

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

GRAHAME PLAUNT and KENNETH L.W. BOLAND

Plaintiffs

- and -

RENFREW POWER GENERATION INC.

Defendant

Proceeding Under the *Class Proceedings Act, 1992*

STATEMENT OF DEFENCE

1. The Defendant admits the allegations contained in paragraphs 5, 6, and 7 (with the caveat that RPG, as defined herein, has to its knowledge owned and operated the Tramore Dam since 1957, not 1971), the first sentence of paragraph 8, paragraph 15, and the second sentence of paragraph 16 of the Fresh Statement of Claim.

2. The Defendant denies the allegations contained in paragraph 3-4, the second sentence of paragraph 8, paragraphs 9, 10, 11, 12, 13, and 14, paragraph 16 (other than the second sentence), 17-23, 25, and 27-29 of the Fresh Statement of Claim.

3. The Defendant has no knowledge in respect of the allegations contained in paragraphs 2 and 24 of the Fresh Statement of Claim, but does not assert that they are correct.

The Defendant

4. The Defendant, Renfrew Power Generation Inc. is a corporation based in Ontario. The Town of Renfrew is the registered owner of all of the issued and outstanding shares of the Defendant. Renfrew Power Generation Inc. owns and operates the Tramore Dam, which is downstream of Round Lake on the Bonnechere River.

5. Prior to 1957, the Tramore Dam was owned and operated by the Hydro-Electric Power Commission of Ontario (hereinafter "HEPC"). Renfrew Hydro Electric Commission has owned and operated the Tramore Dam since 1957.

6. After the enactment of the *Energy Competition Act* in 1998, Renfrew Hydro Electric Commission was restructured such that Renfrew Power Generation Inc. was responsible for the generation of energy, while Renfrew Hydro Inc. was responsible for its distribution.

7. All references to "RPG" herein refer to Renfrew Power Generation Inc. and, where applicable, its predecessor Renfrew Hydro Electric Commission.

Overview

8. The Tramore Dam was constructed for the purpose of controlling the water flows within the Bonnechere River Watershed, including for the purpose of providing hydro-electric power to local businesses and residents. HEPC had obtained the necessary property rights and regulatory approvals to construct the Tramore Dam and also to flood Round Lake. These rights were all lawfully transferred to RPG.

9. Immediately prior to the construction of the Tramore Dam, Round Lake was a smaller lake. Since the construction of the Dam, the shoreline of Round Lake continues to evolve, which means its contours are unstable and constantly changing due to the effects of erosion that occur naturally.

10. The class members' property rights are not established or determined by any of RPG's Licences of Occupation. The boundaries of class members' properties are determined from a variety of sources, including, but not limited to, Crown grants, various deeds, conveyances, quit claims, easements, restrictions, plan registrations, surveys, other documents, and various legal doctrines which may apply.

11. RPG is not responsible for any encroachment of water or ice on the properties abutting Round Lake, should any encroachment have occurred. The class members acquired property on the shores of an evolving lake whose shoreline would inevitably be changing by reason of the natural erosive forces of water and wind. Any such encroachments are the result of the natural evolution of Round Lake's shoreline, or weather events beyond the control of RPG.

12. Moreover, RPG's operation of the Tramore Dam is constrained by the Water Management Plan of the Bonnechere River Watershed, which, since 2004, has dictated mandatory minimum water levels for Round Lake. The Water Management Plan is the result of a balancing of environmental, private property, and public use interests, in addition to the need for the generation of electricity. The operating regime has the effect of causing a risk of higher than historic water levels on Round Lake at certain times of the year, thereby risking damage to shoreline properties. To the extent that there has been increased erosion since the imposition of the Water Management Plan, such increase is in consequence of said Plan with which RPG has complied.

The Tramore Dam, Round Lake, and the Bonnechere Watershed River System

13. The Tramore Dam (the "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 Dam has created a reservoir for the storage of water to be used, amongst other things, in the generation of clean, renewable electricity and to provide water levels and flows to support various recreational and public uses.

14. The Dam lies on the Bonnechere River southeast, and downstream, of Round Lake. The water flow is controlled through a series of 3 sluices with 24 rectangular logs (a capacity of 8 per sluice) measuring 12 in. by 12 in. by 15 feet by 3 inches; logs are inserted and removed, as the case may be, in order to either increase or decrease water flow and in turn control lake levels.

15. In addition to operating the Dam on Round lake, RPG is also responsible for administering control structures affecting Golden Lake and Lake Clear in the Bonnechere Watershed River System (the "Watershed"), which is the system of lakes and rivers located immediately east of Algonquin Provincial Park and extending to the Ottawa River near Castleford, Ontario. Golden Lake is downstream from Round Lake. Round Lake and Golden Lake are hydraulically connected: that is, the water levels of Round Lake directly affect the water levels of Golden Lake, and vice versa. Like Round Lake, there is considerable residential development surrounding Golden Lake.

