

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

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

**STEVE VETSCH and JACQUELINE COFFIN**

Plaintiffs

- and -

**ATLANTIC POWER CORPORATION,  
BARRY WELCH and TERRENCE RONAN**

Defendants

**STATEMENT OF CLAIM**

**(Notice of Action issued April 2, 2013)**

**DEFINED TERMS**

1. In this document, in addition to the terms that are defined elsewhere herein, the following terms have the following meanings:

- (a) “**2011 Annual Report**” means **ATP**’s Annual Report on Form 10-K for the year ended December 31, 2011, filed on **SEDAR** on March 1, 2012;
- (b) “**2012 Annual Report**” means **ATP**’s Annual Report on Form 10-K for the year ended December 31, 2012, filed on **SEDAR** on February 28, 2013;
- (c) “**6% Convertible Debentures**” means **ATP**’s 6.00% Series D Extendible Convertible Unsecured Subordinated Debentures due 2019;
- (d) “**ATP**” means the defendant, Atlantic Power Corporation;
- (e) “**CEO**” means Chief Executive Officer;

- (f) “**CFO**” means Chief Financial Officer;
- (g) “**CJA**” means the Ontario *Courts of Justice Act*, RSO 1990, c C-43, as amended;
- (h) “**Class**” and “**Class Members**” mean all persons and entities, wherever they may reside or be domiciled, who acquired **ATP**’s **Securities** during the **Class Period**, other than the **Excluded Persons**;
- (i) “**Class Period**” means the period from November 5, 2012 through February 28, 2013, inclusive;
- (j) “**CPA**” means the *Class Proceedings Act, 1992*, SO 1992, c 6, as amended;
- (k) “**Debt Securities**” means the various debt securities that **ATP** had issued and outstanding during the **Class Period**;
- (l) “**Defendants**” means, collectively, **ATP** and the **Individual Defendants**;
- (m) “**Dividend Policy**” means **ATP**’s dividend payout rate of \$1.15 per share per annum, which was introduced on November 7, 2011, and remained in effect until February 28, 2013;
- (n) “**Excluded Persons**” means the **Defendants**, their past and present subsidiaries, affiliates, officers, directors, senior employees, partners, legal representatives, heirs, predecessors, successors and assigns, and any individual who is an immediate member of the family of an **Individual Defendant**;
- (o) “**GAAP**” means Generally Accepted Accounting Principles;
- (p) “**Impugned Documents**” (each being an “**Impugned Document**”) means, collectively, the Q3 2012 Interim Financial Statements, filed on

SEDAR on November 5, 2012; the Q3 2012 MD&A, filed on SEDAR on November 5, 2012; and the **Prospectus**;

- (q) “**Individual Defendants**” (each being an “**Individual Defendant**”) means **Welch** and **Ronan**, collectively;
- (r) “**MD&A**” means Management’s Discussion and Analysis;
- (s) “**MW**” means megawatts;
- (t) “**NYSE**” means the New York Stock Exchange;
- (u) “**OEFC**” means the Ontario Electricity Financial Corporation;
- (v) “**Offering**” means the public offering by way of the **Prospectus** in each of the provinces and territories of Canada other than Quebec of \$100 million aggregate principal amount of **ATP’s 6% Convertible Debentures**;
- (w) “**Ontario Acquisition**” means the transaction by **ATP** in November 2011 to acquire Capital Power Income L.P. and its current Ontario-based power projects;
- (x) “**OPA**” means the Ontario Power Authority;
- (y) “**OSA**” means the *Securities Act*, RSO 1990 c S 5, as amended;
- (z) “**Plaintiffs**” means the plaintiffs, Steve Vetsch and Jacqueline Coffin;
- (aa) “**PPA**” means a power purchase agreement;
- (bb) “**Prospectus**” means **ATP’s** prospectus supplement dated December 3, 2012;
- (cc) “**Representation**” means the statement, express or implied, that the **Impugned Documents**, or any of them, fairly presented in all material

respects the financial condition, results of operations and cash flows of **ATP**;

- (dd) “**Ronan**” means the defendant, Terrence Ronan;
- (ee) “**SEC**” means the United States Securities and Exchange Commission;
- (ff) “**Securities**” means **ATP**’s common shares and **Debt Securities**;
- (gg) “**Securities Legislation**” means, collectively, the *OSA*, the *Securities Act*, RSA 2000, c S-4, as amended; the *Securities Act*, RSBC 1996, c 418, as amended; the *Securities Act*, CCSM c S50, as amended; the *Securities Act*, SNB 2004, c S-5.5, as amended; the *Securities Act*, RSNL 1990, c S-13, as amended; the *Securities Act*, SNWT 2008, c 10, as amended; the *Securities Act*, RSNS 1989, c 418, as amended; the *Securities Act*, S Nu 2008, c 12, as amended; the *Securities Act*, RSPEI 1988, c S-3.1, as amended; the *Securities Act*, RSQ c V-1.1, as amended; the *Securities Act, 1988*, SS 1988-89, c S-42.2, as amended; and the *Securities Act*, SY 2007, c 16, as amended;
- (hh) “**SEDAR**” means the system for electronic document analysis and retrieval of the Canadian Securities Administrators;
- (ii) “**TSX**” means the Toronto Stock Exchange; and
- (jj) “**Welch**” means the defendant, Barry Welch.

## CLAIM

### 2. The Plaintiffs claim:

- (a) an order certifying this action as a class proceeding pursuant to the *CPA*, and appointing the Plaintiffs as the representative plaintiffs for the Class;
- (b) a declaration that the Impugned Documents contained the Representation, and that, when made, the Representation was a misrepresentation, both at law and within the meaning of the Securities Legislation;

- (c) a declaration that the Impugned Documents contained one or more of the other misrepresentations alleged herein, and that, when made, those other misrepresentations constituted misrepresentations, both at law and within the meaning of the Securities Legislation;
- (d) a declaration that the Defendants failed to disclose a material change within the meaning of the Securities Legislation in a timely fashion while they knew of that material change and that it constituted a material change within the meaning of the Securities Legislation, or deliberately avoided acquiring knowledge of a material change, or were guilty of gross misconduct in connection with the failure to timely disclose a material change;
- (e) a declaration that the Individual Defendants made public oral statements that were misrepresentations within the meaning of the Securities Legislation, and/or authorized, permitted or acquiesced in the making of those public oral statements while they knew that those oral statements constituted misrepresentations within the meaning of the Securities Legislation, or deliberately avoided acquiring knowledge of that, or were guilty of gross misconduct in connection with the release of those public oral statements;
- (f) damages, as against all Defendants,
  - (i) on behalf of all of the Class Members who acquired ATP's common shares general damages in the sum of \$168 million;
  - (ii) on behalf of all of the Class Members who acquired ATP's 6% Convertible Debentures, whether in the Offering or in the secondary market, general damages in the sum of \$20 million; and
  - (iii) on behalf of all of the Class Members who acquired ATP's Debt Securities other than the 6% Convertible Debentures, general damages in the sum of \$20.5 million;
- (g) a declaration that ATP is vicariously liable for the acts and omissions of the Individual Defendants and of its other officers, directors and employees;
- (h) an order directing a reference or giving such other directions as may be necessary to determine the issues, if any, not determined at trial of the common issues;
- (i) prejudgment and postjudgment interest pursuant to the *CJA*;
- (j) costs of this action;

- (k) costs of notice and of administering the plan of distribution of the recovery in this action, plus applicable taxes; and
- (l) such further and other relief as to this Honourable Court may seem just.

## **OVERVIEW**

3. Atlantic Power Corporation (“ATP”) is a dividend paying utilities company. ATP’s share price depends on its ability to distribute dividends to shareholders. ATP’s ability to pay dividends is dependent on its consolidated cash flow; that is, cash that ATP receives from its various power plant projects.

