

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

BILL BENNETT

Plaintiff

- and -

HYDRO ONE INC., HYDRO ONE BRAMPTON NETWORKS INC.,
HYDRO ONE REMOTE COMMUNITIES INC., NORFOLK POWER
DISTRIBUTION INC., and HYDRO ONE NETWORKS INC.

Defendants

Proceeding under the *Class Proceedings Act, 1992*

**FACTUM OF THE PLAINTIFF
(Certification Motion Returnable May 9-11, 2017)**

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PART I - OVERVIEW

1. This proposed class action arises from the systemically flawed implementation by Hydro One of a new billing and customer information system in May 2013, which is alleged to have resulted in widespread, significant and ongoing billing and customer service issues for Hydro One customers. It focuses squarely on the conduct of Hydro One in the planning, implementation and post-implementation phases of its new system and the resultant risk of harm to which all class members have been exposed.

2. The launch of Hydro One's new billing and customer information system led to immediate and monumental problems. Tens of thousands of customers stopped receiving bills. Many customers received months of "estimated" bills, only to be hit with massive "catch-up" bills. In some cases, Hydro One automatically withdrew huge sums from the bank accounts of its customers, causing extreme stress and disruption to their lives. The expert evidence advanced on this motion demonstrates that, in addition to these documented issues, there is a basis in fact for concluding that latent defects causing unnoticed or unreported billing errors affecting Hydro One customers may continue today.

3. Hydro One carries on a near monopolistic enterprise with over 1.3 million Ontario consumers. It has a contractual obligation to bill its customers only for the electricity they consume, and to take the necessary care in implementing systems and processes that reliably achieve this outcome. As a result of Hydro One's systemic mismanagement, its customers were left in extremely vulnerable circumstances and were faced with significant financial hardship. This case alleges that the deficiencies associated with Hydro One's new billing and customer

information system constitute a breach of the duty of care and contractual obligations that Hydro One owes to its customers, leading to the unjust enrichment of Hydro One vis-à-vis the proposed class.

4. The case, as framed by the plaintiff, meets each of the five criteria in section 5 of the *Class Proceedings Act, 1992* and ought to be certified for the following reasons:

- (a) **The Statement of Claim discloses causes of action:** The plaintiff asserts causes of action in negligence, breach of contract, and unjust enrichment. Each of these causes of action is properly pleaded.
- (b) **There is an identifiable class:** This class proceeding is brought on behalf of persons and entities that purchased electricity from Hydro One from May 2013 to the present. The class is objectively defined and rationally connected to the common issues.
- (c) **This action discloses common issues:** The common issues focus on the conduct of Hydro One, including its failure to take reasonable steps to ensure that it was using an accurate and reliable billing system and to ensure that its customer service representatives were adequately trained, sufficiently informed about the new billing system, and properly resourced to provide timely and effective customer service. The common issues are significant components of each class member's claim and their resolution will advance the action.
- (d) **A class proceeding is the preferable procedure:** A class proceeding is the preferable procedure to answer the common issues. This action raises complex issues and questions concerning Hydro One's knowledge and conduct, which, if resolved in the plaintiff's favour, will substantially advance the litigation for the entire class. Given the nature of the claims, there is no alternative procedure that is capable of granting the relief sought by the plaintiff and the class.
- (e) **The representative plaintiff is suitable:** The proposed representative plaintiff Bill Bennett is a customer of Hydro One and has sworn to vigorously prosecute the action in favour of the class. He has stepped forward to be the face of this class action and is an excellent representative plaintiff to advance the common interests of the class.

PART II - THE FACTS

A. The Plaintiff and the Class

5. The proposed representative plaintiff, Bill Bennett, has been a customer of Hydro One Networks Inc. for many years.¹ Following the implementation of Hydro One's new billing and customer information system ("CIS") in May 2013, Mr. Bennett's Hydro One bills began to reflect higher than average monthly electricity usage, despite there having been no change in the usage associated with his property.² One year after the new CIS was deployed, Mr. Bennett received four separate "catch up" bills from Hydro One disclosing a significant increase in electricity costs and consumption.³ In April 2015, Mr. Bennett received a package from Hydro One containing 39 "revised" bills dating back over a period of four years and was told that he owed Hydro One an additional \$2,587.69.⁴

6. Mr. Bennett brings this action on behalf of himself and a class of all persons and entities, other than the Excluded Persons, who purchased electricity from Hydro One between May 2013 and the date of the certification order in this action (the "**Class Period**"). Excluded from the class are the defendants, their officers and directors, members of their immediate families, and their legal representatives, heirs, successors or assigns ("**Excluded Persons**").

7. As a result of Hydro One's failure to properly plan for and implement its new CIS, its customers were the victims of billing problems causing them to be invoiced for electricity usage

¹ Affidavit of Bill Bennett, sworn March 24, 2016 ["**Bennett Affidavit**"], paras. 24-25, **Plaintiff's Motion Record** ["**PMR**"], Vol. 1, Tab 5, pp. 62-63; Transcript of the cross-examination of Bill Bennett (February 2, 2017) ["**Bennett Transcript**"], q. 7, p. 4, **Joint Record of Cross-Examination Transcripts** ["**Transcript Record**"], Tab C, p. 129.

² Bennett Affidavit, para. 25, **PMR**, Vol. 1, Tab 5, p. 63.

³ Bennett Affidavit, para. 26, **PMR**, Vol. 1, Tab 5, p. 63.

⁴ Bennett Affidavit, para. 35, **PMR**, Vol. 1, Tab 5, p. 65.

in amounts that were greater than what was consumed.⁵ Mr. Bennett brings this class proceeding to address Hydro One's overbilling and mismanagement of its customers' accounts, and its negligent and substandard approach to customer service.⁶

8. Mr. Bennett has also filed the affidavit of Mary Bates, a willing and very suitable candidate to serve as an additional representative plaintiff, if necessary.⁷

B. The Defendants

9. The defendant Hydro One Inc. is an Ontario corporation that is a wholly-owned subsidiary of Hydro One Limited, whose shares trade on the Toronto Stock Exchange.⁸ Hydro One Inc. is a holding company that owns a number of subsidiaries.

10. Hydro One Networks Inc. is a wholly-owned subsidiary of Hydro One Inc.⁹ that services approximately 1.3 million customers.¹⁰ Hydro One Networks Inc. is Ontario's largest electricity transmission and distribution company.¹¹ It began using the CIS in May 2013.¹²

11. The defendant Hydro One Remote Communities Inc. is a wholly-owned subsidiary of Hydro One Inc. that generates and distributes electricity to approximately 3,600 customers in 21

⁵ Bennett Affidavit, para. 5, **PMR, Vol. 1, Tab 5, p. 58.**

⁶ Bennett Affidavit, para. 6, **PMR, Vol. 1, Tab 5, p. 58.**

⁷ Affidavit of Mary Bates, sworn April 12, 2016 ["**Bates Affidavit**"], paras. 21-31, **PMR, Vol. 1, Tab 6, pp. 87-90.**

⁸ Hubert Affidavit, para. 10, **Responding Motion Record ["RMR"], Vol. 1, Tab 1, pp. 3-4.**

⁹ Hubert Affidavit, para. 9, **RMR, Vol. 1, Tab 1, p. 3.**

¹⁰ Hubert Affidavit, para. 12, **RMR, Vol. 1, Tab 1, p. 4.**

¹¹ Affidavit of Oded Hubert, sworn October 19, 2016 ["**Hubert Affidavit**"], para. 8, **RMR, Vol. 1, Tab 1, p. 3.**

¹² Hubert Affidavit, para. 4, 28, **RMR, Vol. 1, Tab 1, p. 2, 12.**

remote communities in northern Ontario.¹³ Hydro One Remote Communities Inc. also began using the CIS in May 2013.¹⁴

12. Norfolk Power Distribution Inc. is a wholly-owned subsidiary of Hydro One Inc. that began using the CIS after September 2015.¹⁵

13. The defendants (collectively, “**Hydro One**”), carry on a near monopoly over electricity consumption in Ontario.¹⁶

14. The evidence demonstrates that, for the purposes of procuring, designing, implementing and testing the CIS, the defendants operate as a single integrated unit:

- (a) the recommendation to implement the new CIS project was made to the Board of Directors of Hydro One Inc.;¹⁷
- (b) approval of the CIS was sought from Hydro One Inc.’s Board of Directors;¹⁸
- (c) Hydro One Networks Inc., Norfolk Power Distribution Inc., and Hydro One Remote Communities Inc. utilize the CIS;¹⁹
- (d) the letterhead on letters from Hydro One to customers reads “Hydro One” and does not distinguish between the various Hydro One entities;²⁰

¹³ Hubert Affidavit, para. 16, **RMR, Vol. 1, Tab 1, p. 7.**

¹⁴ Hubert Affidavit, para. 28, **RMR, Vol. 1, Tab 1, p. 12.**

¹⁵ Hubert Affidavit, para. 20, **RMR, Vol 1, Tab 1, p. 9.** The evidence of Hydro One suggests that Norfolk was integrated into Hydro One Networks’ operations in September 2015, at which time Norfolk customers were migrated to Hydro One’s CIS: see Hubert Affidavit, para. 20, **RMR, Vol 1, Tab 1, p. 9.** The plaintiff does not advance a claim on behalf of Norfolk customers for the time prior to their being migrated onto the CIS. The plaintiff is prepared to adjust the proposed class definition, if necessary, to make this clear.

¹⁶ Ontario Ombudsman Report, “In the Dark” (May 2014), [“**Ombudsman's Report**”], para. 1, exhibit “T” to the Iannacito Affidavit, **PMR, Vol. 4, Tab 9(T), p. 913**; Hubert Affidavit, para. 10, **RMR, Vol. 1, Tab 1, pp. 3-4.**

¹⁷ Hydro One Inc. Submissions to the Board of Directors, dated May 12, 2011, Exhibit “D” to the Iannacito Affidavit, **PMR, Vol. 2, Tab 9(D), p. 264.**

¹⁸ Hydro One Inc. Submission to the Board of Directors, dated May 12, 2011, Exhibit “D” to the Iannacito Affidavit, **PMR, Vol. 2, Tab 9(E), p. 264.**

¹⁹ Hubert Affidavit, paras. 4, 16-17, **RMR, Vol. 1, Tab 1, p. 2, 7.**

²⁰ See for example: Letter from Hydro One, dated May 2014, Exhibit “A” to the Bennett Affidavit, **PMR, Vol. 1, Tab 5(A), p. 68.**

- (e) the CEO of Hydro One Inc. responded to a report by the Ontario Ombudsman identifying billing irregularities;²¹
- (f) the CEO of Hydro One Inc. directed customers to the website www.hydroone.com;²²
- (g) the CEO of Hydro One Inc. refers to “Hydro One” at large and does not distinguish between the parent and its subsidiaries;²³
- (h) Hydro One Inc.’s Board of Directors engaged PwC to perform its independent review of the CIS and the report was responded to by “Hydro One Management” writ large;²⁴ and
- (i) Hydro One’s acting Vice President of Customer Service, Oded Hubert, refers to “[customers’] current Hydro One bill” and does not distinguish between the parent and its subsidiaries.²⁵

15. In the circumstances, each of Hydro One Inc., Hydro One Remote Communities Inc., Norfolk Power Distribution Inc. and Hydro One Networks Inc. are proper defendants. In any event, as set out below, the causes of action are appropriately pleaded against each of the defendants.

C. The Ombudsman's Report Reveals Systemic Failure by Hydro One

16. Hydro One Networks Inc. and Hydro One Remote Communities Inc. transitioned to a new CIS for billing and account management in May 2013 (the “**Go-Live date**”).²⁶ On February 4, 2014, after receiving an unprecedented volume of Hydro One customer complaints and after personally experiencing Hydro One’s delayed and reticent response to its inquiries, the Ontario

²¹ Hydro One News Release, dated June 23, 2014 [“**News Release**”], Exhibit “B” to the Bennett Affidavit, **PMR, Vol. 1, Tab 5(B)**, p. 71.

²² News Release, Exhibit “B” to the Bennett Affidavit, **PMR, Vol. 1, Tab 5(B)**, p. 72.

²³ News Release, Exhibit “B” to the Bennett Affidavit, **PMR, Vol. 1, Tab 5(B)**, p. 72; Letter of Apology to Bates, dated March 2014 [“**Letter of Apology**”], Exhibit “F” to the Bates Affidavit, **PMR, Vol. 1, Tab 6(H)**, p. 121.

²⁴ PriceWaterhouseCoopers LLP Report, “Hydro One Customer Service and Billing Issues – lessons Learned” (December 2014) [“**PwC Report**”], Exhibit “S” to the Iannacito Affidavit, **PMR, Vol. 4, Tab 9(S)**, pp. 876, 897-906.

