

**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

REPLY OF THE PLAINTIFFS

1. The plaintiffs admit the allegations contained in paragraphs 8 and 9 (subject to caveats set out herein), the second sentence of paragraph 10, the first sentence of paragraph 12, the first, second and last sentences of paragraph 24, and paragraphs 30 (subject to caveats set out herein) and 34 of the Statement of Defence.

2. The plaintiffs deny the allegations contained in the first sentence of paragraph 10, paragraph 11, the last two sentences of paragraph 12, the second last sentence of paragraph 15, paragraphs 16, 17, 23, the third sentence of paragraph 24, paragraphs 25, 26, 27, 28, 33, 35 through 41, 42 (subject to caveats set out herein) and paragraphs 43 through 48 of the Statement of Defence.

3. The plaintiffs have no knowledge in respect of the allegations contained in paragraphs 4, 5, 6, 13, 14, the balance of paragraph 15, paragraphs 18 through 22, 29, and paragraphs 31, 32 and 34 of the Statement of Defence, but do not accept that such allegations are correct.

4. Defined terms in this Reply have the same meanings as in the Statement of Claim.

Representative Plaintiffs

5. The plaintiff Kenneth Boland is an owner of private land contiguous to Round Lake, and has owned and occupied the lands, whose legal description is Part Lot 12 Concession 12 of the Township of Hagarty, being Part of former Hwy. No. 15 as closed by R195224, being Part 15 on Reference Plan 49R-4111, being Part 1 on Reference Plan 49R-3768 & as in R136188 in the Township of Killaloe, Hagarty & Richards, in the County of Renfrew, and for greater clarity the lands identified in the Land Registry Office at Renfrew (LRO #49) as PIN 57526-0038, during the Class Period, for recreational purposes.

6. The plaintiff Grahame Plaunt has, since the initiation of the herein action, obtained the interests of the former plaintiffs Peter Plaunt and Alan Plaunt in the lands described in paragraph 3 of the Fresh Amended Statement of Claim. Peter Plaunt and Alan Plaunt are no longer representative plaintiffs.

The Licences of Occupation Impose Fixed Geographical Limits on the Water Storage Rights of the Defendant

7. Contrary to paragraphs 8, 17 and 18 of the Statement of Defence, RPG does not have the authority to “flood Round Lake” or to “flood the lands located behind the Dam”. Licence of Occupation No. 647, for example, grants to the licensee “leave and licence and full permission and authority” only to:

[...] enter upon, possess, occupy, use and enjoy during the pleasure of the Crown for the purpose of power development on the Bonnechere River, ALL AND SINGULAR that certain parcel or tract of land and premises, situate, lying and being in the Township of Richards, County of Renfrew, and being composed of part of broken lot 25, con. 2 of said township, which lies between the south westerly limit of the 66 foot road allowance along the banks of Round Lake and the new high water level as hereinafter described and as shown [in] red on plan signed by E.J. Boswell, O.L.S., containing by admeasurement an area of 0.31 acres more or less (plan in 10807) [...]

8. The Licences of Occupation permit the licensee, where necessary for its hydro operations, to inundate certain strictly defined areas of shoreline which are set out precisely and with reference to the plan of survey as drawn by E.J. Boswell in or about 1917 (the "Boswell Survey"). The Boswell Survey is attached to and forms part of the Licences of Occupation.

9. With respect to paragraph 22 of the Statement of Defence, Licence of Occupation #8281 sets limits on the operation of the Tramore Dam that work in conjunction with other Licences of Occupation issued for water storage on Round Lake and which rely upon the Boswell Survey. For greater certainty, Licence of Occupation #8281 permits the licensee to flood only "unalienated Crown lands".

10. With respect to paragraphs 10 and 24 of the Statement of Defence, the Licences of Occupation in conjunction with the Boswell Survey thus establish, at a minimum, certain of the class members' property rights vis-à-vis RPG, including by permanently setting a fixed geographical limit for the storage of water by RPG on Round Lake.