4. During the Class Period, the Defendants: (a) failed to disclose on a timely basis challenges in re-contracting with customers; (b) failed to disclose on a timely basis increasing costs and declining operating margins; (c) failed to disclose the effect of these challenges on ATP’s project cash flow; (d) failed to disclose the effect of these challenges on ATP’s cash available for distribution to shareholders; (e) failed to disclose the effect of these challenges on ATP’s operational and financial flexibility; and (f) continued to falsely represent that ATP’s project cash flow was stable and that its cash available for distribution to shareholders was sustainable.

5. Throughout the Class Period, the Defendants were aware of challenges to ATP’s cash flow, and the negative effect of those challenges to ATP’s ability to sustain its purported strategy and corporate objectives to pay shareholders’ dividends and make accretive acquisitions. Although ATP’s ability to deliver on its purported corporate strategy and objectives had been impaired, the Defendants continued to falsely represent that ATP was able to deliver on its corporate strategy and objectives.

6. On February 28, 2013, the end of the Class Period, ATP filed its financial and operations results for the year ended December 31, 2012. At this time, ATP finally disclosed that as a result of challenges to its re-contracting prospects and reduced margins, ATP’s project cash flow and Cash Available for Distribution were no longer sustainable. As a result, ATP was no longer able to maintain its Dividend Policy and dividends were slashed by 65%.

7. This announcement had a dramatic, immediate impact on the value of ATP Securities. The price of ATP's shares, which was \$10.26 at the close of trading on February 28, 2013, dropped precipitously to \$7.30 on March 1, 2013, the following trading day. ATP's stock price continued to fall in the next few days as the market absorbed the new negative disclosure, closing at \$5.82 on March 5, 2013.



8. ATP's announcement on February 28, 2013 also negatively impacted the market price of its various Debt Securities, as follows:

- (a) the market price of ATP's 6.50% Convertible Debentures due 2014 declined from \$99.79 as at the close of trading on February 28, 2013 to \$90.00 as at the close of trading on March 1, 2013;
- (b) the market price of ATP's 6.25% Convertible Debentures due 2017 declined from \$97.11 as at the close of trading on February 28, 2013 to \$89.00 as at the close of trading on March 1, 2013;
- (c) the market price of ATP's 5.60% Convertible Debentures due 2017 declined from \$91.77 as at the close of trading on February 28, 2013 to \$86.98 as at the close of trading on March 1, 2013; and

- (d) the market price of ATP's 6% Convertible Debentures due 2019 declined from \$93.34 as at the close of trading on February 28, 2013 to \$85.14 as at the close of trading on March 1, 2013,

all on extraordinarily heavy trading volumes.

## **PARTIES**

9. The plaintiff, Steve Vetsch is an individual residing in Alberta who purchased ATP's common shares during the Class Period.

10. The plaintiff, Jacqueline Coffin is an individual residing in Alberta who purchased ATP's common shares during the Class Period.

11. The defendant, ATP is a utilities company formed pursuant to the *Business Corporations Act* (British Columbia), SBC 2002, c 57. ATP is, and was at all material times, a reporting issuer in all provinces and territories of Canada and a registrant with the SEC. At all material times, ATP's common shares were listed for trading on the TSX (ticker symbol: "ATP") and the NYSE (ticker symbol: "AT"), and also traded on various alternative trading markets in Canada. At all material times, ATP's Debt Securities traded in the secondary market in Canada.

12. As a reporting issuer in Ontario, ATP was required to issue and file with SEDAR:

- (a) within 45 days of the end of each quarter, quarterly interim financial statements prepared in accordance with IFRS that must include a comparative statement to the end of each of the corresponding periods in the previous financial year;
- (b) within 90 days of the end of the fiscal year, annual financial statements prepared in accordance with IFRS, including comparative financial statements relating to the period covered by the preceding financial year; and



- (c) contemporaneously with each of the above, an MD&A of each of the above financial statements.

13. MD&As are a narrative explanation of how the company performed during the period covered by the financial statements, and of the company's financial condition and future prospects. The MD&A must discuss important trends and risks that have affected the financial statements, and trends and risks that are reasonably likely to affect them in future.

14. The defendant, Barry Welch is and has been ATP's President and CEO since October 2004, and a director of ATP since June 2007. At all relevant times, Welch was an officer and director of ATP within the meaning of the Securities Legislation.

15. The defendant, Terrance Ronan is and has been ATP's CFO and Executive Vice President since August 2012. At all relevant times, Ronan was an officer of ATP within the meaning of the Securities Legislation.

## **ATP'S BUSINESS, OPERATIONS, CORPORATE STRATEGY AND OBJECTIVES**

### Overview of Business

16. ATP owns and operates hydro, natural gas and coal fired power generation and infrastructure plants in Canada and the United States.

17. ATP sells electricity generated by its plants to utilities and other large commercial customers principally under long-term PPAs.

18. ATP operates in four main segments across Canada and the United States: 1) the Northeast Segment, which represented 50.1% of ATP's consolidated revenue in 2012; 2) the Northwest Segment, which represented 13.6% of the ATP's consolidated revenue in 2012; 3) the Southwest Segment, which represented 35.9% of ATP's consolidated revenue in 2012; and 4) the Southeast Segment.

19. At all material times, the Southeast segment represented a significant portion of ATP's consolidated revenue. However, because the projects located in the Southeast

Segment were designated as held for sale as at December 31, 2012, those assets did not contribute to ATP's consolidated revenue in 2012 for accounting purposes.

*ATP's Business Strategy and Corporate Objectives, and the Role of Project Cash Flow and Cash Available for Distribution*

20. ATP purportedly pursues a two-pronged corporate strategy, which is to increase the value of the company through accretive acquisitions while generating stable, contracted cash flows from operations in order to sustain its dividend payout to shareholders. ATP's ability to generate stable cash flow to pay sustainable dividends depends on its ability to make acquisitions. Thus, these prongs are intertwined and both are necessary to meet its corporate objectives.

21. ATP states that its primary objective is to generate consistent levels of cash flow to support dividends to shareholders, which it refers to as "Cash Available for Distribution." ATP knows that its shareholders are primarily focused on income through shareholder dividends.

22. The primary factor influencing Cash Available for Distribution is the cash flow that ATP receives from its projects. ATP's ability to maintain consistent levels of cash flow and sustainable Cash Available for Distribution is contingent on its ability to stabilize cash flow.

23. ATP purports to achieve stable cash flow by way of: 1) entering into PPAs; and 2) stabilizing operating margins, as ATP disclosed in the 2011 Annual Report:

***Stability of project cash flow.*** Many of our power generation projects currently in operation have been in operation for over ten years. Cash flows from each project are generally supported by PPAs with investment-grade utilities and other creditworthy counterparties. We believe that each project's combination of PPAs, fuel supply agreements and/or commodity hedges help stabilize operating margins.

*Dividends Constitute ATP's Key Corporate Objective and Depend on Project Cash Flow*

24. ATP is a dividend paying company, and its primary objective is to pay dividends to shareholders. ATP stated in the 2011 Annual Report that “we believe that our shareholders are primarily focused on income,” which is derived from dividends. ATP’s share price reflects, and did reflect during the Class Period, ATP’s dividend policy.

25. Factors that negatively impact steady cash flow from the power projects and/or their PPAs impair ATP’s ability to maintain the Dividend Policy. On November 7 and 11, 2011, ATP issued, respectively, a press release and a material change report announcing, among other things: (1) closing of the Ontario Acquisition; (2) closing of a private offering of US\$460 million senior notes to finance the Ontario Acquisition; and (3) the increase in ATP’s annual dividend on common shares from \$1.094 to \$1.15 per share (the “Dividend Policy”).

26. As ATP acknowledged in the November 7, 2011 press release and the pertinent material change report, ATP’s ability to maintain the Dividend Policy depended on: (1) steady cash flow from its portfolio of power projects; and (2) those projects’ PPAs.