²⁵ Hydro One Letter, dated August 25, 2014, Exhibit “C” to the Bennett Affidavit, **PMR, Vol. 1, Tab 5(C)**, p. 74.

²⁶ Hubert Affidavit, paras. 4, 28, **RMR, Vol. 1, Tab 1**, pp. 2, 12.

Ombudsman announced a systemic investigation into the serious problems with billing and customer service at Hydro One.²⁷

17. In preparing its report, the Ombudsman's Office conducted 190 interviews, including with current and past Hydro One executives, whistleblowers, outsourced agencies that perform work on behalf of Hydro One, complainants and stakeholders.²⁸ In addition, the Ombudsman made two formal requests and several additional requests for documents "when it became clear some relevant information was omitted."²⁹

18. In May 2015, the Ontario Ombudsman's investigation culminated in a report entitled "In the Dark: Investigation into the Transparency of Hydro One's Billing Practices and the Timeliness and Effectiveness of its Process for Responding to Customer Concerns" (the "**Ombudsman's Report**").³⁰ The Ombudsman's Report was a scathing indictment of the countless ways in which Hydro One failed in the planning and implementation of the CIS and in responding to the plethora of problems that materialized post Go-Live. Allegations of improper conduct reached as high as Hydro One's senior executives and its Board of Directors.³¹ The Ombudsman's Report ought to be read in its entirety, but the plaintiff provides the following pertinent excerpts:

- (a) "Hydro One ... made a critical mistake when installing a new billing and account management system in May 2013."³²
- (b) "Problems with the system appeared soon after it was implemented. ... In June 2013, thousands of customers were affected by a variety of defects. ... Defects

²⁷ Ombudsman's Report, para. 14, Exhibit "T" to the Iannacito Affidavit, **PMR, Vol. 4, Tab 9(T), p. 916.**

²⁸ Ombudsman's Report, para. 18 Exhibit "T" to the Iannacito Affidavit, **PMR, Vol. 4, Tab 9(T), p. 916.**

²⁹ Ombudsman's Report, para. 23, Exhibit "T" to the Iannacito Affidavit, **PMR, Vol. 4, Tab 9(T), p. 917.**

³⁰ Ombudsman's Report, Exhibit "T" to the Iannacito Affidavit, **PMR, Vol. 4, Tab 9(T), p. 908.**

³¹ Ombudsman's Report, para. 111, Exhibit "T" to the Iannacito Affidavit, **PMR, Vol. 4, Tab 9(T), p. 939.**

³² Ombudsman's Report, para. 1, Exhibit "T" to the Iannacito Affidavit, **PMR, Vol. 4, Tab 9(T), p. 913.**

resulting in erroneous automatic withdrawals and inaccurate estimated bills persisted through the fall of 2013. ... System errors continued well into 2014."³³

- (c) "In November 2014, Hydro One told us that 32,766 accounts were inaccurately billed: ... 19,160 were overbilled an average of \$26.32 (\$504,410 in total)."³⁴
- (d) "Hydro One ... failed to adequately consider the impact on its customers."³⁵
- (e) "Soon after the system changeover, more than 90,000 customers stopped receiving bills. Some were not billed under the new system for months, while others only received bills based on estimates for prolonged periods. Then, as technical glitches were being addressed, the system issued a flurry of multiple invoices and huge "catch-up" bills, leaving customers frustrated and confused. Many had large sums withdrawn automatically from their bank accounts without notice or explanation. Tens of thousands of accounts were affected by bizarre errors, as Hydro One worked frantically to clear unexpected system problems. Hydro One's outsourced call centre and its in-house customer relations centre were left to cope with the ensuing flood of calls and complaints without proper training or adequate tools and resources. Workload pressures contributed to rude, insensitive, and substandard customer service."³⁶
- (f) "Hydro One tried to contain reputational damage by dealing quietly and reactively with issues as they arose. Whenever bad publicity surfaced in the press, Hydro One adopted a dismissive and minimizing approach, claiming only a small percentage of its customers were affected by the billing problems."³⁷
- (g) "Even after Hydro One pledged to become more customer-centric, to do better, and to learn from its mistakes, it continued to display insensitivity and disregard for its customers."³⁸
- (h) "... [T]he company still selectively used figures to distract from the suffering of individual Ontarians."³⁹
- (i) "... [W]hen crafting the letter to 12,000 never-billed customers, officials decided to remove any reference to the system. One official noted:

I am concerned about the ... references to CIS below creating some spin and undue nervousness.

In the end, the letter simply said the company was "currently experiencing some issues which have prevented us from issuing your bill."⁴⁰

³³ Ombudsman's Report, paras. 71, 72, 76, 77, Exhibit "T" to the Iannacito Affidavit, **PMR, Vol. 4, Tab 9(T), pp. 928, 929.**

³⁴ Ombudsman's Report, para. 79, Exhibit "T" to the Iannacito Affidavit, **PMR, Vol. 4, Tab 9(T), p. 930.**

³⁵ Ombudsman's Report, para. 1, Exhibit "T" to the Iannacito Affidavit, **PMR, Vol. 4, Tab 9(T), p. 913.**

³⁶ Ombudsman's Report, para. 2, Exhibit "T" to the Iannacito Affidavit, **PMR, Vol. 4, Tab 9(T), p. 913.**

³⁷ Ombudsman's Report, para. 4, Exhibit "T" to the Iannacito Affidavit, **PMR, Vol. 4, Tab 9(T), p. 913.**

³⁸ Ombudsman's Report, para. 7, Exhibit "T" to the Iannacito Affidavit, **PMR, Vol. 4, Tab 9(T), 914.**

³⁹ Ombudsman's Report, para. 111, Exhibit "T" to the Iannacito Affidavit, **PMR, Vol. 4, Tab 9(T), p. 939.**

- (j) "When the new customer information system was first rolled out, call centre agents were instructed not to attribute billing issues to the transition to the new system, and to stay away from negative words like "defects." Call centre staff were instructed in training materials that the word was "an internal term that should not be discussed with the customer. As one senior call centre manager explained to us:

(T)here were a lot of debates around messaging that should go to customers, and there was a reluctance for a long period of time for anybody to indicate that there were system problems or [time of use] issues ... I think everybody was worried about it hitting the media and it would be a firestorm."⁴¹

- (k) "When faced with negative publicity, Hydro One's overriding priority became managing its public relations image. With all its frenetic spinning, it neglected the real impact it was having on tens of thousands of Ontario's citizens."⁴²
- (l) "Rather than acknowledge that tens of thousands of its customers were experiencing billing issues, Hydro One continued to stress to outsiders that there was nothing to be concerned about, deflecting concern with evasive, misleading and upbeat messages."⁴³
- (m) "Our review of internal Hydro One documents also clearly shows that at least some management staff deliberately accentuated the positive aspects of the new computer system, while concealing information about billing problems and customer complaints that would cast the company in a bad light."⁴⁴
- (n) "... Hydro One failed to ensure that staff responsible for dealing with customer concerns were adequately trained."⁴⁵

19. On cross-examination, Hydro One's only fact witness, Oded Hubert, Hydro One Networks Inc.'s Vice President, Regulatory Affairs, admitted that: (a) Hydro One had an opportunity to comment on the Ombudsman's Report;⁴⁶ (b) Hydro One had an opportunity to respond to the Ombudsman's Report;⁴⁷ (c) in its comment on the Ombudsman's Report, Hydro

⁴⁰ Ombudsman's Report, para. 121, Exhibit "T" to the Iannacito Affidavit, **PMR, Vol. 4, Tab 9(T), pp. 942-943.**

⁴¹ Ombudsman's Report, para. 122, Exhibit "T" to the Iannacito Affidavit, **PMR, Vol. 4, Tab 9(T), p. 943.**

⁴² Ombudsman's Report, para. 123, Exhibit "T" to the Iannacito Affidavit, **PMR, Vol. 4, Tab 9(T), p. 943.**

⁴³ Ombudsman's Report, para. 131, Exhibit "T" to the Iannacito Affidavit, **PMR, Vol. 4, Tab 9(T), p. 945.**

⁴⁴ Ombudsman's Report, para. 176, Exhibit "T" to the Iannacito Affidavit, **PMR, Vol. 4, Tab 9(T), p. 955.**

⁴⁵ Ombudsman's Report, para. 188, Exhibit "T" to the Iannacito Affidavit, **PMR, Vol. 4, Tab 9(T), pp. 957-958.**

⁴⁶ Transcript of the cross-examination of Oded Hubert (January 19, 2017) [**"Hubert Transcript"**], q. 21, pp. 7-8, **Transcript Record, Tab B, pp. 46-47.**

⁴⁷ Hubert Transcript, qq. 21-25, p. 8, **Transcript Record, Tab B, pp. 46-47.**

One did not dispute any of the findings in the report;⁴⁸ and most importantly, and (d) **Hydro One has accepted the findings in the Ombudsman's Report.**⁴⁹

D. The PwC Report

20. Following its failed implementation of the CIS, Hydro One's Board of Directors engaged PriceWaterhouseCoopers LLP ("PwC") to perform an independent review "on the reasons for the unexpected outcomes of the [CIS] implementation".⁵⁰ This review was limited to the period of time between April 5, 2013 and February 4, 2014. In December 2014, PwC issued a report entitled "Hydro One Customer Service and Billing Issues – Lessons Learned" (the "**PwC Report**") that provided a detailed chronicle of Hydro One's mistakes, misconduct and failures. Again, the PwC Report ought to be read in its entirety, but the plaintiff provides the following pertinent excerpts:

- (a) "Within the first 30 days post go-live it became apparent that there were legacy system/data issues as well as issues associated with the new billing processes and timelines that were causing a higher than expected number of 'estimated' bills, billing exceptions and 'no-bills'."⁵¹
- (b) "As billing exceptions were remediated, it often resulted in a large catch-up bill which generated further inquiries, excessive bank account withdrawals, cancel/rebills and refund cheque issues."⁵²
- (c) "Additionally, when those affected customers called for answers, they were not given a definitive response or adequate assurance that their problem would be addressed and resolved in a timely fashion."⁵³
- (d) PwC found that Hydro One made mistakes at almost every step of the project:
 - (i) the timeline for implementation was too ambitious;⁵⁴

⁴⁸ Hubert Transcript, q. 27, p. 8, **Transcript Record, Tab B, p. 47.**

⁴⁹ Hubert Transcript, q. 28, p. 8, **Transcript Record, Tab B, p. 47.**

⁵⁰ PwC Report, p. 4, Exhibit "S" to the Iannacito Affidavit, **PMR, Vol. 4, Tab 9(S), p. 876.**

⁵¹ PwC Report, p. 5, Exhibit "S" to the Iannacito Affidavit, **PMR, Vol. 4, Tab 9(S), p. 877.**

⁵² PwC Report, p. 5, Exhibit "S" to the Iannacito Affidavit, **PMR, Vol. 4, Tab 9(S), p. 877.**

⁵³ PwC Report, p. 5, Exhibit "S" to the Iannacito Affidavit, **PMR, Vol. 4, Tab 9(S), p. 877.**

- (ii) overall project governance was inadequate and inconsistently executed;⁵⁵
- (iii) the level and quality of reporting varied over the course of the project, and it noticeably decreased post go-live;⁵⁶ and
- (iv) ineffective team complement, knowledge gaps and insufficient resourcing.⁵⁷

21. PwC identified "gaps in testing" that had a profound effect on the rollout of the CIS. In particular, PwC found that the resting phases between Systems Integration Testing ("SIT"), User Acceptance Testing ("UAT"), and Operational Readiness Testing ("ORT") were allowed to overlap, "which is a high-risk practice."⁵⁸ PwC concluded that "at least one clean round of SIT should be performed prior to proceeding to UAT and there should be no overlap between UAT and ORT from a leading practice perspective."⁵⁹

22. On cross-examination, Mr. Hubert again admitted that: (a) Hydro One was given the opportunity to comment on the PwC Report;⁶⁰ (b) Hydro One was given the opportunity to provide responses to the recommendations in the PwC Report;⁶¹ (c) in its response, Hydro One did not disagree with any of the findings in the PwC Report;⁶² and (d) **Hydro One accepted PwC's findings in the report.**⁶³

⁵⁴ PwC Report, pp. 14-15, Exhibit "S" to the Iannacito Affidavit, PMR, Vol. 4, Tab 9(S), pp. 886-887.

⁵⁵ PwC Report, p. 15, Exhibit "S" to the Iannacito Affidavit, PMR, Vol. 4, Tab 9(S), p. 887.

⁵⁶ PwC Report, pp. 17-18, Exhibit "S" to the Iannacito Affidavit, PMR, Vol. 4, Tab 9(S), pp. 889-890.