11. Stated in the inverse, the Licences of Occupation establish and determine the limits on RPG's right to store water in Round Lake for the purposes of hydro-electric power generation.

Contrary to paragraph 28 of the Statement of Defence, RPG's storage of water on Round Lake has always been subject, expressly and by necessary implication, to the private property rights including the riparian rights of the Class Members.

12. No Licence of Occupation authorizes RPG to cause, intentionally or otherwise, water or ice to encroach upon the lands of the Class members or to cause, intentionally or otherwise, erosion or other damage to private lands.

13. The plaintiffs plead and rely on the *Public Lands Act*, R.S.O. 1970 c.380, s.20.

14. No Licence of Occupation authorizes RPG to take advantage of any erosion, "natural" or otherwise, of private lands to store water or ice beyond the fixed contour line set out in the Boswell Survey.

15. The grant of any such rights over the Class Members' lands must be express and cannot be effected without due process. The plaintiffs plead and rely on the *Expropriations Act* R.S.O. 1990 c.E.26.

16. To the extent, if any, that HEPC or RPG obtained further water storage rights by way of legal instruments or transactions such as those alleged in paragraphs 18 through 22 of the Statement of Defence, such instruments and transactions contemplate that only the lands specifically described in the relevant legal instrument may be flooded and, or in the alternative, incorporate the contour line depicted on the Boswell Survey as the fixed geographical boundary for flooding.

Round Lake is Not a “Natural Lake” and the Damage Complained of is Not “Natural”

17. Contrary to paragraphs 9, 11 and 27 of the Statement of Defence, prior to the construction of the Tramore Dam, Round Lake was a “natural” lake. Subsequent to the construction of the dam, Round Lake is not a “natural” lake but rather a man-made reservoir such that its hydrodynamics, its contours, the erosion of its shorelines and the formation and movement of its ice cover are no longer “natural”. These elements are controlled or otherwise directly affected by RPG by way of its operation of the Tramore Dam.

18. Contrary to paragraph 26 of the Statement of Defence, Round Lake as it appeared on the original Plan of the Township of Richards in 1860 very strongly resembled in shoreline contour and surface area the same lake as depicted on the 1917 Boswell Survey. This stability in the shoreline of the lake persisted despite the construction of the dam until the advent of RPG’s modern water management regime in and around the 1990s. In that recent history, particularly when viewed from the perspective of the waterfront lands of individual Class Members, the once-stable shoreline of Round Lake has been significantly altered by the manipulation of water levels by RPG which have caused water and ice to encroach upon, weaken and rapidly erode areas of waterfront land.

19. It is specifically pleaded that shoreline instability increased dramatically in scope and seriousness after RPG elected to attempt to maximize its annual hydro generation capacity and output by holding water in Round Lake at higher-than-historic levels for long periods rather than drawing down water levels in anticipation of increased inflow. Through this modern period, RPG has caused water and ice to encroach further and more frequently onto the shore, amplifying their erosive effects by, *inter alia*, uprooting old-growth trees and other vegetation that previously assisted in maintaining the stability of the shoreline.

20. To the extent that the movement of water and ice on Round Lake are “natural”, the damaging effects of such movement on the lands of the Class as complained of in the herein action are accelerated and exacerbated by the artificial manipulation of water levels on Round Lake by RPG. Absent such manipulation, the damage to the lands of the Class Members complained of in the herein action would not have occurred or would have been materially less.

21. The phenomenon known as “ice push”, whereby lake ice encroaches upon the shoreline, destroying buildings, vegetation, and erosion protection structures and otherwise further destabilizing the shoreline, is caused or exacerbated by RPG’s failure to sufficiently or appropriately draw down the lake levels prior to freeze-up. At higher water levels, ice fails to freeze to or “bond” with the lake bottom near the shore, with the consequence that during ice push events, the ice is driven up onto dry land and has the effects complained of herein. When the ice recedes and the lake level rises with the spring freshet, the shoreline is newly vulnerable to erosion.