27. ATP pays dividends to shareholders out of its “Cash Available for Distribution,” a non-GAAP measure that ATP uses principally to measure its ability to pay dividends to shareholders. ATP also states that Cash Available for Distribution is “the key measure [ATP] uses to evaluate the results of [its] business.”

28. The primary factor influencing ATP’s Cash Available for Distribution is ATP’s project cash flow. ATP purportedly attempts to ensure stable cash flow from its power generation projects through PPAs and by maintaining stable operating margins. As a result, any event that affects ATP’s PPAs and its operating margins directly impacts ATP’s cash flow and Cash Available for Distribution and, as a result, ATP’s purported business strategy and objective to pay dividends.

*ATP’s Purported Business Strategy to Make Accretive Acquisitions Depends on Cash Flow from Operations*

29. ATP depends on PPAs and stabilized operating margins to generate steady project cash flow. Accordingly, any event that affects ATP’s PPAs and operating

margins directly impairs ATP's liquidity required to deliver on its purported operational and financial objective to make acquisitions.

30. Part of ATP's purported business strategy is to make accretive acquisitions. Accretive acquisitions are necessary to enable ATP to meet its "primary objective" to pay dividends.

31. ATP's ability to make accretive acquisitions depends on its liquidity which, in turn, depends on ATP's project cash flow. As ATP stated in the 2011 Annual Report, "Our primary source of liquidity is distributions from our projects and availability under our revolving credit facility."

32. Since ATP currently has significant debt outstanding, its access to outside financing directly depends on its project cash flow, its ability to meet current debt obligations, and to satisfy them upon their maturity dates. Without stable cash flow from operations, ATP's liquidity and financial flexibility and its ability to make future acquisitions to deliver on its purported objectives and strategy are in jeopardy.

#### **ATP DELAYED DISCLOSURE OF ADVERSE INFORMATION**

33. During the Class Period, ATP experienced significant challenges concerning the re-contracting prospects of its PPAs and a decline in its operating margins. These challenges affected (a) ATP's project cash flow; (b) ATP's ability to maintain sustainable levels of Cash Available for Distribution; and, ultimately (c) ATP's ability to deliver on its stated corporate strategy and objectives.

34. This adverse information was improperly withheld from investors. Instead of making full and true disclosure, ATP continued to make misleading information about its business and operations, including on the earnings call held on November 6, 2012, where the defendant, Welch, stated: "We're confident in our ability to sustain the current divided level" (i.e., the Dividend Policy).

35. In fact, the challenges in securing new PPAs and the declining operating margins had negatively affected ATP's project cash flow and the sustainability of ATP's Cash

Available for Distribution. As a result, those challenges had undermined the Dividend Policy, which ATP was no longer able to maintain.

### **ATP'S POWER PURCHASE AGREEMENTS**

36. PPAs are at the core of ATP's business model, and the most significant determinant of the future cash flow of ATP's projects.

37. At relevant times, ATP's PPAs had expiration dates starting in 2013. When a PPA expires, the parties engage in re-contracting negotiations in order to enter into new PPAs. The PPA re-contracting processes often start many months in advance of the expiration dates and, in current market condition, normally result in PPAs on substantially less favourable terms to the electricity generator. Sometimes, no new PPA will be reached at all.

38. At all times during the Class Period, the Defendants knew that the prospects of securing new PPAs had declined, and that ATP's ability to deliver on its strategic and financial objectives had been impaired due to the challenges it had faced in its re-contracting process. However, it was only on February 28, 2013 that ATP disclosed that it had received *increasingly* challenging signals in the re-contracting processes.

#### ***ATP's Ontario PPAs***

39. The Defendants knew at all relevant times that the prospects of securing new PPAs in Ontario had declined and that, as a result, ATP's project cash flow was no longer stable and its Cash Available for Distribution was no longer sustainable. However, the Defendants did not disclose those challenges and their impact on ATP's project cash flow and Cash Available for Distribution on a timely basis, and continued to represent falsely that ATP was able to deliver on its corporate strategy and objectives.

40. ATP's Ontario-based facilities are classified in the company's Northeast Segment. At relevant times during the Class Period, ATP had five power generation projects in Ontario with PPA expiration dates ranging from 2014 to 2022, as set out below. ATP acquired these assets, and their respective PPAs, pursuant to the acquisition of Capital Power Income L.P. in November 2011 (the "Ontario Acquisition").

<b>Project</b>	<b>Fuel</b>	<b>Gross MW</b>	<b>Economic Interest</b>	<b>Net MW</b>	<b>Primary Purchaser</b>	<b>PPA Expiration</b>
Calstock	Biomass	35	100%	35	OEFC	2020
Kapuskasing	Natural Gas	40	100%	40	OEFC	2017
Nipigon	Natural Gas	40	100%	40	OEFC	2022
North Bay	Natural Gas	40	100%	40	OEFC	2017
Tunis	Natural Gas	43	100%	43	OEFC	2014

Overview of the current Ontario market condition

41. The Ontario electricity market is highly regulated, and electricity generators must primarily sell electricity to the Government of Ontario through its various agents. The Ontario Electricity Financial Corporation (“OEFC”) is the counterparty to all of ATP’s current Ontario PPAs. In 2012, electricity sales to the OEFC represented 34.7%, or \$153 million, of ATP’s total consolidated revenue.

42. The OEFC is one of the five entities established by the *Electricity Act, 1998*, as part of the restructuring of the former Ontario Hydro. Among other assets, the OEFC inherited certain outstanding non-utility generator (“NUG”; also known as independent power producer, or “IPP”) contracts of Ontario Hydro. These included all of ATP’s Ontario PPAs. The OEFC was responsible for “managing the former Ontario Hydro’s NUG contracts in the current market environment” through the end of those contracts’ terms.

43. The PPAs inherited by OEFC generally provided for the purchase of power from generators at prices in excess of future market price, resulting in significant additional costs for both the Government of Ontario and end customers.

44. In December 2004, the *Electricity Restructuring Act, 2004* was passed. At the time, the Ontario electricity market was undersupplied, and the purpose of this legislation, among other things, was to:

- (a) to ensure the adequacy, safety, sustainability and reliability of electricity supply in Ontario through responsible planning and management of electricity resources, supply and demand;
- (b) to encourage electricity conservation and the efficient use of electricity in a manner consistent with the policies of the Government of Ontario;
- (c) to facilitate load management in a manner consistent with the policies of the Government of Ontario; and
- (d) to promote the use of cleaner energy sources and technologies, including alternative energy sources and renewable energy sources, in a manner consistent with the policies of the Government of Ontario.

45. The Ontario Power Authority (“OPA”) was established pursuant to the *Electricity Restructuring Act, 2004*, with a mandate to ensure the reliability of Ontario’s electricity resources by managing supply and demand.

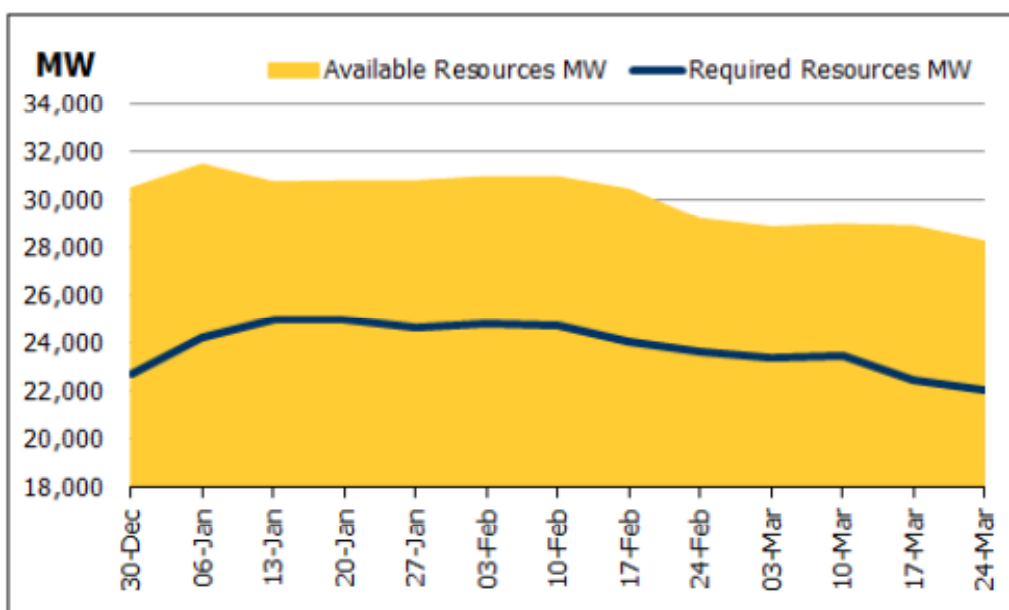
46. In 2009, Ontario passed Bill 150, by way of which it enacted the *Green Energy Act* and amended several key pieces of energy-related legislation, including the *Electricity Act, 1998* and the *Ontario Energy Board Act, 1998*. Pursuant to Bill 150, the OPA was mandated to develop and implement the Government of Ontario’s clean and renewable energy initiative.