⁵⁷ PwC Report, p. 19, Exhibit "S" to the Iannacito Affidavit, PMR, Vol. 4, Tab 9(S), p. 891.

⁵⁸ PwC Report, p. 21, Exhibit "S" to the Iannacito Affidavit, PMR, Vol. 4, Tab 9(S), p. 893.

⁵⁹ PwC Report, p. 21, Exhibit "S" to the Iannacito Affidavit, PMR, Vol. 4, Tab 9(S), p. 893.

⁶⁰ Hubert Transcript, qq. 37-38, p. 10, Transcript Record, Tab B, p. 49.

⁶¹ Hubert Transcript, qq. 39-40, pp. 10-11, Transcript Record, Tab B, pp. 49-50.

⁶² Hubert Transcript, q. 41, p. 11, Transcript Record, Tab B, p. 50.

⁶³ Hubert Transcript, q. 42, p. 11, Transcript Record, Tab B, p. 50.

E. Hydro One Finally Advises Customers of its CIS Failures

23. In March 2014, Hydro One sent class members a letter apologizing for its billing and customer service issues. Hydro One described its mismanagement as follows:

This past May, Hydro One transitioned to a new billing system. Our previous billing system was more than a decade old and needed to be replaced to continue to reliably and effectively meet our customers' needs and manage our business. While the new system did correct some of the existing issues, the unanticipated result was that some of our customers have experienced prolonged estimated bills, delayed bills, multiple bills or no bills at all. We also know that some of you who are calling our Customer Communications Centre have also experienced a lower level of service as we have been unable to provide you with the answers to your questions in a timely manner. As well, some of your escalated complaints are sometimes taking months to resolve [emphasis added].⁶⁴

24. Notwithstanding that its billing and customer service issues arose almost immediately following the implementation of the CIS in May 2013, Hydro One took 10 months to advise customers of the root cause of the problems.

F. Hydro One has One Contract with Class Members

25. Although Hydro One has several different categories of customers, Hydro One only has one Conditions of Service contract that applies to all customers throughout the class period.⁶⁵ In addition, the contractual terms of service between Hydro One and its customers are informed by the Distribution System Code ("DSC") and the Retail Settlement Code ("RSC"), which are regulatory instruments imposed by the Ontario Energy Board ("OEB") that set minimum standards that must be met by every Ontario electricity distributor in carrying out its

⁶⁴ Letter of Apology, Exhibit "F" to the Bates Affidavit, **PMR, Vol. 1, Tab 6F, p. 121.**

⁶⁵ Conditions of Service (May 21, 2013 – December 31, 2014), Exhibit "U" to the Hubert Affidavit, **RMR, Vol. 2, Tab 1(U), pp. 637-770**; Conditions of Service (January 1, 2015 – Current), Exhibit "T" to the Hubert Affidavit, **RMR, Vol. 3, Tab 1(T), pp. 495-635**; Hubert Transcript, qq. 88, 90, 93, 98, 100, 104, 106, pp. 20-23, **Transcript Record, Tab B, pp. 59-62.**

operations.⁶⁶ Both the DSC and the RSC also apply to the relationship between a distributor and all of its customers.

26. As a distributor of electricity, Hydro One must meet the obligations set out in the DSC. Under section 7.11 of the DSC, "a distributor must issue an accurate bill to each of its customers".⁶⁷ This requirement must be met "at least 98 percent of the time on a yearly basis".⁶⁸ In other words, Hydro One is required to issue accurate bills to its customers 98 percent of the time. Thus, pursuant to the DSC, Hydro One owes all class members an obligation to use a billing system that is accurate and reliable, resulting in accurate bills at least 98 percent of the time.

27. Hydro One must also meet the obligations set out in the RSC. Pursuant to sections 7.1.3, 7.2.4 and 7.3.3 of the RSC, a distributor such as Hydro One has obligations to respond to all customer inquiries concerning distribution service.⁶⁹ These obligations include a duty to respond to customer inquiries regarding meter accuracy, distribution rates, usage amounts and bill

⁶⁶ Statement of Claim, para. 22, **PMR, Vol. 1, Tab 3, pp. 24**; Distribution System Code (last revised on December 21, 2015) [**"DSC Dec 2015"**], ss. 1.1, 1.4, Exhibit "V" to the Hubert Affidavit, **RMR, Vol. 2, Tab 1(V), pp. 778, 791**; Distribution System Code (last revised on October 8, 2015) [**"DSC Oct 2015"**], ss. 1.1, 1.4, Exhibit "W" to the Hubert Affidavit, **RMR, Vol. 2, Tab 1(W), pp. 928, 941**; Distribution System Code (last revised on April 15, 2015) [**"DSC Apr 2015"**], ss. 1.1, 1.4, Exhibit "X" to the Hubert Affidavit, **RMR, Vol. 3, Tab 1(X), pp. 1079, 1092**; Distribution System Code (last revised on January 1, 2015), ss. 1.1, 1.4, Exhibit "Y" to the Hubert Affidavit, **RMR, Vol. 3, Tab 1(Y), pp. 1222, 1234-1235**; Distribution System Code (last revised on June 13, 2013), ss. 1.1, 1.4, Exhibit "Z" to the Hubert Affidavit, **RMR, Vol. 3, Tab 1(Z), pp. 1362, 1371**; Retail Settlement Code (revised on October 8, 2015), [**"RSC Oct 8, 2015"**], ss. 1.1, 1.4, Exhibit "AA" to the Hubert Affidavit, **RMR, Vol. 3, Tab 1(AA), p. 1469-1476**.

⁶⁷ DSC Dec 2015, s. 7.11.1, Exhibit "V" to the Hubert Affidavit, **RMR, Vol. 2, Tab 1(V), p. 907**; DSC Oct 2015, s. 7.11.1, Exhibit "W" to the Hubert Affidavit, **RMR, Vol. 2, Tab 1(W), p. 1058**; DSC April 2015, s. 7.11.1, Exhibit "X" to the Hubert Affidavit, **RMR, Vol. 3, Tab 1(X), p. 1208**.

⁶⁸ DSC Dec 2015, s. 7.11.2, Exhibit "V" to the Hubert Affidavit, **RMR, Vol. 2, Tab 1(V), p. 907**; DSC Oct 2015, s. 7.11.2, Exhibit "W" to the Hubert Affidavit, **RMR, Vol. 2, Tab 1(W), p. 1058**; DSC April 2015, s. 7.11.2, Exhibit "X" to the Hubert Affidavit, **RMR, Vol. 3, Tab 1(X), p. 1208**.

⁶⁹ RSC Oct 8, 2015, ss. 7.1.3, 7.2.4, 7.3.3, Exhibit "AA" to the Hubert Affidavit, **RMR, Vol. 3, Tab 1(AA), pp. 1506, 1507, 1509**.

calculation errors. The RSC also imposes obligations on Hydro One regarding billing errors, including overbilling or under-billing.⁷⁰

G. The Plaintiff's Expert Evidence on Commonality

28. The plaintiff's expert evidence of Rajesh Gurusamy demonstrates that the proposed common issues permit class-wide determination. Mr. Gurusamy is an expert in designing, configuring, customizing, planning and implementing SAP-based solutions for diversified industries, including utilities.⁷¹ Mr. Gurusamy has experience with utility specific customer care and service modules, similar to the SAP landscape implemented for Hydro One in May 2013.⁷² Mr. Gurusamy gave the opinion that:

- (a) Hydro One's CIS replacement project was "seriously flawed – it resulted in unprecedented volumes of delayed or erroneous bills being produced, causing financial problems, understandable stress and lingering dissatisfaction amongst customers",⁷³
- (b) there were generally-accepted standards of care that pertain to the planning, implementation and testing of SAP-based systems, such as Hydro One's CIS;⁷⁴
- (c) Hydro One "breached various generally-accepted standards of care during every phase of its CIS Replacement project, including the post-implementation periods;"⁷⁵
- (d) the "most serious breaches of the generally-accepted standards of care centred around:
 - (i) inadequate project scope management;
 - (ii) reckless compromises to the planned testing strategy;

⁷⁰ RSC Oct 8, 2015, s. 7.7, Exhibit "AA" to the Hubert Affidavit, **RMR, Vol. 3, Tab 1(AA), pp. 1511-1514.**

⁷¹ Report of Rajesh Gurusamy, dated April 13, 2016 ["**Gurusamy Report of April 13**"], p. 5, **PMR, Vol. 1, Tab 8(B), p. 174.**

⁷² Gurusamy Report of April 13, p. 5, **PMR, Vol. 1, Tab 8(B), p. 174.**

⁷³ Gurusamy Report of April 13, p. 4, **PMR, Vol. 1, Tab 8(B), p. 173.**

⁷⁴ Gurusamy Report of April 13, p. 6, **PMR, Vol. 1, Tab 8(B), p. 175.**

⁷⁵ Gurusamy Report of April 13, pp. 4, 10, **PMR, Vol. 1, Tab 8(B), pp. 173, 179.**

- (iii) premature implementation – a "Go-Live" decision taken with no proof of readiness";⁷⁶ and
- (e) the "[b]reaches occurred enough times and with enough severity, that many of the delays and other problems it experiences arose from clearly foreseeable and avoidable risks".⁷⁷

29. Hydro One did not file any evidence responding to Mr. Gurusamy's expert report.⁷⁸

30. Mr. Gurusamy's evidence demonstrates that at the common issues trial, the court will be able to determine whether the design, configuration, customization, planning, testing and implementation of the CIS fell below the standard of care. Mr. Gurusamy is able to identify, at this preliminary stage, the precise generally-accepted standards of practice breached by Hydro One. Based on Mr. Gurusamy's evidence, there is some basis in fact that the proposed common issues with respect to Hydro One's liability: (a) are a common ingredient of each class members' claim; (b) are necessary for the resolution of each class members' claim; and (c) can be resolved in common for the class.

31. Mr. Gurusamy's evidence also provides a basis for believing that the systemic problems with the CIS persist to this day.⁷⁹ Given Hydro One's failure to conduct parallel testing or another comparable method of testing accuracy, it remains possible that, as the claim alleges, underlying defects causing undetected or unreported billing errors persist. Mr. Hubert's assertions that a certain percentage of customers were unaffected by CIS-related issues⁸⁰ and that billing issues resulting from the implementation of the CIS have been entirely or substantially

⁷⁶ Gurusamy Report of April 13, p. 5, **PMR, Vol. 1, Tab 8(B)**, p. 174.

⁷⁷ Gurusamy Report of April 13, p. 4, **PMR, Vol. 1, Tab 8(B)**, p. 173.

⁷⁸ Hubert Affidavit, para. 88, **RMR, Vol. 1, Tab 1**, p. 30.

⁷⁹ Reply Report of Rajesh Gurusamy, dated December 8, 2016 [**"Reply Gurusamy Report"**] at p. 1, **Plaintiff's Reply Motion Record ("PRMR")**, Tab 3(A), p. 14.

⁸⁰ Hubert Affidavit, para. 29, **RMR, Vol. 1, Tab. 1**, p. 13.

resolved⁸¹ are merits-based assertions that are not appropriate at the certification stage of the proceeding.

H. The Plaintiff's Expert Evidence on Aggregate Damages

32. The expert report of Errol Soriano supports the plaintiff's assertion that the aggregate damages common issues should be certified. Mr. Soriano is a Chartered Professional Accountant and a Chartered Business Valuator.⁸² His practice is dedicated exclusively to matters involving quantification of financial loss and the valuation of business interests.⁸³

33. Mr. Soriano has opined that he can calculate the loss suffered by the class on an aggregate basis with a reasonable degree of precision, based on the difference between the amounts invoiced by Hydro One to the class (the "**Invoiced Amounts**") and the dollar value of the amounts that the defendants should have charged the class members in accordance with the stipulated rates and actual consumption (the "**Proper Amounts**").⁸⁴ Mr. Soriano will be able to calculate loss on an aggregate basis since:

- (a) the Invoiced Amounts can be determined by Hydro One's business records; and
- (b) the customer categorization, consumption volumes and rates necessary to calculate the Proper Amounts are available from Hydro One's database records.⁸⁵

34. Neither of these assumptions were challenged by Hydro One.

⁸¹ Hubert Affidavit, para 39, **RMR**, Vol. 1, Tab. 1, p. 16.

⁸² Report of Errol Soriano, dated April 13, 2016 ["Soriano Report of April 13"], p. 2, **PMR**, Vol. 1, Tab 7(A), p. 130.

⁸³ Soriano Report of April 13, p. 2, **PMR**, Vol. 1, Tab 7(A), p. 130.

⁸⁴ Soriano Report of April 13, pp. 1-2, 6, **PMR**, Vol. 1, Tab 7(A), pp. 129-130, 134.