16. The Dam allows for only limited control over water levels. Uncontrolled inflows into Round Lake – e.g. the Bonnechere River, precipitation, run off – and a natural downstream restriction at Golden Lake are uncontrollable determinants of water levels.

HEPC, and therefore RPG, Obtained the Necessary Grants, Licences and Easements to Flood Round Lake

17. HEPC and RPG have obtained the necessary rights to flood Round Lake by way of a number of transactions, many of which are discussed below.

18. From 1911-1913, prior to the construction of the Tramore Dam, HEPC purchased the land upon which the Dam was to be constructed, and also lands that were to be flooded due to the Dam's construction and operation. In 1917, HEPC also obtained a number of Licences of Occupation permitting HEPC to flood the lands located behind the Dam.

19. In 1919, when HEPC transferred 155 acres of land to a private owner, it reserved the right to flood that land "in connection with the present or any future Power Development Work at Round Lake".

20. In 1957, the Corporation of the Town of Renfrew enacted By-Law Number 1975 dated November 26, 1957, authorizing the transfer of all lands, rights over land and all other interests relating to the storage dams at Round Lake from HEPC to the Hydro-Electric Power Commission of Renfrew.

21. Also in 1957, HEPC obtained 28 easements permitting it to flood certain lands surrounding Round Lake. Those easements were registered and transferred to Hydro-Electric Power Commission of Renfrew in 1958.

22. The operation of the Tramore Dam itself is governed by a single Licence of Occupation ("Licence # 8281"), and not any other Licence of Operation administered under the *Public Lands Act*, R.S.O. 1990, c. P.43. Licence # 8281 provides that RPG may maintain "a control dam... for the purpose of storing water in Round Lake" and may engage in "Flooding and overflowing by means of the said dam all unalienated Crown lands situate, lying and being adjacent to the said waters in the Townships of Hagarty and Richards, below an elevation of 107.5 feet, local datum, said elevation being 4.5 feet below the top of dam."

23. Licence # 8281 is also expressly subject to such other directions which the Minister of Natural Resources may issue for the operation of the dam, which includes the Water Management Plan, as discussed below.

24. In addition to Licence # 8281 discussed above, RPG possesses a number of other Licences of Occupation corresponding to Licences discussed above at paragraph 18. These Licences provide for RPG to be able to flood certain public lands as defined in the *Public Lands Act*. They do not purport to speak to the property rights of class members, nor do the boundaries of the class members' properties depend on those Licences. The boundaries of class members' properties are determined from a variety of sources, including, but not limited to, Crown grants, various deeds, conveyances, quit claims, easements, restrictions, plan registrations, surveys, other documents, and various legal doctrines which may apply.

25. Contrary to paragraph 23 of the Fresh as Amended Claim, RPG has never admitted to a breach of any of its Licences of Occupation.

Natural Erosion of Round Lake

26. Round Lake was a smaller existing lake before the construction of the Dam. In 1913 there weren't any cottages developed on the shore, nor was there a body of water which resembles Round Lake today. The cottage lifestyle did not begin to appear around Round Lake until the 1950's and 1960's.

27. Class members purchased properties on a lake with a naturally eroding and evolving shoreline. The shores of the expanded lake are not stable and are constantly naturally evolving and eroding, with weather - wind, water flow, ice, etc. - being the primary causes of erosion. The shoreline has yet to reach a stable configuration and erosion continues to occur, regardless of water level.

Regulation of the Bonnechere Watershed by the MNR and the Water Management Plan

28. The activities relating to the Bonnechere Watershed are governed by the Ministry of Natural Resources ("MNR"). Prior to September 2004, RPG's management of water levels was subject only to Licence # 8281 and the MNR's concerns and requirements with respect to fish populations.

29. In 2002, the MNR, after consultation with stakeholders, including representatives of class members and RPG, put in place the Bonnechere River Water Management Plan ("WMP"), which was approved in September 2004 and was most recently amended in December 2009. The WMP sets out legally enforceable guidelines for the management of

flows and levels on the Bonnechere River. The water level requirements in the WMP are mandatory.

30. The WMP sets out guidelines for the operation and maintenance of water levels in the watershed in order to balance the various stakeholder interests, including public rights in or over the waters of the lakes and rivers of Ontario, protection of the interests of riparian owners, and a number of competing environmental concerns. One of the purposes of the WMP is to apply a system-wide, comprehensive approach to managing flows and levels within the watershed.

31. The WMP sets out, among other things, minimum and maximum lake levels for Round Lake. Minimum levels are set primarily for the purposes of protecting the spawning grounds of fish stocks in Round Lake. Maximum levels are set by the limit as dictated by Licence # 8281. By its terms, the WMP recognizes that, due to factors beyond the control of the operator, water levels may not always lie within the range as required by the Plan, and that this in and of itself does not constitute a violation of the WMP.