47. Since then, the OPA has launched two series of a program called the “feed-in-tariff” program (the “FIT Program”) to promote renewable sources of energy. Under the FIT Program, and certain other renewable energy programs and projects (including a project operated by a Korean Consortium, which currently has approximately 2,500 MW generation capacity under contract with the OPA pursuant to directives of the Ontario Ministry of Energy dated September 2010 and July 2011), as at June 2012, the OPA had approximately 10,000 MW renewable generation capacity under long-term contracts.

48. According to the OPA report titled “A Progress Report on Contracted Electricity Supply, Third Quarter 2012,” as at third quarter 2012, total contracted generation capacity with the OPA comprised of 21,491 MW, while 13,547 MW were in commercial operation and the remainder at various development stages. Under development projects were expected to be added to the Ontario electricity grid between 2014 to 2016. In other

words, it was expected that substantially all of OPA's current contracted electricity capacity become commercially available by the end of 2016. This capacity did not include PPAs that are currently in place with the OEFC, or other generation capacity that is or will become available in Ontario, or generation capacity that is not under contract.

49. As a result of the foregoing, Ontario electricity market is currently significantly oversupplied. The chart below, retrieved from the IESO website, shows available generation capacity in Ontario in comparison with required resources during the first quarter of 2013.



50. This situation was described by Capstone Infrastructure Corporation, a peer company of ATP, at a shareholders' conference call held in December 2011, as follows:

[O]ur sector in Ontario has gone through a real roller coaster over the last little while... [O]nly a short time ago, going back to 2002 to 2006 or so, we were grossly undersupplied. It wasn't uncommon for the Ontario markets to be importing as much as 4,000 megawatts of power, of energy, on any given day. And we've quickly gone to a position of surplus...

51. Through to 2014, it is expected that electricity supply in Ontario will exceed demand. The IESO 18-Month Outlook, From March 2013 to August 2014, dated February 28, 2013, reported that Ontario's energy generating capacity is experiencing



growth while conservation is reducing consumption. These factors, reported the ISEO, will lead to a decline in electricity consumption in 2013. With this decline and with significant quantities of baseload generation on the Ontario electricity system, the IESO reported that “Ontario will continue to experience surplus baseload generation..”

52. PPAs that are currently in place in Ontario impose significant costs to the Ontario end customers. In these circumstances of excess supply and declining demand and increasing costs to the Ontario end customers, the Government of Ontario, or its agents, have little incentive, if any, to enter into new PPAs on terms that were previously in place with the pertinent electricity generators.

*ATP’s challenges in re-contracting the Ontario PPAs*

53. The re-contracting process for ATP’s Ontario PPAs, and the other PPAs in place with the OEFC, was commenced in November 2010 by a Directive issued by the then-Ontario Minister of Energy, Brad Duguid, dated November 23, 2010 (the “Directive”). By way of the Directive, the Minister directed the OPA to engage into negotiations for the possibility to re-contract with generators who had outstanding PPAs with the OEFC as at the end of 2010.

54. The Directive reads in the pertinent parts:

To support the objective of clean and efficient electricity generation and to help ensure electricity system adequacy, the Ministry of Energy (the “Ministry”) has determined that it is advisable to pursue the initiative of seeking new contracts (the “New Contracts”) for the non-utility generators that are listed in the attached Appendix A (the “NUG Facilities”) where these would have cost and reliability benefits to Ontario electricity customers.

The details of the initiative (the “Initiative”) are as follows:

[...]

5. Each New Contract will be on terms that reflect a reasonable cost to Ontario electricity customers and the value of the NUG facility output to Ontario electricity customers...

6. The New Contracts should be structured to provide clear signals to NUG Facilities to operate in a manner that optimizes operation when power is valued highly and does not provide an incentive to operate when the output is not required, or the value of the power is low.

7. The New Contracts will require the NUG Facilities to be curtailed when requested to do so by the IESO when capacity needs to be constrained off for system or local reasons.

8. The payments under the existing NUG contracts constitute a significant share of the payments covered by Ontario electricity customers through the Global Adjustment. The outcome of the negotiations set out in this initiative should be to significantly reduce the payments made by Ontario electricity customers under the Global Adjustment related to NUG facilities.

9. The New Contracts should endeavour to ensure that a greater share of the payments to NUG Facilities is recovered through the Hourly Ontario Electricity Price, and to minimize the portion of revenues to be recovered through the Global Adjustment.

[...]

*For greater clarity, the OPA is not required by this direction to enter into a New Contract with a NUG Party where the OPA is unable to reach agreement with the NUG Party on terms that satisfy the requirements outlined in this direction, including the requirements relating to reasonable cost and reasonable balancing of risk and reward.*

[emphasis added]

55. The OPA views the Directive and its mandate thereunder as follows:

On November 23, 2010, the Ontario Power Authority (OPA) received a directive from the Ministry of Energy instructing the OPA to enter into negotiations to sign new contracts with non-utility generators (“NUGs”) listed in Appendix A of the directive. In accordance with the terms of the directive, the OPA is not obligated to enter into a new contract with any NUG that does not meet the requirements outlined in the directive. *As a result, the OPA does not expect to enter into any contracts that are not on terms that reflect a reasonable cost to Ontario electricity customers and the value of the NUG facility output.*

[emphasis added]

56. The negotiation process as per the Directive was commenced in 2011, and included the OEFC's PPAs in respect of ATP's five Ontario facilities, as well as 26 other facilities. As at the end of the Class Period in February 2013, ATP had not been invited to those negotiations.

57. The Defendants did not disclosed the specific impact of the Directive on the re-contracting prospects of its Ontario facilities. Nevertheless, Paul Howard Rapisarda, ATP's Executive Vice-President – Commercial Development, appears to have referred to it as a “soft guideline” at the November 6, 2012 earnings call:

<Q - Nelson Ng>: Okay, thanks. And just one last thing, in terms of the Tunis facility, have you started recontracting discussions or can you give us a sense of where you are in that process?

<A - Barry Edward Welch>: Yeah, Paul will talk that.

<A - Paul Howard Rapisarda>: Sure. As Barry said, the Tunis contract expires at the end of 2014, the OPA has a sort of soft guideline that they've been trying to invite people in at least a year in advance of their contract expiration, so they've been in discussions for I think over 12 months at this point with an initial group of five NUGs. And we would anticipate being in the next group that would be invited in. But, we have not started discussions with them at this point, Nelson.

58. In light of the above, the Defendants knew at all relevant times there were increasing challenges in regard to the re-contracting prospects of its Ontario PPAs.

59. Furthermore, Pursuant to the terms of the Directive, the Defendants knew that, if ATP were to secure new PPAs in Ontario, these would have necessarily been on significantly lower prices. The Defendants also knew that new PPAs, if any, would be on less favourable terms, requiring ATP to suspend operation or curtail generation when requested to do so.