⁸⁵ Soriano Report of April 13, p. 6, **PMR**, Vol. 1, Tab 7(A), pp. 134.

35. Mr. Soriano has also proposed a methodology, to be carried out in cooperation with a statistician, to calculate damages in the aggregate based on a statistically valid sample of the class members.⁸⁶

36. Finally, Mr. Soriano anticipates that it will be more manageable to conduct an analysis of class member loss on an aggregate level as opposed to an individual basis, as he will be able to avoid many of the complexities associated with assessing damages suffered by each individual class member.⁸⁷ Mr. Soriano's expert opinion more than satisfies the some basis in fact requirement for the certification of the aggregate damages common issues.

PART III - ISSUES AND THE LAW

A. The Test for Certification is Met

37. The sole issue to be determined on this motion is whether the action meets the criteria for certification set out in subsection 5(1) of the *Class Proceedings Act, 1992* (the "**CPA**").⁸⁸

38. Section 5(1) of the *CPA* states that the court shall certify a class proceeding if the certification test is met.

39. In *Pro-Sys Consultants Ltd. v. Microsoft Corporation*,⁸⁹ the Supreme Court of Canada confirmed that the test for certification is decidedly not meant to be a test of the merits of the action; rather, it is concerned with the form of the action and whether a class proceeding is the

⁸⁶ Soriano Report of April 13, p. 7, **PMR, Vol. 1, Tab 7(A), p. 135.**

⁸⁷ Soriano Report of April 13, p. 7, **PMR, Vol. 1, Tab 7(A), p. 135.**

⁸⁸ S.O. 1992, c. 6 [**"CPA"**].

⁸⁹ *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 [*Pro-Sys*], **Plaintiff's Book of Authorities ["PBOA"], Vol. 1, Tab 1.**

appropriate procedural vehicle.⁹⁰ The court also confirmed that the standard of proof to be applied for each of the certification requirements set out in section 5(1) (other than the cause of action requirement) is "some basis in fact".⁹¹ The low evidentiary burden does not require that there be some basis in fact for the claim itself, but rather some basis in fact which establishes each of the individual certification requirements."⁹² The merits of the claim are unquestionably not at issue at this preliminary stage.

40. The purpose of evidence on a certification motion is to explain the background of the action.⁹³ A certification motion is not the time to resolve conflicts in the evidence.

B. The Pleadings Disclose Causes of Action

41. The first criterion the court must consider when determining whether to certify a class proceeding is whether the statement of claim discloses a cause of action.⁹⁴ The test under section 5(1)(a) of the *CPA* is the same as under Rule 21 of the *Rules of Civil Procedure*.⁹⁵ In considering section 5(1)(a) of the *CPA*, the court must accept the pleaded allegations of fact as true unless they are patently ridiculous or incapable of proof. The cause of action must be permitted to proceed unless it is "plain and obvious" that it cannot succeed.⁹⁶ This is a low hurdle, and here it is easily cleared. The causes of action in negligence, breach of contract and unjust enrichment are properly pleaded.

⁹⁰ *Pro-Sys*, *supra* note 89 at paras. 99-100, **PBOA Vol. 1, Tab 1**; *Hollick v. Toronto (City)*, 2001 SCC 68 at paras. 16-26 [*Hollick*], **PBOA, Vol. 1, Tab 2**.

⁹¹ *Pro-Sys*, *supra* note 89 at para. 99, **PBOA, Vol 1, Tab 1**; *Hollick*, *supra* note 90 at para. 25, **PBOA, Vol. 1, Tab 2**.

⁹² *Pro-Sys*, *supra* note 89 at para. 100, **PBOA, Vol. 1, Tab 1**.

⁹³ *Cloud v. Canada (Attorney General)*, [2004] OJ No 4924 (C.A.) at para 50 [*Cloud*], **PBOA, Vol. 1, Tab 3**.

⁹⁴ *CPA*, *supra* note 88, s. 5(1)(a).

⁹⁵ *Fulawka v Bank of Nova Scotia*, 2010 ONSC 1148 at para 70 [*Fulawka Certification*], **PBOA, Vol. 1, Tab 4**.

⁹⁶ *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, p. 988, **PBOA, Vol. 1, Tab 5**.

i. Negligence

42. The plaintiff properly pleads the elements of negligence with particularity:

- (a) **Duty of care:** Hydro One owes a duty of care to the class members to, among other things, take reasonable steps to ensure that it employs an accurate and reliable billing system and provide timely, effective and informed customer service to the class.⁹⁷
- (b) **Breach of the standard of care:** Hydro One breached the standard of care by systemically failing to employ a billing and account management system that accurately and reliably bills customers for the amount of electricity actually consumed and to provide adequate customer service.⁹⁸
- (c) **Damages:** Class members are entitled to the difference between the price they paid Hydro One and were billed by Hydro One for electricity and the price that they would have paid had Hydro One correctly designed and implemented the CIS. Class members are also entitled to the interest that would have accrued on payments that were improperly demanded by and made to Hydro One.⁹⁹
- (d) **Causation and remoteness:** As a result of the conduct of Hydro One detailed above, class members have suffered damages.¹⁰⁰

43. The claim of negligence satisfies section 5(1)(a) of the *CPA*.

ii. Breach of Contract

44. The Statement of Claim discloses a cause of action for breach of contract. Mr. Bennett pleads that the following express or implied terms of the class members' contracts with Hydro One were breached:

- (a) It is an express or implied term of class members' contracts with Hydro One that Hydro One will employ a billing system that accurately and reliably bills customers for the amount of electricity actually consumed and to ensure that bills issued to customers accurately state the consumption of electricity upon which the bill is based.¹⁰¹ Hydro One breached class members' contracts by, *inter alia*:

⁹⁷ Statement of Claim, para. 76, **PMR, Vol. 1, Tab 3, p. 37.**

⁹⁸ Statement of Claim, para. 78, **PMR, Vol. 1, Tab 3, pp. 37-38.**

⁹⁹ Statement of Claim, para. 82, **PMR, Vol. 1, Tab 3, p. 39.**

¹⁰⁰ Statement of Claim, para. 85, **PMR, Vol. 1, Tab 3, p. 40.**

¹⁰¹ Statement of Claim, para. 28, **PMR, Vol. 1, Tab 3, p. 25.**

- (i) issuing inaccurate bills to some or all class members;
 - (ii) failing to employ a system or process to ensure that bills issued to class members accurately state the consumption of electricity upon which the bill is based;
 - (iii) issuing multiple bills for the same period to some or all class members;
 - (iv) failing to issue bills for every billing period to some or all class members;
 - (v) withdrawing from some class members' bank accounts significant sums that did not reflect actual electricity consumed; and
 - (vi) failing to rectify these issues in a timely manner.¹⁰²
- (b) It is an express or implied term of class members' contracts with Hydro One that Hydro One will employ a system or process to ensure that it provides timely, effective, accurate, and informed customer service that is responsive to questions posed by class members about meter accuracy, distribution rates and billing errors.¹⁰³ Hydro One breached class members' contracts by, *inter alia*:
- (i) failing to provide adequate training to customer service representatives;
 - (ii) failing to ensure that customer service representatives were sufficiently informed on the CIS and its defects;
 - (iii) creating an environment in which customer service representatives were asked to reduce the average duration of calls with class members rather than seeking to address class members' problems;
 - (iv) providing insufficient customer service resources such that class members had long wait times to have their problem addressed;
 - (v) providing customer service that did not deliver honest answers and failed to address class members' complaints.¹⁰⁴
- (c) It is an express or implied term of class members' contracts with Hydro One that Hydro One observe a duty of good faith and fair dealing with them, characterized by candour, reasonableness, honesty, and forthrightness, and Hydro One will not act in bad faith by being, for example, untruthful, misleading or unduly insensitive.¹⁰⁵ Hydro One breached class members' contracts by, *inter alia*:
- (i) failing to act in good faith by refusing to acknowledge that the CIS was causing serious losses and harm to class members;

¹⁰² Statement of Claim, para. 72, PMR, Vol. 1, Tab 3, p. 35.

¹⁰³ Statement of Claim, para. 29, PMR, Vol. 1, Tab 3, p. 25.

¹⁰⁴ Statement of Claim, para. 74, PMR, Vol. 1, Tab 3, pp. 35-36.

¹⁰⁵ Statement of Claim, para. 30, PMR, Vol. 1, Tab 3, p. 25.

- (ii) failing to act in good faith by delaying taking action to address the systemic issues that were causing harm to class members; and
- (iii) failing to act in good faith by misleading class members and obfuscating the serious nature of the problems plaguing Hydro One's CIS.¹⁰⁶

45. The claim for breach of contract satisfies section 5(1)(a) of the *CPA*.

iii. Unjust Enrichment

46. The Statement of Claim discloses a cause of action in unjust enrichment:¹⁰⁷

- (a) **Hydro One's enrichment:** Hydro One has been enriched by: (a) billing class members for amounts over and above each member's actual electricity consumption; (b) charging class members interest on amounts that do not reflect the actual electricity consumed; and (c) levying service charges and delivery charges on class members without providing the class with the services that these charges are meant to reflect.¹⁰⁸
- (b) **Class members' corresponding deprivation:** Class members have suffered a corresponding deprivation in the form of: (a) amounts paid to Hydro One that were over and above what class members owed based on actual electricity consumption; (b) interest on overbilled charges; and (d) improper electricity service and delivery charges.¹⁰⁹
- (c) **No juristic reason for enrichment:** There was no juristic reason for the resulting enrichment of Hydro One. The contracts between Hydro One and its customers provide that customers will pay for the electricity actually consumed. The amounts paid to Hydro One that reflected higher than actual electricity consumption and the related interest and fees thereon were paid for no juristic reason.¹¹⁰

47. The Statement of Claim pleads the following causes of action: (a) negligence; (b) breach of contract and (c) unjust enrichment. Section 5(1)(a) of the *CPA* is satisfied.

¹⁰⁶ Statement of Claim, para. 75, *PMR*, Vol. 1, Tab 3, pp. 36-37.

¹⁰⁷ *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at para. 30 [*Garland*], *PBOA*, Vol. 1, Tab 6 (The pleading requirements for unjust enrichment are: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment).

¹⁰⁸ Statement of Claim, para. 79, *PMR*, Vol. 1, Tab 3, pp. 38-39.

¹⁰⁹ Statement of Claim, para. 80, *PMR*, Vol. 1, Tab 3, p. 39.

¹¹⁰ Statement of Claim, para. 81, *PMR*, Vol. 2, Tab 3, p. 39.

C. There is an Identifiable Class

48. Section 5(1)(b) of the *CPA* requires an identifiable class of two or more persons to be represented by Mr. Bennett. The proposed class has been defined as all persons and entities, other than the Excluded Persons, who purchased electricity from Hydro One between May 2013 and the date of the certification order in this action. Excluded Persons are the defendants, their current and former officers and directors, members of their immediate families, and their legal representatives, heirs, successors or assigns.¹¹¹

49. The class definition uses objective criteria to determine class membership.¹¹² Individuals are class members if they purchased electricity from Hydro One. This can be determined based on objective evidence.¹¹³ Hydro One's ability to identify the class members with precision through an analysis of its own customer records provide the basis in fact to satisfy section 5(1)(b) of the *CPA*.

50. Mr. Bennett submits that the class definition is appropriate. Any further narrowing of the class definition may arbitrarily exclude some people who were subjected to the systemic failure of Hydro One. Section 5(1)(b) of the *CPA* is satisfied.

D. The Claims of Class Members Raise Common Issues

51. Section 5(1)(c) of the *CPA* requires that the claims of class members raise common issues of fact or law that will move the litigation forward. This is not a high hurdle.¹¹⁴ The court must simply determine whether there is some basis in fact to find that each of the issues can be

¹¹¹ Statement of Claim, paras. 18-19, **PMR, Vol. 1, Tab 3, p. 23**.

¹¹² *Western Canadian Shipping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 38, **PBOA, Vol. 1, Tab 7**.

¹¹³ See for example the Hydro One bill of Mary Bates, dated May 2013, Exhibit "A" to the Bates Affidavit, **PMR, Vol. 1, Tab 6(A), pp. 92-93**.