32. The WMP provides that any relevant Licences of Occupation only restrict RPG's operation of the Dam by limiting the *elevation* of the water level of Round Lake, as opposed to providing for the contours or placement of Round Lake's shoreline. The WMP contains no mention of a "contour line".

33. Moreover, the WMP explicitly contemplates that the water levels mandated in accordance with the WMP for Round Lake could cause damage to the properties along the shore of Round Lake.

34. The WMP provides for an amendment process whereby any interested party can request an amendment to the WMP, which will be reviewed by the MNR District Manager with advice from the WMP's Standing Advisory Committee, subject to public consultation. The WMP also sets out a dispute resolution process with respect to its administration and enforcement.

Denial of Trespass Claim

35. RPG denies that water and ice has continuously encroached on the class members' properties to which they have title and puts them to the strict proof thereof.

36. In addition, RPG has permission to flood many of the class members' properties by virtue of various grants and easements for which HEPC paid lawful consideration and which were lawfully assigned to RPG.

37. In the alternative, RPG denies that any encroachment of water or ice on the Plaintiffs' properties is attributable to RPG's operation of the Tramore Dam.

Flooded Land Now in Possession of the Ontario Crown

38. In the further alternative, the shoreline of Round Lake is evolving and has not yet reached a stable configuration and erosion continues to occur. The boundaries of the class members' properties are not fixed. The erosion of Round Lake since 1913 has been slow, gradual and imperceptible. Any land which is now underwater is the property of Her Majesty the Queen in right of Ontario.

39. RPG pleads and relies on section 109 of the *Constitution Act, 1867* and the *Beds of Navigable Waters Act* R.S.O. 1990, c. B.4.

Any Trespass is Required or Authorized by the WMP

40. The WMP also sets minimum water levels for Round Lake. To the extent that, by reason of such minimum levels, the waters and ice of Round Lake happen to encroach over the contour line as drawn by E.J. Boswell (as referred to in the Fresh as Amended Claim at paragraph 9), RPG is required or authorized by law to maintain those minimum water levels. RPG relies on the *Lakes and Rivers Improvement Act*, R.S.O. 1990, c. L-3.

41. Any encroachments over the 107.5' elevation have not been intentional and certainly have not been continuous. In addition, the Minister of Natural Resources has never considered any incident preceding the commencement of this action whereby the water level of Round Lake exceeded an elevation of 107.5' to be a violation of a Licence of Occupation or of the WMP.

Plaintiffs Required to Protect Their Property and Mitigate Damages

42. Class members have a variety of techniques at their disposal to stabilize their portion of the shoreline, and they are obligated to mitigate the potential impacts of erosion on their shoreline.

43. Moreover, to the extent that any class member has failed to comply with municipal by-laws in respect of the set back of any structures on their properties from the shore of Round Lake, or any other requirements, whether regulatory or otherwise, the class member is precluded by law and equity from being awarded damages for any trespass that may have occurred.

Action is Statute Barred

44. In the event that RPG has trespassed on the Plaintiffs' property, RPG denies that the trespass has been continuous.

45. The Plaintiffs' claims are statute-barred. RPG pleads and relies upon the *Real Property Limitations Act*, R.S.O. 1990, Chapter L.15 and the *Limitations Act*, S.O. 2002, c. 24, Sched. B.

46. Moreover, given that no claim of this nature has been brought in the almost 100 years that the Tramore Dam has been in operation, the Plaintiffs and the class members are now estopped from bringing this action or have acquiesced to any encroachment of water and ice on their properties.

Damages Sought are Excessive

47. Lastly, the damages sought by the Plaintiffs are not caused by any conduct of RPG and are excessive and remote. RPG denies that the Plaintiffs are entitled to aggravated or punitive damages as alleged or at all.

Order Sought

48. RPG therefore asks that this action be dismissed with costs.

January 20, 2012

NORTON ROSE CANADA LLP
Suite 3800, Royal Bank Plaza, South Tower
200 Bay Street, P.O. Box 84
Toronto ON M5J 2Z4

Alan H. Mark LS# 21772L
Michael Kotrly LS#: 53745A
Tel: 416-216-4000
Fax: 416-216-3930

Lawyers for the Defendant

TO: FRASER MILNER CASGRAIN LLP
1420 – 99 Bank Street
Ottawa ON K1P 1H4

K. Scott McLean LS# 16455G
Tel: 613 783-9665

James M. Wishart LS#: 58794G
Tel: 613 783-9651
Fax: 613-783-9690

Lawyers for the Plaintiffs

Grahame Plaunt et al. v. Renfrew Power Generation Inc.

Court File No: 08-CV-42639CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Ottawa

STATEMENT OF DEFENCE

NORTON ROSE CANADA LLP
Suite 3800, Royal Bank Plaza, South Tower
200 Bay Street, P.O. Box 84
Toronto ON M5J 2Z4

Alan H. Mark LS# 21772L
Michael Kotrly LS#: 53745A

Tel: 416-216-4000
Fax: 416-216-3930

Lawyers for the Defendant