60. All of this information was withheld from the ATP investors during the Class Period.

### ***ATP's Florida PPAs***

#### ***Overview of the Florida operations***

61. The Defendants knew at all relevant times that due to the declining financial returns at the Florida projects, ATP’s project cash flow was no longer stable and its Cash Available for Distribution was no longer sustainable. However, the Defendants did not disclose on a timely fashion that ATP’s project cash flow and Cash Available for Distribution had been negatively impacted by the declining financial returns at the Florida projects, and continued to represent falsely that ATP was able to deliver on its corporate strategy and objectives.

62. At all times during the Class Period, ATP owned four electricity projects in Florida, with expiration dates ranging from 2013 to 2023, as set out in the below table.

<b>Project</b>	<b>Fuel</b>	<b>Gross MW</b>	<b>Economic Interest</b>	<b>Net MW</b>	<b>Primary Purchaser</b>	<b>PPA Expiration</b>
Auburndale	Natural Gas	155	100%	155	Progress Energy Florida	2013
Lake	Natural Gas	121	100%	121	Progress Energy Florida	2013
Pasco	Natural Gas	121	100%	121	Tampa Electric Company	2018
Orlando	Natural Gas	129	50%	46	Progress Energy Florida	2023
				19	Reedy Creek Improvement District	2013

63. As at year-end 2012, ATP’s Florida-based facilities comprised the company’s Southeast Segment.

64. ATP’s Auburndale, Lake and Orlando 2013 PPAs were all agreements with the utility company Progress Energy Florida, Inc. (“Progress Energy Florida”). At all

material times, PPAs with Progress Energy Florida accounted for a material portion of ATP's consolidated revenue.

65. In its Q3 2012 Interim Financial Statement, ATP disclosed that its sales to Progress Energy Florida provided approximately:

- (a) \$43.3 million, or 28%, of total consolidated revenue for the three months ended September 30, 2012, and 90% of the \$48.2 million total revenue generated from the Southeast Segment; and
- (b) \$120.5 million, or 26%, of total consolidated revenue for the nine months ended September 30, 2012, and 88% of the \$137.4 million total revenue from the Southeast Segment.

66. In its 2011 Audited Financial Statements, ATP disclosed that its sales to Progress Energy Florida provided approximately \$148 million, or 52%, of its 2011 total consolidated revenue, and 92% of the \$161 million total revenue from the Southeast Segment.

*Re-contracting of the Florida PPAs and sale of the Florida assets*

67. At the relevant time, ATP had PPAs in respect of the Lake and Auburndale projects with Progress Energy Florida, which were due to expire in 2013. ATP also had a PPA with Progress Energy Florida in respect of the Pasco project expiring in 2018.

68. In the third quarter of 2012, ATP responded to a request for a proposal by Progress Energy Florida to secure a PPA for the years 2016-2018 in respect of the Lake project.

69. In December 2012, ATP was advised that its bid for a new PPA in respect of the Lake project had been declined. This event prompted a study on the prospects of financial returns at the Lake project. ATP informed its investors, by way of a press release dated December 28, 2012, of the uncertainties concerning financial returns at the Lake project principally due to "continuing projections of weak underlying fundamentals associated with the Florida market and the absence of realistic prospects to secure

profitable PPAs for the Project in the near-term.” ATP also stated that in the third quarter of 2012, it had received an unsolicited, non-binding bid from a third party for the purchase of a group of assets that included the Lake project.

70. It is not clear whether ATP ever submitted a proposal in respect of the Auburndale project. In regard to the Pasco project, ATP had disclosed that “[o]ur Pasco project was able to enter into a new ten-year tolling agreement, but it provided substantially lower cash flow than under the original agreement.”

71. The uncertainties concerning financial returns at ATP’s Florida-based assets, and in particular, the Lake project, prompted ATP to sell all three of Lake, Auburndale and Pasco projects. The decision to sell those assets, made in December 2012, was due to the fact that “the Florida energy market will not recover in the near-term to allow us to secure economic PPAs.”

72. The sale of these Florida assets was disclosed by way of a press release dated January 30, 2013, which stated:

“Our business model is focused on achieving stable, predictable cash flows from contracted power generation. Given our projections that the Florida energy market will not recover in the near-term to allow us to secure economic power purchase agreements (“PPAs”), we concluded, after considering all available options, that the sale of Lake and Auburndale maximizes shareholder value,” said Barry Welch, President and CEO of Atlantic Power.

73. At all relevant times, ATP was aware of the increasing challenges in securing new PPAs in respect of the Florida assets. In fact, the prospects of securing new Florida PPAs had already declined precipitously by Q3 2012 when ATP submitted its ‘last and best bid’ for the Lake project.

74. At all times, ATP was aware of the continuing challenges in the Florida market and “the absence of realistic prospects to secure profitable PPAs,” not only in respect of the Lake project, but also in respect of the other Florida-based projects.

75. In fact, ATP had disclosed that the future cash flow from the Pasco project would be “substantially lower,” and that ATP’s “most significant exposure to future cash flows is at our Lake and Auburndale projects.”

76. However, ATP did not disclose the impact of these challenges on its ability to deliver on its operational and financial objectives and corporate strategy, and on its project cash flow and Cash Available for Distribution.

77. The post-PPA income from the Florida assets and, subsequently, the decision to sell those projects had negatively impacted ATP’s project cash flow, a fact that was disclosed to the public only on February 28, 2013.

#### **DECLINING MARGINS DUE TO DECREASING TRANSCANADA PIPELINE FLOW**

78. At all relevant times, due to the increasing TransCanada pipeline tolls and the decreasing waste heat available from the pipeline, ATP’s operating margins relating to its Ontario assets had declined. As a result of the declining margins, ATP’s cash flow from the Ontario projects and Cash Available for Distribution had declined. However, the Defendants did not disclose these facts during the Class Period.

#### ***Increased Tolls Reduce Margins***

79. ATP relies on the TransCanada pipeline to transport natural gas from Alberta to four of its Ontario facilities. For the transportation of natural gas, TransCanada charges customers certain amounts known as the TransCanada tolls.

80. As a result of the decline in the number of TransCanada’s customers and the decreasing natural gas flow, the TransCanada pipeline tolls have increased. Effective January 1, 2012, TransCanada increased its transportation rate from \$1.63 per gigajoule to \$2.24 per gigajoule. This rate continues to be effective.

81. ATP, which has four natural gas power plants in Ontario, relies heavily on the TransCanada pipeline for fuel transportation. The increase in the TransCanada tolls has significantly increased the operating costs of power generators that rely on the

transportation of fuel through the TransCanada pipeline. As a result, ATP's operating margins declined in 2012.

*Less Available Waste Heat Reduces Margins*

82. In addition to relying on the TransCanada pipeline to transport fuel, all of ATP's five Ontario facilities have long-term agreements with TransCanada to use waste heat generated by the gas turbine compressors located adjacent to those facilities. Waste heat is provided by TransCanada on an as-available basis. In the event waste heat output is reduced at those compressor stations, TransCanada's obligation to deliver waste heat is reduced.

83. At all material times in 2012, waste heat output at the TransCanada facilities declined due to decreasing natural gas flow in the pipeline. Accordingly, less waste heat was available to ATP from adjacent TransCanada facilities and, as a result, ATP had to spend more on energy, a further factor that negatively impacted ATP's operating margins at the Ontario projects.