¹¹⁴ *Fulawka Certification*, supra note 95 at para 111, **PBOA, Vol. 1, Tab 4**.

determined on a class-wide basis. For an issue to be common, its resolution must be a substantial ingredient of each class members' claim and its resolution must be necessary to the resolution of those claims.¹¹⁵ An issue can be a substantial ingredient of a claim even if it makes up a very limited aspect of the liability question.¹¹⁶ The Supreme Court of Canada has recently clarified that "the factual evidence required at this stage goes only to establish whether the [common issues] are common to all class members."¹¹⁷

52. The proposed common issues are essential ingredients of the claims of class members and are consistent with the principles adopted by the Ontario Court of Appeal:

- (a) the common issues would avoid duplication of fact-finding or legal analysis relating to the defendants' conduct and liability;
- (b) there is a rational relationship between the class and the common issues as each of the class members was a customer of Hydro One and has an interest in the determination of the common issues; and
- (c) the answers to the common issues are necessary to each class members' claims.¹¹⁸

53. The proposed common issues are set out below:

Negligence

- (1) Do the defendants owe the class a duty of care to take reasonable steps to ensure that they:
 - (a) employ a billing system that accurately and reliably bills customers for the amount of electricity actually consumed;
 - (b) employ a system or process to ensure that bills issued to customers accurately state the consumption of electricity upon which the bill is based; and/or

¹¹⁵ *Hollick*, *supra* note 90 at para. 18, **PBOA, Vol. 1, Tab 2**.

¹¹⁶ *Cloud*, *supra* note 93 at para 53, **PBOA, Vol. 1, Tab 3**.

¹¹⁷ *Pro-Sys*, *supra* note 89 at para. 110, **PBOA, Vol. 1, Tab 1**.

¹¹⁸ *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443 at para. 81 [*Fulawka ONCA*], leave to appeal to S.C.C. ref'd [2012] S.C.C.A. No. 326, **PBOA, Vol. 1, Tab 8**.

- (c) employ a system of process to ensure that they provide timely, effective, accurate and informed customer service that is responsive to questions posed by class members about meter accuracy, distribution rates and billing errors;
- (2) Did the defendants breach the standard of care? If so, how?
- (3) If the answer to (2) is yes, did the breach of the defendants' standard of care cause damages to the class?
- (4) If the answer to (3) is yes,
 - (a) can damages be assessed on an aggregate basis?
 - (b) if so, what is the quantum of aggregate damages owed to the class members?

Breach of Contract

- (5) Was it a term of class members' contracts with the defendants that the defendants will:
 - (a) employ a billing system that accurately and reliably bills customers for the amount of electricity actually consumed;
 - (b) employ a system or process to ensure that bills issued to customers accurately state the consumption of electricity upon which the bill is based;
 - (c) employ a system of process to ensure that they provide timely, effective, accurate and informed customer service that is responsive to questions posed by class members about meter accuracy, distribution rates and billing errors; and/or
 - (d) observe a duty of good faith and fair dealing with customers.
- (6) Were the terms of the contract between the defendants and the class breached?
- (7) If the answer to (6) is yes,
 - (a) can damages be assessed on an aggregate basis?
 - (b) if so, what is the quantum of aggregate damages owed to the class members?

Unjust Enrichment

- (8) Were the defendants enriched?
- (9) If the answer to (8) is yes, were the class members correspondingly deprived?
- (10) If the answer to (9) is yes, was there a juristic reason for the defendants' enrichment?
- (11) If the answer to (10) is no, can damages be assessed on an aggregate basis?

- (12) If the answer to (11) is yes, what is the quantum of aggregate damages owed to the class members?

Punitive Damages

- (13) Should the defendants pay punitive damages? If so, in what amount, and to whom?

i. The Negligence Common Issues Should be Certified

54. Proposed common issues (1), (2), and (3) are elements of the negligence cause of action.

55. Common issue (1) goes to the requirement that there be a duty of care. Whether the defendants owe a duty of care to Hydro One customers is a threshold question common to all class members. It does not depend on the evidence of individual class members. It requires a review of the defendants' behaviour and the law.

56. Common issue (2) goes to the determination of whether the defendants' conduct breached the standard of care. This determination involves an assessment, within the legal framework of what the standard of care is, of factual and expert evidence relating to the defendants' knowledge and conduct, and does not depend on the evidence of individual class members.

57. Common issue (3) goes to whether the defendants' breach caused damages to the class. Again, this determination involves an assessment of the defendants' conduct at large, and does not depend on the evidence of individual class members.

58. The evidence on this motion demonstrates that the negligence issues can be determined in common for the class. In particular, the plaintiff relies on the expert evidence of Mr. Gurusamy that: (a) there were generally-accepted standards of care that pertain to the planning, implementation and testing of SAP-based systems, such as Hydro One's CIS;¹¹⁹ and (b) Hydro

¹¹⁹ Gurusamy Report of April 13, p. 6, PMR, Vol. 1, Tab 8(B), p. 175.

One "breached various generally-accepted standards of care during every phase of its CIS replacement project, including the post-implementation periods".¹²⁰ The plaintiff also relies on the Ombudsman's Report and the PwC Report that demonstrate that Hydro One's systemic failures were the direct cause the damages sustained by class members.¹²¹

59. The issues of duty, standard, breach and causation rely exclusively on the conduct of the defendants, can all be determined in common for the entire class and "are a substantial and necessary factual link in the chain of proof leading to liability for every member of the class."¹²² Negligence common issues have been certified by the court in numerous class actions, such as in *Carillo v. Vinen Atlantic S.A.*,¹²³ *Good v. Toronto (City) Police Services Board*,¹²⁴ *Rumley v. British Columbia*,¹²⁵ *Dine v. Biomet*,¹²⁶ and *Cloud v. Canada (Attorney General)*.¹²⁷ The proposed negligence common issues should be certified in this case.

ii. The Breach of Contract Common Issues Should be Certified

60. Common issue (5) seeks a determination of the express and implied terms of the contract between Hydro One and the class members. Common issue (6) asks whether these terms were breached. These two issues are capable of being determined in common since:

¹²⁰ Gurusamy Report of April 13, p. 4, **PMR, Vol. 1, Tab 8(B), p. 173.**

¹²¹ Ombudsman's Report, Exhibit "T" to the Iannacito Affidavit, **PMR, Vol. 4, Tab 9(T), pp. 920-921**; PwC Report, p. 4, Exhibit "S" to the Iannacito Affidavit, **PMR, Vol. 4, Tab 9(S), pp. 876-878.**

¹²² *Jones v. Zimmer GMBH*, 2013 BCCA 21 at para. 36, **PBOA, Vol. 1, Tab 9.**

¹²³ *Carillo v. Vinen Atlantic S.A.*, 2014 ONSC 5269 at para. 64, **PBOA, Vol. 1, Tab 10.**

¹²⁴ *Good v. Toronto (City) Police Services Board*, 2016 ONCA 250 at Schedule "E" [*Good ONCA*], **PBOA, Vol. 1, Tab 11.**

¹²⁵ *Rumley v. British Columbia*, 2001 SCC 69 at para. 21 [*Rumley*], **PBOA, Vol. 1, Tab 12.**

¹²⁶ *Dine v Biomet*, 2015 ONSC 7050 at paras. 20, 44 [*Dine*], leave to appeal ref'd 2016 ONSC 4039 (Div. Ct.) [*Dine Div Court*], **PBOA, Vol. 1, Tab 13.**

¹²⁷ *Cloud*, *supra* note 93 at para. 72, **PBOA, Vol. 1, Tab 3.**

- (a) **One single contract:** Hydro One's contractual obligations do not vary among the class and are identical as between the class members; and
- (b) **Breaches focus on Hydro One's conduct:** The alleged breaches of Hydro One's contracts with the class members focus on the common systemic conduct of Hydro One and do not depend on the evidence of individual class members.

61. Hydro One only had one Conditions of Service contract that applied to all customers throughout the class period at any given time.¹²⁸ The contractual terms of service between Hydro One and its customers are also informed by the DSC and the RSC, which apply to every single class member and which set minimum standards that every Ontario electricity distributor must meet in carrying out its operations.¹²⁹ Since the contractual terms between Hydro One and the class members do not vary as between each member of the class, common issue (5), which seeks to determine the relevant terms of the contract, is capable of being determined in common for the class.

62. Common issue (6), which asks whether any of the terms of the contract were breached, is also capable of being determined in common for the class. In particular, each of the terms focuses on the systemic, common conduct of the defendants. Did Hydro One have appropriate systems in place? Did Hydro One observe a duty of good faith and fair dealing? The manner in which the alleged breaches are framed permits the court to resolve the common issues on a class-wide basis. Whether Hydro One employed the relevant systems and observed a duty of good faith can be determined without reference to the actions of any individual class members. In this case, common contractual breach arises from Hydro One's common, systemic failings.

¹²⁸ Conditions of Service (May 21, 2013 – December 31, 2014), Exhibit "U" to the Hubert Affidavit, **RMR, Vol. 3, Tab 1(U)**, pp. 637-770; Conditions of Service (January 1, 2015 – Current), Exhibit "T" to the Hubert Affidavit, **RMR, Vol. 3, Tab 1(T)**, pp. 495-635; Hubert Transcript, qq. 88, 90, 93, 98, 100, 104, 106, pp. 20-23, **Transcript Record, Tab B**, pp. 59, 60, 61, 62.

¹²⁹ Statement of Claim, para. 22, **PMR, Vol. 1, Tab 3**, pp. 24.

63. The factual footprint for the breach of contract common issues will largely overlap with the footprint for the negligence common issues. At this preliminary stage, the plaintiff relies on the Ombudsman's Report, the PwC Report and the expert evidence of Mr. Gurusamy to demonstrate that during the class period, Hydro One breached the terms of its contracts with class members by failing to have the required systems in place and by failing to observe a duty of good faith and fair dealing.¹³⁰

64. There is thus some basis in fact in support of the existence and commonality of the breach of contract common issues. As Justice Strathy found in *Fulawka Certification*, "claims for breach of contract based on the interpretation of common contract provisions have been frequently certified as class actions".¹³¹ In this case, the contract is common and the breaches focus on the conduct of the defendants. Breach of contract common issues have been certified by the court in numerous class actions where these criteria are met, such as *Fulawka ONCA*,¹³² *Rosen v. BMO Nesbitt Burns Inc.*,¹³³ *Sankar v. Bell Mobility Inc.*,¹³⁴ and many others.¹³⁵ The proposed breach of contract common issues should be certified in this case.

¹³⁰ Ombudsman's Report, para. 14, Exhibit "T" to the Iannacito Affidavit, **PMR, Vol. 4, Tab 9(T), p. 916**; PwC Report, p. 4, Exhibit "S" to the Iannacito Affidavit, **PMR, Vol. 4, Tab 9(S), p. 876**; Gurusamy Report, p. 4, **PMR, Vol. 1, Tab 8(A), p. 155**.

¹³¹ *Fulawka Certification*, *supra* note 95 at para. 72, **PBOA, Vol. 1, Tab 4**.

¹³² *Fulawka ONCA*, *supra* note 118 at Appendix, **PBOA, Vol. 1, Tab 8**.

¹³³ *Rosen v. BMO Nesbitt Burns Inc.*, 2013 ONSC 2144 at Appendix, **PBOA, Vol. 1, Tab 14**.

¹³⁴ *Sankar v. Bell Mobility Inc.*, 2013 ONSC 5916 at Appendix B [*Sankar*], **PBOA, Vol. 1, Tab 15**.

¹³⁵ *Cassano v. Toronto- Dominion Bank*, 2007 ONCA 781, at para. 25, leave to appeal to S.C.C. refused [2008] S.C.C.A. No. 15, **PBOA, Vol. 2, Tab 16**; *Markson v. MBNA Canada Bank*, [2004] O.J. No. 3226 (S.C.J.) [*Markson Certification*], **PBOA, Vol. 2, Tab 17**, rev'd 2007 ONCA 334, at paras. 31, 57 [*Markson ONCA*], **PBOA, Vol. 2, Tab 18**; *Hickey-Button v. Loyalist College of Applied Arts & Technology*, [2006] O.J. No. 2393 (C.A.), at paras. 41, 53, **PBOA, Vol. 2, Tab 19**.

iii. The Unjust Enrichment Common Issues Should be Certified

65. Common issue (8) asks whether the defendants were enriched. Common issue (9) asks if the class members were correspondingly deprived. Common issue (10) asks whether there was a juristic reason for the enrichment.

66. The unjust enrichment common issues are well-suited for certification as common issues because they focus on the defendants' conduct and not on the actions of individual class members. In this case, the action has been framed to focus on Hydro One's systemic conduct and the unjust enrichment common issues will focus on whether Hydro One's conduct resulted in its enrichment and a corresponding deprivation to the class, in the aggregate.

67. Unjust enrichment common issues have been certified by the court in numerous class actions, such as *Markson*,¹³⁶ *Pro-Sys*,¹³⁷ *Fulawka ONCA*,¹³⁸ *Sankar*¹³⁹ and many others.¹⁴⁰ There is no compelling reason why this case should be any different.

iv. The Aggregate Damages Common Issues Should be Certified

68. Common issues (4), (7), and (12) ask, for each cause of action, whether: (a) damages can be assessed on an aggregate basis; and if so, (b) what is the quantum of aggregate damages owed to the class members.

