examination of a person under Rule 36 (taking evidence before trial) be subject to a time limit;
  - (h) that a party deliver, within a specified time, a written summary of the anticipated evidence of a witness;
  - (i) that any oral examination of a witness at trial be subject to a time limit;
  - (j) that the evidence of a witness be given in whole or in part by affidavit;
  - (k) that any experts engaged by or on behalf of the parties in relation to the action meet on a without prejudice basis in order to identify the issues on which the experts agree and the issues on which they do not agree, to attempt to clarify and resolve any issues that are the subject of disagreement and to prepare a joint statement setting out the areas of agreement and any areas of disagreement and the reasons for it if, in the opinion of the court, the cost or time savings or other benefits that may be achieved from the meeting are proportionate to the amounts at stake or the importance of the issues involved in the case and,
    - (i) there is a reasonable prospect for agreement on some or all of the issues, or
    - (ii) the rationale for opposing expert opinions is unknown and clarification on areas of disagreement would assist the parties or the court;
  - (l) that each of the parties deliver a concise summary of his or her opening statement;
  - (m) that the parties appear before the court by a specified date, at which appearance the court may make any order that may be made under this subrule;
  - (n) that the action be set down for trial on a particular date or on a particular trial list, subject to the direction of the regional senior judge;
  - (o) for payment into court of all or part of the claim; and
  - (p) for security for costs. O. Reg. 438/08, s. 14.

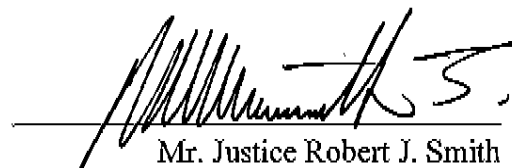
[8] In this case, neither party has brought a motion for summary judgment but rather made submissions in response to my initial thought that a summary motion or application would be appropriate to interpret the occupation licence document at the heart of the common issue. The Court has authority to give directions to impose terms as are just similar to those set out in Rule 20.05(2) in order to have an action proceed to trial on the common issue expeditiously. The plaintiffs propose that an agreed statement of facts be prepared, that expert reports be exchanged, that any relevant evidence filed in the certification motion be included, and that *viva voce* evidence be given by expert witnesses and other potential witnesses at trial.

[9] Underlying the plaintiffs' proposed procedure is an assumption supported by the defendant that the material facts are not in dispute. The plaintiffs submit that the evidence of the expert witnesses should be heard at trial where there is the opportunity for both parties to cross-examine.

[10] Based on the fact that there will be contested expert evidence, I find that a modified trial procedure, similar to that authorized under Rule 20.05 as proposed by the plaintiffs, as opposed to a summary judgment motion is appropriate. In addition, the parties are to be permitted some discovery to be agreed upon or to be determined by me at a case management conference. 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.

[11] Order to go as follows on the procedure to follow to determine the common issue:

- (1) A trial of the common issue to be held following modified procedures;
- (2) The parties to exchange expert reports within time limits to be agreed or to be determined at a case conference;
- (3) The parties to prepare an agreed statement of facts and file a joint book of documents within time limits to be agreed or to be determined at a case conference;
- (4) If the parties are unable to agree upon all of the material facts, each party shall file an affidavit setting out their version of the contested facts within time limits to be agreed or to be determined at a case conference;
- (5) Parties may conduct discovery and cross-examine on the affidavits and documents in a manner and within time limits to be agreed failing or to be determined at a case conference;
- (6) An expeditious trial date to be set with the parties at a case conference. The anticipated witnesses would be the expert witnesses. If there is material evidence that is contested by the parties, then the additional witnesses will to be determined at a subsequent case conference and the required trial time set aside.
- (7) A further case conference should be arranged in any event to set time limits and give any additional directions required as soon as possible.



Mr. Justice Robert J. Smith

**CITATION:** *Plaunt v. Renfrew Power Generation Inc.*, 2013 ONSC 1687  
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**DATE:** 2013/03/20

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**SUPERIOR COURT OF JUSTICE**

**PROCEEDING UNDER THE *CLASS*  
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**BETWEEN:**

GRAHAME PLAUNT, PETER PLAUNT and  
ALAN PLAUNT

Plaintiffs

– and –

RENFREW POWER GENERATION INC.

Defendant

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**REASONS FOR DECISION ON PROCEDURE TO  
DETERMINE FIRST COMMON ISSUE**

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Smith J.

**Released:** March 20, 2013