**THE TRUTH IS REVEALED**

84. On February 28, 2013, ATP issued its fiscal year 2012 operational and financial results, and disclosed for the first time that:

- (a) ATP had experience significant challenges in regard to the re-contracting of the Ontario facilities, reducing its near-term re-contracting prospects of the Ontario projects;
- (b) ATP's prospects of re-contracting the PPA relating to the New York-based Selkirk project had declined;
- (c) the increase in TransCanada tolls had reduced operating margins at ATP's Ontario facilities;
- (d) ATP's initially estimated post-PPA cash flow from the Florida-based, Lake and Auburndale projects, and then ATP's decision to sell the three Florida projects had in fact negatively affected ATP's project cash flow;



- (e) the expected sale of ATP's Path 15 transmission line had further negatively affected ATP's project cash flow;
- (f) ATP's Cash Available for Distributions was no longer sustainable and, as a result, the dividends had to be cut;
- (g) ATP's operational and financial flexibility had been impaired;
- (h) ATP did not have the required liquidity for future acquisitions;

and that, as a result of all the foregoing,

- (i) ATP's ability to deliver on its strategic and financial objectives had been impaired;

(collectively, hereinafter, the "Adverse Information").

85. After these announcements, the market price of ATP's Securities plummeted.

86. The cumulative effect of the Adverse Information constituted a change in the business, operations or capital of ATP that was reasonably expected to have a significant effect on the market price or value of ATP's Securities.

## **THE DEFENDANTS' MISREPRESENTATIONS**

### **Q3 2012 Interim Financial Statements and MD&A**

87. On November 5, 2012, ATP issued and filed on SEDAR its Q3 2012 Interim Financial Statements and MD&A, which are Impugned Documents. ATP's statements in the 2011 Annual Report were incorporated into the Q3 2012 Interim Financial Statements and MD&A.

88. Each of Welch and Ronan certified the Q3 2012 Interim Financial Statements and MD&A as follows:

Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the

circumstances under which such statements were made, not misleading with respect to the period [ended September 30, 2012].

Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods [ended September 30, 2012].

89. The Adverse Information existed as at September 30, 2012. The Defendants were required to disclose the Adverse Information in the Q3 2012 Interim Financial Statements and MD&A, but failed to do so.

90. Additionally, the Q3 2012 Interim Financial Statements and MD&A contained positive statements derived from the 2011 Annual Report about ATP's business and operations, including:

- (a) "OUR OBJECTIVES AND BUSINESS STRATEGY Our corporate strategy is to increase the value of the company through accretive acquisitions in North American markets while generating stable, contracted cash flows from our existing assets to sustain our dividend payout to shareholders. In order to achieve these objectives, we intend to focus on enhancing the operating and financial performance of our current projects and pursuing additional accretive acquisitions primarily in the electric power industry in the United States and Canada";
- (b) "ORGANIC GROWTH We intend to enhance the operation and financial performance of our projects through ... optimization of commercial arrangements such as PPAs, fuel supply and transportation contracts, steam sales agreements, operations and maintenance agreements and hedge agreements ..."
- (c) "Our primary objective is to generate consistent levels of cash flow to support dividends to our shareholders";

- (d) “The operating performance of our projects supports cash distributions that are made to us after all operating, maintenance, capital expenditures and debt service requirements are satisfied at the project level. Our projects are able to generate Cash Available for Distribution because they generally receive revenues from long-term contracts that provide relatively stable cash flows”;
- (e) “OUR COMPETITIVE STRENGTHS: *Stability of project cash flow.* Many of our power generation projects currently in operation have been in operation for over ten years. Cash flows from each project are generally supported by PPAs with investment-grade utilities and other creditworthy counterparties. We believe that each project's combination of PPAs, fuel supply agreements and/or commodity hedges help stabilize operating margins”;
- (f) “OUR COMPETITIVE STRENGTHS: *Access to capital.* Having significant experience in accessing all of these markets provides flexibility such that we can pursue transactions in the most cost-effective market at the time capital is needed”; and
- (g) “We intend to expand our operations by making accretive acquisitions”.

91. The above statements were false or misleading as at September 30, 2012, or the Defendants’ omission to disclose the Adverse Information rendered the above statements false and/or misleading.

92. The Defendants falsely represented in the Q3 2012 Interim Financial Statements and MD&A that: 1) ATP’s project cash flow was stable; 2) ATP’s Cash Available for Distribution was sustainable; and 3) ATP was able to deliver on its corporate strategy and objectives.

93. Additionally, the Q3 2012 Interim Financial Statements and MD&A included the Representation. However, because of the Defendants’ failure to disclose the Adverse Information, the Q3 2012 Interim Financial Statements and MD&A did not fairly present

in all material respects ATP's financial condition, results of operations and cash flows. Accordingly, the Representation was false.

*ATP's Offering and Misrepresentations in the Prospectus*

94. On December 3, 2012, ATP issued the Prospectus, which is an Impugned Document. By way of the Prospectus, ATP distributed \$100 million aggregate principal amount of the 6% Convertible Debentures in all provinces and territories of Canada, other than Quebec.

95. The Prospectus incorporated various documents by reference, including: (1) the Q3 2012 Interim Financial Statements, which are an Impugned Document; (2) the Q3 2012 MD&A, which is an Impugned Document; and (3) all ATP's reports on Form 8-K issued from August 17, 2012 through December 3, 2012.

96. The Prospectus supplemented a Short-Form, Base Shelf Prospectus (the "Base Shelf Prospectus") dated August 17, 2012. The Base Shelf Prospectus, in turn, incorporated by reference various ATP documents, including: (1) each of the 2011 Annual Report, and the amendment number 1 thereto, filed on SEDAR on April 5, 2012; (2) the 2011 Audited Annual Financial Statements, filed on SEDAR on March 1, 2012; (3) the 2011 MD&A, filed on SEDAR on March 1, 2012; (4) the Q2 2012 Interim Financial Statements, filed on SEDAR on August 8, 2012; and (5) the Q2 2012 MD&A, filed on SEDAR on August 8, 2012. The documents incorporated by reference into the Base Shelf Prospectus form part of the Prospectus, and are incorporated by reference therein.

97. The documents incorporated by reference in the Base Shelf Prospectus were incorporated into, and formed part of, the Prospectus.

98. Each of Welch and Ronan signed the Prospectus, and certified that the Prospectus, together with the documents incorporated in the Prospectus by reference, constituted full, true and plain disclosure of all material facts relating to the securities offered by the Prospectus as required by the securities legislation of the provinces and territories of Canada other than the province of Quebec.

99. The Adverse Information existed as at the date of the Prospectus. The Defendants were required to disclose the Adverse Information in the Prospectus, but failed to do so.

100. Additionally, the Prospectus contained positive statements about ATP's business and operations, including:

- (a) "OUR OBJECTIVES AND BUSINESS STRATEGY Our corporate strategy is to increase the value of the company through accretive acquisitions in North American markets while generating stable, contracted cash flows from our existing assets to sustain our dividend payout to shareholders. In order to achieve these objectives, we intend to focus on enhancing the operating and financial performance of our current projects and pursuing additional accretive acquisitions primarily in the electric power industry in the United States and Canada";
- (b) "ORGANIC GROWTH We intend to enhance the operation and financial performance of our projects through ... optimization of commercial arrangements such as PPAs, fuel supply and transportation contracts, steam sales agreements, operations and maintenance agreements and hedge agreements . . ."
- (c) "Our primary objective is to generate consistent levels of cash flow to support dividends to our shareholders";
- (d) "The operating performance of our projects supports cash distributions that are made to us after all operating, maintenance, capital expenditures and debt service requirements are satisfied at the project level. Our projects are able to generate Cash Available for Distribution because they generally receive revenues from long-term contracts that provide relatively stable cash flows";
- (e) "OUR COMPETITIVE STRENGTHS: *Stability of project cash flow.* Many of our power generation projects currently in operation have been

in operation for over ten years. Cash flows from each project are generally supported by PPAs with investment-grade utilities and other creditworthy counterparties. We believe that each project's combination of PPAs, fuel supply agreements and/or commodity hedges help stabilize operating margins”;

- (f) “OUR COMPETITIVE STRENGTHS: *Access to capital.* Having significant experience in accessing all of these markets provides flexibility such that we can pursue transactions in the most cost-effective market at the time capital is needed”; and
- (g) “We intend to expand our operations by making accretive acquisitions.”