¹³⁶ *Markson Certification*, *supra* note 135, rev'd *Markson ONCA*, *supra* note 135 at para. 57, **PBOA, Vol. 2, Tab 17**.

¹³⁷ *Pro-Sys*, *supra* note 89 at Appendix, **PBOA, Vol. 1, Tab 1**.

¹³⁸ *Fulawka ONCA*, *supra* note 118 at Appendix, **PBOA, Vol. 1, Tab 8**.

¹³⁹ *Sankar*, *supra* note 134 at Appendix B, **PBOA, Vol. 1, Tab 15**.

¹⁴⁰ *Smith v. National Money Mart Co.*, [2007] O.J. No. 46, (S.C.J.), Appendix A, leave to appeal ref'd [2007] O.J. No. 2160, (Div. Ct.), **PBOA, Vol. 2, Tab 20**; *McCutcheon v. The Cash Store Inc.*, [2006] O.J. No. 1860 (S.C.J.) at para. 72, **PBOA, Vol. 2, Tab 21**.

69. Section 24 of the *CPA* permits the court to determine the aggregate or part of a defendant's liability to class members where it can reasonably be determined without proof by individual class members.¹⁴¹ For an aggregate assessment common issue to be certified, there need only be some basis in fact to conclude that there is a "reasonable possibility" that an aggregate assessment be made.¹⁴² Several further principles are relevant to the availability of aggregate damages:

- (a) **Certification of Aggregate damages common issues should be the routine rather than the exception:** In *Ramdath v. George Brown College of Applied Arts and Technology*,¹⁴³ the Ontario Court of Appeal endorsed the principle that "it is desirable to award aggregate damages where the criteria under s. 24(1) are met in order to make the class action an effective instrument to provide access to justice."¹⁴⁴ In so doing, the Court of Appeal recognized that "aggregate damages are essential to the continuing viability of the class action."¹⁴⁵
- (b) **The same degree of accuracy as in an ordinary action is not required:** In *Ramdath*, the Ontario Court of Appeal also endorsed the principle that, in contrast to the degree of accuracy required in an ordinary action, the legislature's chose a "reasonableness" standard for determining aggregate liability in a class proceeding.¹⁴⁶
- (c) **Aggregate awards of damage may be ordered even when damages are not suffered by every single member of the class:** Aggregate awards of monetary relief are appropriate "notwithstanding that identifying individual class members entitled to damages and determining the amount cannot be done except on a case-by-case basis".¹⁴⁷ As the Court of Appeal found in *Markson v. MBNA*, "[i]t may be that in the result some class members who did not actually suffer damage will receive a share of the

¹⁴¹ *CPA*, *supra* note 88, s. 24.

¹⁴² *Vezina v. Loblaw Companies Ltd.*, [2005] O.J. No. 1974 (S.C.J.) at para. 25, **PBOA, Vol. 2, Tab 22**.

¹⁴³ *Ramdath v. George Brown College of Applied Arts and Technology*, 2015 ONCA 921 [*Ramdath*], **PBOA, Vol. 2, Tab 23**.

¹⁴⁴ *Ramdath*, *supra* note 143 at para. 76, **PBOA, Vol. 2, Tab 23**.

¹⁴⁵ *Ramdath v. George Brown College*, 2014 ONSC 3066 at para. 1, **PBOA, Vol. 2, Tab 24**, *aff'd Ramdath*, *supra* note 143, **PBOA, Vol. 2, Tab 23**.

¹⁴⁶ *Ramdath*, *supra* note 143 at para. 76, **PBOA, Vol. 2, Tab 23**.

¹⁴⁷ *Markson ONCA*, *supra* note 135 at para. 48, leave to appeal *ref'd* [2007] S.C.C.A. No. 346, **PBOA, Vol. 2, Tab 18**.

award. However, that is exactly the result contemplated by s. 24(2) and (3)
....¹⁴⁸

- (d) **The aggregate damages common issue may be for all or part of the total damages:** Determination of aggregate damages need not determine the entirety of the damages claimed for the entirety of the class. Although damages may be different for each class member, it is open to a common issues judge to determine that there was a base amount of damages that each member of the class may be entitled to.¹⁴⁹

70. In support of the certification of the aggregate damages common issues, the plaintiff relies on the expert evidence of Errol Soriano, a Chartered Professional Accountant and a Chartered Business Valuator.¹⁵⁰ Mr. Soriano gave the opinion that he is able to calculate the loss to the class on an aggregate basis with a reasonable degree of precision based on the difference between the Invoiced Amounts and the Proper Amounts.¹⁵¹ Mr. Soriano has also proposed a methodology to calculate damages in the aggregate based on a statistically valid sample of the class members.¹⁵²

71. In response to Mr. Soriano's evidence, Hydro One relies on the evidence of Vinita Juneja, who gave the opinion that there was considerable variation among Hydro One customers' payment plans, and that Mr. Soriano's proposed methodology did not consider certain individual customer characteristics.¹⁵³ Ms. Juneja also concluded that sampling would not be appropriate

¹⁴⁸ *Markson ONCA*, *supra* note 135 at para. 49, leave to appeal ref'd [2007] S.C.C.A. No. 346, **PBOA, Vol. 2, Tab 18**.

¹⁴⁹ *Good v. Toronto (Police Services Board)*, 2014 ONSC 4583 (Div. Ct.) at paras. 73-74, **PBOA, Vol. 2, Tab 11**, *aff'd Good ONCA*, *supra* note 124 at para. 75, **PBOA, Vol. 1, Tab 11**, citing *Pro-Sys*, *supra* note 89 at para. 134, **PBOA, Vol. 1, Tab 1**.

¹⁵⁰ Soriano Report of April 13, p. 2, **PMR, Vol. 1, Tab 7(A), p. 130**.

¹⁵¹ Soriano Report of April 13, pp. 1-2, **PMR, Vol. 1, Tab 7(A), pp. 129-130**.

¹⁵² Soriano Report of April 13, p. 7, **PMR, Vol. 1, Tab 7(A), p. 135**.

¹⁵³ Report of Vinita Juneja, dated October 19, 2016 ["Juneja Report"], pp. 3-4, **RMR, Vol. 3, Tab 2(A), pp. 1672-1673**.

since the sample must reflect the variation in the population and could result in a less precise answer than a tabulation of each class members' individual losses.¹⁵⁴

72. In his reply report, Mr. Soriano confirmed that: (a) his methodology to calculate damages in the aggregate would account for the various individual issues identified by Ms. Juneja;¹⁵⁵ and (b) to the extent that statistical sampling is used, the process would have to be properly controlled.¹⁵⁶

73. Mr. Soriano's independent, expert opinion did not change after reviewing Ms. Juneja report. He maintained his opinion that his "proposed methodology to calculate damages remains valid."¹⁵⁷

74. Mr. Soriano's evidence is compelling. In lieu of reviewing each class member's individual damages on a case by case basis, he is able to take a systemic approach to calculate damages in the aggregate, without proof by individual class members.

75. Proving damages will require complex evidence at the common issues trial. As Justice Rothstein held in *Pro-Sys*, "resolving conflicts between experts is an issue for the trial judge and not one that should be engaged in at certification (see *Infinion*, at para 68; *Irving*, at para. 143). The trial judge will have the benefit of a full record upon which to assess the appropriateness of any damages award that may be made pursuant to the proposed methodology."¹⁵⁸

¹⁵⁴ Juneja Report, p. 4, **RMR, Vol. 3, Tab 2(A)**, p. 1673.

¹⁵⁵ Report of Errol Soriano, dated December 2, 2016 ["Reply Soriano Report"], p. 5, **PRMR, Tab 1(A)**, p. 8.

¹⁵⁶ Reply Soriano Report, p. 3, **PRMR, Tab 1(A)**, p. 6.

¹⁵⁷ Reply Soriano Report, p. 2, **PRMR, Tab 1(A)**, p. 5.

¹⁵⁸ *Pro-Sys*, *supra* note 89 at para. 126, **PBOA, Vol. 1, Tab 1**.

76. Mr. Soriano's evidence represents a reasonable and credible approach to establish some basis in fact that damages can be calculated in the aggregate. In the circumstances of this case, the aggregate damages common issues should be certified.

v. The Punitive Damages Common Issue Should be Certified

77. Common issue (13) asks whether: (a) the defendants should pay punitive damages; and (b) if so, in what amount and to whom?

78. The punitive damages inquiry focusses on the blameworthiness of the defendant's conduct. This determination can be made without evidence from individual class members and it is routinely certified as a common issue. For example, in *Rumley v. British Columbia*, the Supreme Court of Canada certified a proposed punitive damages common issue on the basis that it involved an inquiry into the knowledge and conduct of the defendant.¹⁵⁹

79. Most recently, the Ontario Court of Appeal in *Good v. Toronto* endorsed the certification of punitive damages common issues. The Court of Appeal reasoned that the issue is eminently certifiable as its determination depends solely on the conduct of the defendant, which was common to the entire class.¹⁶⁰

80. In this case, the plaintiff pleads that the defendants acted with reckless disregard for the class members' interests. In other words, their conduct was markedly worse than negligence.¹⁶¹ Such allegations, if proved at trial, support a claim for punitive damages which can be determined in the aggregate.

¹⁵⁹ *Rumley*, *supra* note 125 at para. 34, **PBOA, Vol. 1, Tab 12**.

¹⁶⁰ *Good ONCA*, *supra* note 124 at para. 80, **PBOA, Vol. 1, Tab 11**; See also *Dine*, *supra* note 126 at paras. 54-61, leave to appeal ref'd [2016] O.J. No. 3190 (Div. Ct.), **PBOA, Vol. 1, Tab 13**.

¹⁶¹ Statement of Claim, para. 87, **PMR, V. 1, Tab 3, p. 40**.

81. Even at this preliminary stage, there is evidence that the defendants' conduct warrants an award of punitive damages. For example, the Ontario Ombudsman found that Hydro One customer service staff was instructed to mislead customers about the cause of their billing problems.¹⁶² Likewise, the Ombudsman found deliberate misconduct on behalf of Hydro One: "internal Hydro One documents also clearly shows that at least some management staff deliberately accentuated the positive aspects of the new computer system, while concealing information about billing problems and customer complaints that would cast the company in a bad light."¹⁶³ To the extent that evidence is even necessary at this stage (which the plaintiff submits it is not), there is some basis in fact for the punitive damages common issue.

E. A Class Proceeding is the Preferable Procedure

82. Section 5(1)(d) of the *CPA* requires that a class proceeding be the "preferable procedure for the resolution of the common issues." The common issues in this action will be best resolved through a class proceeding.

83. In *AIC Limited v. Fischer*,¹⁶⁴ the Supreme Court of Canada held that the preferability analysis required a comparative exercise in which the court must consider whether other means of resolving the claim are preferable to a class proceeding.¹⁶⁵ To assist lower courts in their preferability analysis, the Supreme Court of Canada in *AIC* identified five questions to be asked

¹⁶² Ombudsman's Report, paras. 122, 131, Exhibit "T" to the Iannacito Affidavit, **PMR, Vol. 4, Tab 9(T), pp. 943, 945.**

¹⁶³ Ombudsman's Report, para. 176, Exhibit "T" to the Iannacito Affidavit, **PMR, Vol. 4, Tab 9(T), p. 955.**

¹⁶⁴ *AIC Limited v. Fischer*, [2013] 3 S.C.R. 949 [*AIC*], **PBOA, Vol. 2, Tab 25.**

¹⁶⁵ *AIC*, *supra* note 164 at para. 23, **PBOA, Vol. 2, Tab 25.**

which must not be considered in isolation or a specific order, but ought to inform the overall comparative preferability analysis.¹⁶⁶

i. Alternative Procedures Are Not Preferable to a Class Proceeding

84. Hydro One gave evidence that its customers can make complaints to: (a) member of Provincial Parliament (“MPP”) offices; (b) the Ontario Ombudsman; (c) the Hydro One Ombudsman; (d) Hydro One executives and the Board of Directors; (f) the Ontario Minister of Energy; and (g) Hydro One Networks' Call Centre.¹⁶⁷ In his affidavit, Mr. Hubert also purports to rely on the OEB as an alternative procedure to a class proceeding. None of these entities are preferable to a class proceeding to resolve the common issues.

ii. No Jurisdiction or Remedial Power

85. In determining whether a class proceeding is the preferable procedure, this court must have regard to the jurisdiction and remedial powers of the alternatives proposed.¹⁶⁸ Where a proposed alternative procedure does not have the same jurisdiction or remedial powers available as a class proceeding, it will not be preferable.