22. It is specifically pleaded that RPG is obliged to adapt its water management regime and, if necessary, its expectations for its generation of hydroelectricity, to account for any “natural” conditions so as to avoid trespass to private property contiguous to Round Lake and the Bonnechere River.

23. Contrary to paragraphs 38 and 39 of the Statement of Defence, the damage to the shoreline of Round Lake complained of by the plaintiffs is not slow, gradual and imperceptible but has been and continues to be rapid, at times sudden, and clearly evident to the naked eye from year to year. The rate and significance of erosion and damage caused by water and ice on

private properties belonging to Class members has increased concurrently with RPG's efforts to maximize its power generation capacity.

24. The overall effect of RPG's water management regime is that the water stored for hydroelectric generation purposes on Round Lake, even when it is below 107.5 feet when measured vertically at the Tramore Dam, now continuously intrudes beyond the 107.5 foot contour line set out on the Boswell Survey in breach of the Licences of Occupation and in violation of the rights of Class Members. RPG maintains this regime without regard for what it knows to be the damaging effects of high water levels and in the knowledge that by maintaining its preferred water levels it continuously trespasses on the private property of Class Members.

Water Management Plan does not Authorize Trespass by the Defendant

25. With respect to paragraphs 12, 23, 28-34 and 40 of the Statement of Defence, neither the Water Management Plan ("WMP") nor any act, regulation, policy, grant, licence, agreement or other legislative or administrative instrument authorizes RPG to cause water and ice to encroach upon private lands, to cause erosion or other damage to private lands or to expropriate private lands for water storage.

26. The grant of any such rights over the Class Members' lands must be express and cannot be effected without due process. The plaintiffs plead and rely on the *Expropriations Act* R.S.O. 1990 c.E.26.

27. With respect to paragraph 13 of the Statement of Defence, the plaintiffs say that the generation of a small amount of "clean, renewable electricity" by RPG cannot in any way justify the associated cumulative damage to the lands of the Class.

28. Contrary to paragraphs 12 and 32 of the Statement of Defence, the WMP explicitly recognizes the paramountcy of the water storage limits set out in the Licences of Occupation and as described herein and in the Fresh Amended Statement of Claim and in no way diminishes the private property rights of the Class.

29. During the consultations surrounding the drafting of the WMP, RPG advocated for the maintenance of artificially high water levels throughout the year so as to attempt to maximize its hydro generation capacity and its profit. It did so without regard for what it knew then to be the damaging effects of high water levels, and in the knowledge that by maintaining its desired operating regime it continuously trespassed upon and caused damage to the lands of the Class.

30. Contrary to paragraph 41 of the Statement of Defence, RPG was charged in 2005 for failure to comply with the WMP and has in fact failed to comply with the WMP on other occasions during the time period encompassed by this action.

31. With respect to paragraphs 28, 29, and 32 of the Statement of Defence, the WMP does not prevent RPG from taking steps, including those set out in paragraphs 19 and 20 of the Fresh Amended Statement of Claim, to modernize and improve its water management practices so as to avoid trespassing upon and damaging the private property of the plaintiffs and the Class.

32. Contrary to paragraphs 15 and 16 of the Statement of Defence, the water level on Golden Lake has no independent or necessary effect upon the water level on Round Lake.

Attempts at Mitigation by Class Members

33. With respect to paragraph 42 of the Statement of Defence, while the plaintiffs deny that they or the Class Members are legally obliged to do so in order to prevent trespass by RPG, Class Members have nevertheless deployed a variety of techniques to stabilize and protect what remains of their portions of the shoreline. In many or most cases these efforts have been rendered useless by the encroachment of water and ice caused by the defendant.

34. The plaintiffs plead and rely on the *Class Proceedings Act 1992*, S.O. 1992, c. 6, specifically including ss. 12 and 24.

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Defendant

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REPLY OF THE PLAINTIFFS

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