101. The above statements were false or misleading as of the date on which the Prospectus was issued, or the Defendants’ omission to disclose the Adverse Information rendered the above statements false and/or misleading.

102. The Defendants falsely represented in the Prospectus that: 1) ATP’s project cash flow was stable; 2) ATP’s Cash Available for Distribution was sustainable; and 3) ATP was able to deliver on its corporate strategy and objectives.

103. Additionally, the Prospectus included the Representation. However, because of the Defendants’ failure to disclose the Adverse Information, the Prospectus did not fairly present in all material respects ATP’s financial condition, results of operations and cash flows. Accordingly, the Representation was false.

***The Defendants’ Misrepresentations Constituted Statutory Misrepresentations***

104. The OSA and the other Securities Legislation imposed an obligation on the Defendants to make full, true and plain disclosure of all material facts in the Impugned Documents, and to not make any statements or omit any statement that would render the Impugned Documents misleading.

105. United States securities law imposed an obligation on the Defendants to make full, true and plain disclosure of all material facts in the Impugned Documents, and to

not make any statements or omit to make any statement that would render the Impugned Documents misleading.

106. The misrepresentations particularized herein constituted misrepresentations within the meaning of applicable securities law.

***The Defendants' Misrepresentations were Incorporated Efficiently into the Price of ATP's Securities***

107. The issuance of the Impugned Documents directly affected the price of ATP's Securities. ATP's disclosure documents were the primary source of information concerning ATP's business and prospects, including the impact of the broader market and regulatory environment on ATP's business. The Defendants were aware at all material times of the effect of ATP's disclosure documents upon the price of its Securities. The Impugned Documents were filed, among other places, on SEDAR and EDGAR, and with regulatory authorities in Canada and the United States, and thereby became immediately available to, and were reproduced for inspection by, the Class Members, other members of the investing public, financial analysts and the financial press.

108. ATP routinely transmitted the information referred to above to the financial press, financial analysts and certain prospective and actual holders of its Securities. ATP provided either copies of the Impugned Documents or links thereto on its website. ATP maintains a website in part to communicate with the Class and prospective investors.

109. ATP regularly communicated with the public investors and financial analysts via established market communication mechanisms, including through regular disseminations of its disclosure documents, including press releases on newswire services. Each time ATP communicated that new material information about its financial results to the public it directly affected the price of its Securities.

110. ATP regularly held earnings conference calls with financial analysts and members of the investing public, on which it routinely discussed its business, operations, objectives and strategy, including the information referred to above.

111. ATP was the subject of analysts' reports that incorporated certain of the material information contained in the Impugned Documents, with the effect that any recommendations to purchase ATP's Securities in such reports during the Class Period were based, in whole or in part, upon that information.

112. ATP's Securities were and are traded, among other places, on the TSX and the NYSE, which are efficient and automated markets. The price at which ATP's Securities traded promptly incorporated material information from ATP's disclosure documents about ATP's business, operations, objectives and strategy, including the Representation, which was disseminated to the public through the documents referred to above and the various other means ATP chose and used to communicate that information to the public.

## **RIGHTS OF ACTION**

### ***Statutory Liability for Misrepresentation in the Prospectus***

113. As against ATP and the Individual Defendants, both of whom signed the Prospectus, and on behalf of those Class Members who acquired ATP's 6% Convertible Debentures in the Offering, the Plaintiffs assert the right of action found in s 130 of the OSA and, if necessary, the equivalent provisions of the other Securities Legislation.

114. The Prospectus contained misrepresentations within the meaning of Part XXIII of the OSA and the equivalent provisions of the other Securities Legislation, as particularized above.

115. The Prospectus, together with the documents incorporated therein by reference, did not constitute full, true and plain disclosure of all material facts relating to the 6% Convertible Debentures.

116. ATP issued the 6% Convertible Debentures, and the Individual Defendants signed the Prospectus.

### ***Negligence Simpliciter***



117. As against ATP and the Individual Defendants, both of whom signed the Prospectus, and on behalf of those Class Members who acquired ATP's 6% Convertible Debentures in the Offering, the Plaintiffs assert negligence *simpliciter*.

118. ATP, and by virtue of their position of authority and responsibility within ATP, the Individual Defendants, owed a duty to purchasers to ensure that the Prospectus made full, true and plain disclosure of all material facts relating to the securities offered thereby, and was materially accurate and complete.

119. The reasonable standard of care expected in the circumstances required the Defendants to prevent the distributions to which the Prospectus related from occurring prior to the correction of the Representation and the other misrepresentations particularized herein.

120. The Defendants violated their duty of care to those Class Members who acquired ATP's securities pursuant to the Prospectus. As a result, those Class Members were damaged.

121. Had the Defendants exercised reasonable care and diligence in connection with the distribution of the securities to which the Prospectus related, the securities regulators would not have issued a receipt for the Prospectus, or the prospectus that it supplemented, and that distribution would not have occurred, or would have occurred at prices that reflected the true value of the 6% Convertible Debentures.

***Statutory Liability for Secondary Market Misrepresentation (s 138.3 of the OSA)***

122. On behalf of themselves and all other Class Members who acquired ATP's Securities in the secondary market, the Plaintiffs assert the rights of action found at subsections 138.3(1) and 138.3(2) of the *OSA* subject to section 138.8 of the *OSA*, and, if required, the equivalent provisions of the other Securities Legislation, against all Defendants.

123. Each of the Impugned Documents was a core document in respect of each of the Defendants within the meaning of the Securities Legislation.

124. As particularized above, each of the Impugned Documents contained one or more misrepresentations.

125. ATP is a responsible issuer within the meaning of the Securities Legislation. Welch was a director and officer of ATP, and Ronan was an officer of ATP within the meaning of the Securities Legislation.

126. Each of Welch and Ronan authorized, permitted or acquiesced in the release of the Impugned Documents. Each of Welch and Ronan falsely certified the accuracy of each of the Impugned Documents in their capacities as, respectively, ATP's CEO and CFO.

127. In addition, Welch made public oral statements that constituted misrepresentations, as particularized herein, within the meaning of Part XXIII.1 of the *OSA* and, if necessary, the equivalent provisions of the other Securities Legislation. Welch had actual, implied or apparent authority to speak on behalf of ATP, and those oral statements related to the business or affairs of ATP. Ronan authorized, permitted or acquiesced in the making of those public oral statements.

128. When those public oral statements were made, each of the Defendants knew of the misrepresentations particularized herein, and knew that those public oral statements constituted a misrepresentation within the meaning of the Securities Legislation. In the alternative, each of the Defendants deliberately avoided acquiring knowledge that those public oral statements were misrepresentations. In the further alternative, each of the Defendants, through action or failure to act, was guilty or gross misconduct in connection with the release of those public oral statements.

129. Each of the Individual Defendants authorized, permitted or acquiesced in the release of the Impugned Documents. Each of the Individual Defendants falsely certified the accuracy of each of the Impugned Documents in their capacities as, respectively, ATP's CEO and CFO. Each of the Individual Defendants caused the Impugned

Documents to be released through instructing ATP's employees to release the Impugned Documents, among other things

130. The Plaintiffs will seek leave of court to pursue the rights of action found at subsections 138.3(1) and 138.3(2) of the *OSA* and, if required, the equivalent provisions of the other Securities Legislation.

***Statutory Liability for Secondary Market Misrepresentation (s 138.3(4) of the OSA)***

131. On behalf of themselves and all other Class Members who purchased ATP's Securities in the secondary market, the Plaintiffs assert the cause of action for failure to make timely disclosure of a material change, found at subsection 138.3(4) of the *OSA* and, if necessary, the equivalent provisions of the other Securities Legislation, against all Defendants.

132. The Adverse Information, or substantially all of them, existed as at the start of the Class Period. The cumulative effect of the Adverse Information constituted a change in the business, operations or capital of ATP that reasonably expected to have a significant effect on the market price or value of ATP's Securities (the "Material Change").