86. For example, in *Fulawka v. Bank of Nova Scotia*, a certification decision with respect to an action for unpaid overtime, the defendant proposed as an alternative to a class proceeding that the class members individually apply for compensation to the *Canada Labour Relations Board* (the “**Board**”). Just as in this case, the Board had no jurisdiction over the causes of action advanced in the class proceeding. Moreover, similar to this case, the pleadings sought

¹⁶⁶ *AIC*, *supra* note 164 at paras. 27-38, **PBOA**, Vol. 2, Tab 25.

¹⁶⁷ Hubert Affidavit, para. 26, **RMR**, Vol. 1, Tab 1, pp. 10-12.

¹⁶⁸ *Fulawka ONCA*, *supra* note 118 at para. 165, **PBOA**, Vol. 1, Tab 8.

declaratory relief and punitive damages for which the Board lacked jurisdiction to grant.¹⁶⁹ In concluding that the Board did not have jurisdiction over the claims advanced in the class action, the Ontario Court of Appeal found that the Board was not the preferable procedure:

[166] The appellant's arguments for preferring Part III proceedings over a class proceeding once again fundamentally misstate the nature of the claims asserted on behalf of the class members. **These claims are framed in breach of contract, breach of a duty of good faith, negligence and unjust enrichment -- causes of action over which the administrative actors under the Code have no jurisdiction**; see Lax J.'s decision in *Fresco*, at para. 98. Inspectors and referees appointed under the Code have no jurisdiction to investigate a claim that an employer's company-wide overtime policy breaches the terms of its employees' employment contracts. **Nor do they have jurisdiction to determine if an employer has been unjustly enriched by a failure to comply with its duties to pay overtime on a company-wide basis. Moreover, the pleadings seek declaratory and injunctive forms of relief and punitive damages that inspectors and referees lack jurisdiction to grant** [emphasis added].

[167] Given the type of liability and damages issues raised by the class members' claims, the limitations on the jurisdiction and remedial authority of inspectors and referees under the Code would thwart rather than fulfill the central CPA goal of promoting access to justice.¹⁷⁰

87. Similarly, in *Sankar*, this court rejected the defendant's submission that proceedings before the Canadian Radio-Television Telecommunications Commission (the "CRTC") were preferable, since: (a) the CRTC could not adjudicate breach of contract claims; (b) the CRTC could not resolve the common issues; and (c) the CRTC did not provide a viable procedure for the disputes herein.¹⁷¹

¹⁶⁹ *Fulawka ONCA*, *supra* note 118 at paras. 164-167, **PBOA, Vol. 1, Tab 8** (In this action, the plaintiff seeks declarations that the defendants:

- (a) breached their contracts with some or all members of the class;
- (b) owed a duty of care to the class and that the defendants breached this duty with respect to some or all class members; and
- (c) have been unjustly enriched, that the members of the class have suffered a corresponding deprivation, and that there is no juristic reason for such enrichment);

Statement of Claim, para. 1, **PMR, Vol. 1, Tab 3, pp. 18-19**.

¹⁷⁰ *Fulawka ONCA*, *supra* note 118 at paras. 165-166, **PBOA, Vol. 1, Tab 8**.

¹⁷¹ *Sankar*, *supra* note 134 at para. 97, **PBOA, Vol. 1, Tab 15**.

88. On cross-examination, Hydro One's witness, Mr. Hubert, admitted that MPP offices and the Ontario Ombudsman simply liaise with Hydro One Networks on behalf of customers, or they may simply send customers directly to Hydro One Networks.¹⁷² Similarly, neither MPP offices nor the Ontario Ombudsman can make any compulsory directions to Hydro One Networks.¹⁷³ Finally, when complaints go to Hydro One executives or directors or the Ontario Ministry of Energy, they generally just get routed back to the Customer Relations Centre.¹⁷⁴

89. Like in *Fulawka* and *Sankar*, none of these alternative "complaint takers" have jurisdiction over the causes of action in this case, and none of these alternatives can offer the remedial relief available in this court. Indeed, they are simply different avenues through which a customer may complain. In no way, shape or form can a "complaint taker" that has no remedial power and that redirects customers back to Hydro One's customer service department be considered an alternative procedure to a class action, let alone one that is preferable.

90. The OEB is also incapable of being the preferable procedure. Like the tribunals under consideration in *Fulawka* and *Sankar*, the OEB: (a) does not have jurisdiction over the claims for negligence, breach of contract and unjust enrichment advanced in this action; (b) cannot grant the relief sought herein; (c) cannot answer the proposed common issues; and (d) has extremely limited participatory rights for class members.

91. Critically, on cross-examination Mr. Hubert admitted his understanding was that Hydro One customers cannot initiate proceedings before the OEB.¹⁷⁵

¹⁷² Hubert Transcript, qq. 110, 111, 129, 131, pp. 24, 28, 29, **Transcript Record, Tab B, pp. 63, 67, 68.**

¹⁷³ Hubert Transcript, qq. 112, 134, pp. 24, 29-30, **Transcript Record, Tab B, pp. 63, 68-69.**

¹⁷⁴ Hubert Transcript, qq. 136, 138, pp. 30, **Transcript Record, Tab B, p. 69.**

¹⁷⁵ Hubert Transcript, qq. 117, pp. 25, **Transcript Record, Tab B, p. 64.**

92. In *AIC*, the Supreme Court of Canada concluded that the inability of class members to initiate alternative procedure was a factor weighing in favour of the preferability of a class proceeding. Prior to the commencement of the investor class action in *AIC*, the defendants had entered into a settlement agreement with the Ontario Securities Commission (the "OSC"). The defendants argued at certification that proceedings before the OSC were the preferable procedure. On appeal, the Supreme Court of Canada concluded that a class action was preferable on the basis that: (a) the main jurisdiction of the OSC was regulatory, not compensatory; (b) there was no investor participation in the process leading to compensation from the OSC; and (c) there was no information about how OSC staff assessed investor compensation:

In summary, the regulatory nature of and the limited participation rights for investors in the OSC proceedings, coupled with the absence of information about how the OSC staff assessed investor compensation, support the conclusion that significant procedural access to justice concerns remain which the proposed class action can address. Moreover, the focus and nature of the OSC process reinforce the concerns which I will turn to next about whether substantial access to justice was achieved.¹⁷⁶

93. Similarly, in *Garland v. Consumers' Gas Co.*, a class action for repayment of interest exceeding the criminal rate, the Ontario Court of Appeal concluded that the OEB's jurisdiction to fix rates for gas and to set penalties for late payment "does not empower it to impose a restitutionary order sought by the plaintiff."¹⁷⁷ The Court of Appeal concluded that "the statutory scheme of the OEBA [*Ontario Energy Board Act*] does not contemplate resolving the dispute between the class members and CG [*Consumers' Gas*], nor does it provide an adequate adjudicative mechanism for resolving the private law claim that is prompted by the Board's rate

¹⁷⁶ *AIC*, *supra* note 164 at para. 55, **PBOA, Vol. 2, Tab 25**.

¹⁷⁷ *Garland v. Consumers' Gas Co.*, [2001] O.J. No. 4651 (C.A.) [*Garland ONCA*], para. 32, **PBOA, Vol. 2, Tab 26** rev'd on other grounds, *supra* note 107, **PBOA, Vol. 2, Tab 6**.

order."¹⁷⁸ Finally, with respect to class member participation before the OEB, the Court of Appeal concluded that although the OEB's practice permits an individual to apply for intervenor status at a rate hearing, nothing in the governing legislation "permits a member of the public to commence a proceeding before the Board."¹⁷⁹

94. On appeal, the Supreme Court of Canada affirmed the conclusion of the Court of Appeal on jurisdiction and found that "**at its heart [this] is a private law matter under the competence of civil courts and consequently the [Ontario Energy] Board does not have jurisdiction to order the remedy sought by the appellant**"¹⁸⁰ [emphasis added].

95. Given (a) the type of liability and damages issues raised by the class members' claims; (b) the limitations on the OEB's jurisdiction and remedial authority; (c) the inability of class members to actually initiate proceedings before the Board; and (d) the extremely limited participatory rights of class members before the OEB, directing class members to simply make complaints to the OEB would thwart rather than fulfill the central goal of the *CPA* of promoting access to justice. In these circumstances, the OEB cannot be the preferable procedure.

iii. The Class Members' Evidence Demonstrates a Class Action is Preferable

96. The evidence from Mr. Bennett and Ms. Bates also demonstrate that the alternative procedures relied upon by Hydro One are not preferable to a class proceeding.

97. Before commencing this class action, Mr. Bennett sought assistance with respect to his serious billing and customer service issues with Hydro One from the following entities: (a) the

¹⁷⁸ *Garland ONCA*, *supra* note 177, para. 32, *supra* note 107, **PBOA, Vol. 2, Tab 26**, rev'd on other grounds, *supra* note 107, **PBOA, Vol. 1, Tab 6**.

¹⁷⁹ *Garland ONCA*, *supra* note 177 at para. 32, **PBOA, Vol. 2, Tab 26**, rev'd on other grounds, *supra* note 107, **PBOA, Vol. 1, Tab 6**.

¹⁸⁰ *Garland*, *supra* note 107 at para. 70, **PBOA, Vol. 1, Tab 6**.

Ontario Ombudsman;¹⁸¹ (b) the OEB;¹⁸² (c) the Minister of Energy;¹⁸³ and (d) his local MPP.¹⁸⁴ However, none of these proposed procedures were able to resolve Mr. Bennett's dispute with Hydro One. Mr. Bennett's evidence is that "the complete and utter fiasco that I have experienced since the implementation of Hydro One's new billing and customer information system, and the mismanagement of my account, remains unresolved."¹⁸⁵

98. Similarly, Ms. Bates has made many inquiries to Hydro One's Customer Communications Department in response to her billing issues.¹⁸⁶ She has called and emailed Hydro One "many, many times," and there have been long delays in Hydro One responding to her emails.¹⁸⁷ She also contacted the Ontario Ombudsman's office with her complaints, who directed her back to a Hydro One customer service representative.¹⁸⁸ Finally, she contacted her local MPP, who also directed her back to a Hydro One representative.¹⁸⁹ Ms. Bates' evidence is that "[n]either the Ombudsman's Office nor [her] MPP's office have been able to help resolve my problems with Hydro One."¹⁹⁰

99. Although Hydro One's evidence suggests that alternatives are available, in practice, the evidence demonstrates that these alternatives do not provide any access to justice.

¹⁸¹ Bennett Affidavit, para. 39, **PMR, Vol. 1, Tab 5, p. 65.**

¹⁸² Bennett Affidavit, para. 39, **PMR, Vol. 1, Tab 5, p. 65.**

¹⁸³ Bennett Affidavit, para. 39, **PMR, Vol. 1, Tab 5, p. 65**; Letter to Minister of Energy, Exhibit "E" to the Bennett Affidavit, **PMR, Vol. 1, Tab 5(E), p. 79.**

¹⁸⁴ Bennett Affidavit, para. 39, **PMR, Vol. 1, Tab 5, p. 65**; Letter to Member of Provincial Parliament, Exhibit "F" to the Bennett Affidavit, **PMR, Vol. 1, Tab 5(F), p. 81.**

¹⁸⁵ Bennett Affidavit, para. 39, **PMR, Vol. 1, Tab 5, p. 65.**

¹⁸⁶ Bates Affidavit, para. 10, **PMR, Vol. 1, Tab 6, pp. 84-85.**

¹⁸⁷ Bates Affidavit, para. 10, **PMR, Vol. 1, Tab 6, pp. 84-85.**

¹⁸⁸ Bates Affidavit, para. 14, **PMR, Vol. 1, Tab 6, p. 85**; Letter to Ontario Ombudsman, Exhibit "D" to the Bates Affidavit, **PMR, Vol. 1, Tab 6(D), p. 102.**

¹⁸⁹ Bates Affidavit, para. 15, **PMR, Vol. 1, Tab 6, p. 86**; Email to Minister of Provincial Parliament, Exhibit "E" to the Bates Affidavit, **PMR, Vol. 1, Tab 6(E), p. 105.**

¹⁹⁰ Bates Affidavit, para. 16, **PMR, Vol. 1, Tab 6, p. 86.**

iv. A Class Proceeding is the Preferable Procedure

100. Canadian courts have consistently found that access to justice is the overriding consideration in making a preferability assessment. It is well-settled that "class actions can facilitate procedural justice by providing a vehicle for bringing claims to court for people who, for any number of reasons, cannot or will not independently enforce their rights" while also "facilitat[ing] the substantive element of access to justice because the class as a whole is stronger than individual claimants when facing a defendant with considerable resources to defend itself".¹⁹¹

101. In contrast to any of the procedures identified above, a class proceeding offers tremendous benefits to all parties, making it "preferable", such as:

- (a) whatever limitation period is deemed applicable will be tolled for the entire class;
- (b) a formal court approved notice program will alert and advise all interested persons of the status of the litigation;
- (c) a class proceeding prevents a defendant from creating endless procedural obstacles that an individual litigant may not have the resources to bear;
- (d) class members' participation in the litigation is limited and controlled by the court to ensure that the process is fair and not too onerous;
- (e) the action is typically case-managed by a single judge which itself creates efficiencies and economies;
- (f) the court has a number of statutory tools and powers designed to protect the best interests of the absent class members;
- (g) class members are individually protected from paying legal fees and/or any adverse costs awards in relation to the common issues stage; and

¹⁹¹ The Hon. Frank Iacobucci, "What Is Access to Justice in the Context of Class Actions?", *Accessing Justice: Appraising Class Actions Ten Years After Dutton, Hollick & Rumley*, ed. J. Kalajdzic (Lexis Nexis, 2011), p. 21, PBOA, Vol. 2, Tab 27.