133. The Material Change constituted a material change within the meaning of the Securities Legislation. Pursuant to section 75 of the *OSA* and, if applicable, the equivalent provisions of the other Securities Legislation, the Defendants ought to have disclosed the Material Change forthwith, but failed to do so.

134. ATP was a responsible issuer, within the meaning of the Securities Legislation. Each of the Individual Defendants was a director or officer of ATP, and authorized, permitted or acquiesced in the failure to make timely disclosure of the Material Change.

135. Each of the Defendants knew of the Material Change and that it constituted a material change within the meaning of the Securities Legislation, but failed to disclose it in a timely fashion. In the alternative, each of the Defendants deliberately avoided acquiring knowledge of the Material Change or that it constituted a material change

within the meaning of the Securities Legislation. In the further alternative, each of the Defendants, through action or failure to act, was guilty or gross misconduct in connection with the failure to make timely disclosure of the Material Change.

136. The Plaintiffs will seek leave of court to pursue the right of action found at subsection 138.3(4) of the *OSA* and, if necessary, the equivalent provisions of the other Securities Legislation.

***Negligent Misrepresentation***

137. On behalf of themselves and those Class Members who acquired ATP's Securities in the secondary market, the Plaintiffs assert negligent misrepresentation against all Defendants.

138. In support of these claims, the sole misrepresentation that the Plaintiffs plead is the Representation. The Representation was included in the Impugned Documents. The Representation was untrue when made, and constituted a misrepresentation at law and within the meaning of the Securities Legislation.

139. The Defendants had a duty at common law to exercise care and diligence to not falsely state that the Impugned Documents presented in all material respects ATP's financial condition, results of operations and cash flows.

140. In addition, ATP is a reporting issuer in all provinces and territories of Canada and a registrant with the SEC. As such, at all material times ATP was subject to securities law in Canada and the United States.

141. The Defendants had statutory obligations under applicable securities law to ensure that Impugned Documents represented fairly in all material respects ATP's financial condition, results of operations and cash flow. The Defendants breached that duty by making the Representation, and by falsely certifying so.

142. Furthermore, the Individual Defendants had a duty to the Class Members pursuant to section 142 of the *Business Corporations Act* (British Columbia), SBC 2002, c 57.

143. The Impugned Documents were prepared for the purpose of attracting investment and inducing members of the investing public to purchase ATP's Securities. The Defendants knew and intended at all material times that those documents had been prepared for that purpose, and that the Class Members would rely reasonably and to their detriment upon such documents in making the decision to purchase ATP's Securities.

144. The Defendants further knew and intended that the information contained in the Impugned Documents would be incorporated into the price of ATP's publicly traded Securities such that the trading price of those securities would at all times reflect the information contained in the Impugned Documents.

145. Throughout the Class Period, the Defendants had exclusive access to information about ATP's business and operations. As such, they were the primary source of information specifically related to ATP's business which was relevant to the Class Members' decision to acquire ATP's Securities and the prices at which they would be acquired.

146. As ATP's CEO, Welch certified the accuracy of the Q3 2012 Interim Financial Statements and MD&A. Therein, he asserted that those Impugned Documents "fairly present[ed] in all material respects the financial condition, results of operations and cash flows" of ATP. Welch authorized, permitted or acquiesced in the release of ATP's Q3 2012 Interim Financial Statements and MD&A, or caused them to be released, and adopted the Representation by certifying the accuracy of those documents.

147. As ATP's CEO, Welch certified the accuracy of the Prospectus. Therein, he asserted that the Prospectus, which is an Impugned Document, "constitut[ed] full, true, and plain disclosure of all material facts relating to the securities offered by the prospectus." Welch authorized, permitted or acquiesced in the release of the Prospectus, or caused it to be released, and adopted the Representation by certifying the accuracy of the Prospectus.

148. As ATP's CFO, Ronan certified the accuracy of the Q3 2012 Interim Financial Statements and MD&A. Therein, he asserted that those Impugned Documents "fairly

present[ed] in all material respects the financial condition, results of operations and cash flows” of ATP. Ronan authorized, permitted or acquiesced in the release of ATP’s Q3 2012 Interim Financial Statements and MD&A, or caused them to be released, and adopted the Representation by certifying the accuracy of those documents.

149. As ATP’s CFO, Ronan certified the accuracy of the Prospectus. Therein, he asserted that the Prospectus, which is an Impugned Document, “constitut[ed] full, true, and plain disclosure of all material facts relating to the securities offered by the prospectus.” Ronan authorized, permitted or acquiesced in the release of the Prospectus, or caused it to be released, and adopted the Representation by certifying the accuracy of the Prospectus.

150. As such, the Defendants owed Class Members a duty of care to ensure that ATP’s disclosure documents did not misrepresent ATP’s business, financials and affairs. That duty was informed by the Securities Legislation, subsidiary instruments, including NI 51-102, NI 52-109, NI 41-101, NI 44-101 and NI 44-102, as well as applicable United States securities law.

151. The Defendants breached their duty owed to the Class Members by making the Representation, which was false.

152. The Plaintiffs and the other Class Members were entitled to, and did, reasonably rely on the Representation in making a decision to purchase the Securities of ATP, and suffered damages when the falsity of the Representation was revealed.

153. Alternatively, the Plaintiffs and the other Class Members relied on the Representation by the act of purchasing ATP’s Securities in an efficient market that promptly incorporated into the price of those securities all publicly available material information regarding the Securities of ATP. As a result, the repeated publication of the Representation in the Impugned Documents and through the facilities of securities markets caused ATP’s Securities to trade at inflated prices during the Class Period, thus directly resulting in damage to the Plaintiffs and the other Class Members.

## **Damages**

154. The Plaintiffs and Class Members suffered damages as a result of the Defendants' breach of their duties at law by making the misrepresentations particularized herein.

155. The Class Members suffered damages equivalent to the drop in market price or value of the Securities as the truth about ATP's financial condition, results of operation and cash flow, and the other misrepresentations particularized herein, was disclosed. If the Defendants had not made the misrepresentations described above, ATP's Securities would not have traded at artificially high levels during the Class Period, and the Class Members would not have suffered losses when the truth was finally and belatedly revealed on February 28, 2013.

### **Vicarious Liability**

156. ATP is vicariously liable for the acts and omissions of Welch and Ronan, and of its other directors, officers and employees including, without limitation, misrepresentations made negligently. The Individual Defendants engaged in the misconduct described above while engaged in the management, direction, control and transaction of the business and affairs of ATP.

### **Real and Substantial Connection with Ontario**

157. The Plaintiffs plead that this action has a real and substantial connection with Ontario, because, among other things:

- (a) ATP is a reporting issuer in Ontario;
- (b) ATP has an office, owns and operates assets, and is actively engaged in doing business in Ontario;
- (c) ATP's securities trade on the TSX and certain Canadian alternative trading venues, all of which are located in Ontario;
- (d) ATP's public disclosure was disseminated in Ontario;
- (e) a substantial proportion of the Class Members reside in Ontario; and

- (f) a substantial portion of the damages sustained by the Class were sustained in Ontario.

**Service Outside of Ontario**

158. The Plaintiffs may serve the Notice of Action and this Statement of Claim outside of Ontario without leave in accordance with rule 17.02 of the *Rules of Civil Procedure*, because it is:

- (a) a claim in respect of personal property in Ontario (para 17.02(a));
- (b) a claim in respect of damage sustained in Ontario (para 17.02(h));
- (c) a claim authorized by statute to be made against a person outside of Ontario by a proceeding in Ontario (para 17.02(n));
- (d) a claim against a person outside of Ontario who is a necessary or proper party to a proceeding properly brought against another person served in Ontario (para 17.02(o)); and
- (e) a claim against a person ordinarily resident or carrying on business in Ontario (para 17.02(p)).



159. This action was commenced pursuant to the *Class Proceedings Act, 1992*.

160. The Plaintiffs intend to serve a jury notice.

May 2, 2013

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