- (h) if any individual issues remain following determination of the common issues, the court has the power under the statute to create simplified structures, procedures and processes.¹⁹²

102. There is no other type of proceeding capable of providing the same access to justice that is offered through a class proceeding. Thus, the defendants' position is essentially, "no litigation is preferable to collective litigation." Such arguments must not be given any effect.¹⁹³

103. The evidence on this motion further demonstrates the reality that there are no feasible alternatives for legal redress, as the costs of pursuing an action on an individual basis may be prohibitive and uneconomical.¹⁹⁴ Time and time again in the class proceeding context courts have found that individual actions "would be less practical and less efficient than a class proceeding."¹⁹⁵ Courts, therefore, regularly rejected individual litigation as a legitimate or practical alternative to a class action.

v. Judicial Economy Can Only be Achieved by a Class Proceeding

104. The central legal issues in this action will be the nature and extent of the duty owed by the defendants to the class members, the terms of the contracts between class members and Hydro One, and whether or not any such duty or terms were breached. Those issues are amenable to collective resolution as they do not require individual testimony.

105. If an aggregate award of damages is made, all issues may be addressed in common at the common issues trial:

¹⁹² *Wilson v. Servier Canada Inc.*, [2000] O.J. No. 3392 (S.C.J.), para. 116, **PBOA, Vol. 2, Tab 28**.

¹⁹³ *1176560 Ontario Limited et al. v. The Great Atlantic and Pacific Company of Canada Limited*, [2002] O.J. No. 4781 (S.C.J.), para. 46, aff'd [2004] O.J. No. 865 (Div. Ct.), **PBOA, Vol. 2, Tab 29**.

¹⁹⁴ Affidavit of David Rosenfeld, sworn April 11, 2016 ["**Rosenfeld Affidavit**"], para. 10, **PMR, Vol. 1, Tab 4, p. 46**.

¹⁹⁵ *Rumley*, *supra* note 125 at para. 38, **PBOA, Vol. 1, Tab 12**.

If an aggregate assessment of damages can be made, the trial of common issues will virtually end the litigation. If the trial judge finds that this cannot be done, the individual issues involved in proving causation and damages should be no greater than in *Rumley* and *Cloud* where it was held that the existence of such individual issues did not detract from the overriding significance and advantage of the resolution of the common issues in a single trial.¹⁹⁶

106. If an aggregate award of damages is not made, or if certain issues remain regarding damages that have to be addressed individually, these issues may be, as the Supreme Court of Canada said in *Rumley*, "relatively minor aspects of this case",¹⁹⁷ as compared to the common issues. In any event, as described herein, the tools available to the court for individual issue determinations under section 25 of the *CPA* would permit the efficient and streamlined determination of the individual issues.

107. Proceeding by way of individual trials would also require that all of the same parties' evidence, technical, expert, factual or otherwise, would have to be repeated in hundreds of individual cases.¹⁹⁸ This gives rise to the very real potential that the claims of class members would yield inconsistent judicial findings of fact and law. It would also needlessly tax the courts and the judiciary.

vi. A Class Proceeding Can Also Achieve Behaviour Modification

108. The Ontario Ombudsman concluded in its report that "[l]arge public sector corporations carrying on monopolistic commercial enterprises can sometimes forget the citizens they were created to serve."¹⁹⁹ As in other class proceedings, "a successful prosecution of this case as a class proceeding would act as a warning, and as a deterrent" to other entities charged

¹⁹⁶ *Dolmage v. Ontario*, 2010 ONSC 1726, para. 169, leave to appeal ref'd 2010 ONSC 6131 (Div. Ct.), **PBOA, Vol. 2, Tab 30**.

¹⁹⁷ *Rumley*, *supra* note 125 at paras. 37-38, **PBOA, Vol. 1, Tab 12**.

¹⁹⁸ *Rumley*, *supra* note 125 at para. 38, **PBOA, Vol. 1, Tab 12**.

¹⁹⁹ Ombudsman's Report, para. 1, p. 5, **PMR, Vol. 4, Tab 9(T), p. 913**.

with operating utilities who are tempted to subordinate their obligations and duties of care.²⁰⁰ To this extent, the certification and continuation of this action as a class proceeding would accord with the objective of behaviour modification.

109. For all of these reasons, the plaintiff respectfully submits that the components of section 5(1)(d) of the *CPA* are satisfied. A class proceeding is the preferable procedure.

F. Mr. Bennett is an Appropriate Representative Plaintiff

110. The final criterion for certification is that there is a representative plaintiff who: (a) would adequately and fairly represent the interests of the class; (b) does not have a conflict of interest with respect to the common issues; and (c) has produced a workable litigation plan.²⁰¹ This criterion is satisfied.

i. The Representative Plaintiff is Adequate and has No Conflict

111. The adequacy of a proposed representative plaintiff involves the court's inquiry into the motivation of the plaintiff and the competence of class counsel. Any proposed representative plaintiff need not be "typical" of the class, but must be "adequate" in the sense that they share a common interest with the other class members and they would 'vigorously prosecute' the claim.²⁰²

²⁰⁰ *Tiboni v. Merck Frost Canada Ltd.*, [2008] O.J. No. 2996 (S.C.J.) at para. 110, **PBOA**, Vol. 2, Tab 31.

²⁰¹ *CPA*, *supra* note 88, s. 5(1)(e).

²⁰² *Campbell v. Flexwatt*, [1997] B.C.J. No. 2477 (C.A.) at paras. 75-76, **PBOA**, Vol. 2, Tab 32.

112. The proposed representative plaintiff is Bill Bennett. Mr. Bennett is an excellent representative plaintiff. He falls within the class definition, has a significant stake in the action, will vigorously represent the class and does not have a conflict with other class members.²⁰³

113. Mr. Bennett has filed evidence to confirm that he understands the nature of these proceedings and can provide instruction to counsel.²⁰⁴ As a representative plaintiff, Mr. Bennett must consider and act in the best interests of the class, and he is fully prepared and able to do this.²⁰⁵ Mr. Bennett has demonstrated his clear commitment to prosecuting this action by, among other things, keeping himself informed of the steps in the litigation, helping prepare affidavits and other materials and travelling long distances to be cross-examined.²⁰⁶ Mr. Bennett is fully committed to completing all other steps as representative plaintiff, including attending examinations for discovery, assisting in preparing affidavits of documents, attending at the common issues trial, providing direction and assistance regarding the evidence in this case and expressing his views and instructing counsel.²⁰⁷

114. If for some reason Mr. Bennett is unable to fill the role of representative plaintiff, he has also filed the affidavit of Mary Bates who's evidence demonstrates that she is a willing and capable candidate to represent the class.²⁰⁸

²⁰³ Bennett Affidavit, para. 24, **PMR, Vol. 1, Tab 5, p. 62.**

²⁰⁴ Bennett Affidavit, paras. 4-5, 11, **PMR, Vol. 1, Tab 5, pp. 58, 59.**

²⁰⁵ Bennett Affidavit, para. 11, **PMR, Vol. 1, Tab 5, p. 59.**

²⁰⁶ Bennett Affidavit, paras. 12-13, **PMR, Vol. 1, Tab 5, pp. 59-60.**

²⁰⁷ Bennett Affidavit, paras. 12-13, **PMR, Vol. 1, Tab 5, pp. 59-60.**

²⁰⁸ Bates Affidavit, paras. 21-31, **PMR, Vol. 1, Tab 6, pp. 87-90.**

ii. The Litigation Plan is Adequate

115. Mr. Bennett has produced a reasonable and practical litigation plan for the proceeding that sets out a workable methodology for advancing the proceeding on behalf of the class and for notifying the class members of this proceeding. The litigation plan proposes a method to distribute damages if they awarded in the aggregate. The litigation plan also proposes that any remaining individual issues will be decided by a referee to whom both class counsel and the defendant's counsel may make submissions in writing or by means of oral hearing, depending on the nature and complexity of the claim and the severity of the alleged damages.²⁰⁹ This litigation plan can be modified or adjusted over the course of the proceeding. Accordingly, the litigation plan need only be "workable in its essentials" at the certification stage. As Justice Goudge observed in *Canada (Attorney General)*, "litigation plans, [are] something of a work in progress."²¹⁰

116. This Court should find that section 5(1)(e) of the *CPA* is satisfied.

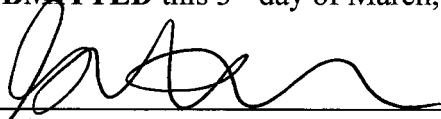
²⁰⁹ Litigation Plan, para. 26, Exhibit "A" to the Rosenfeld Affidavit, **PMR, Vol. 1, Tab 4(A)**, p. 54.

²¹⁰ *Cloud*, *supra* note 93 at para. 95, **PBOA, Vol. 1, Tab 3**.

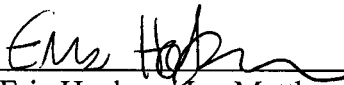
PART IV - ORDER REQUESTED

117. The plaintiff requests that the motion for certification be granted, that he be appointed as the representative plaintiff, and that the costs of this motion be ordered against the defendants payable forthwith.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of March, 2017.



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Eric Hoaken / Ian Matthews / Lisa Lutwak
Lax O'Sullivan Lisus Gottlieb LLP

Lawyers for the Plaintiff

**SCHEDULE “A”
LIST OF AUTHORITIES**

1. *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57.
2. *Hollick v. Toronto (City)*, 2001 SCC 68.
3. *Cloud v. Canada (Attorney General)*, [2004] OJ No 4924 (C.A.).
4. *Fulawka v Bank of Nova Scotia*, 2010 ONSC 1148.
5. *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.
6. *Garland v. Consumers' Gas Co.*, 2004 SCC 25.
7. *Western Canadian Shipping Centres Inc. v. Dutton*, 2001 SCC 46.
8. *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 1148, leave to appeal to S.C.C. ref'd [2012] S.C.C.A. No. 326.
9. *Jones v. Zimmer GMBH*, 2013 BCCA 21.
10. *Carillo v. Vinen Atlantic S.A.*, 2014 ONSC 5269.
11. *Good v. Toronto (City) Police Services Board*, 2014 ONSC 4583 (Div. Ct.), aff'd 2016 ONCA 250.
12. *Rumley v. British Columbia*, 2001 SCC 69.
13. *Dine v Biomet*, 2015 ONSC 7050, leave to appeal ref'd 2016 ONSC 4039 (Div. Ct.).
14. *Rosen v. BMO Nesbitt Burns Inc.*, 2013 ONSC 2144.
15. *Sankar v. Bell Mobility Inc.*, 2013 ONSC 5916.
16. *Cassano v. Toronto- Dominion Bank*, 2007 ONCA 781, leave to appeal to S.C.C. refused [2008] S.C.C.A. No. 15.
17. *Markson v. MBNA Canada Bank*, [2004] O.J. No. 3226 (S.C.J.)
18. *Markson v. MBNA Canada Bank*, 2007 ONCA 334, leave to appeal ref'd [2007] S.C.C.A. No. 346,
19. *Hickey-Button v. Loyalist College of Applied Arts & Technology*, [2006] O.J. No. 2393 (C.A.).
20. *Smith v. National Money Mart Co.*, [2007] O.J. No. 46, (S.C.J.), leave to appeal refused [2007] O.J. No. 2160, (Div. Ct.).

21. *McCutcheon v. The Cash Store Inc.*, [2006] O.J. No. 1860 (S.C.J.).
22. *Vezina v. Loblaw Companies Ltd.*, [2005] O.J. No. 1974 (S.C.J.).
23. *Ramdath v. George Brown College of Applied Arts and Technology*, 2015 ONCA 921.
24. *Ramdath v. George Brown College*, 2014 ONSC 3066.
25. *AIC Limited v. Fischer*, [2013] 3 S.C.R. 949.
26. *Garland v. Consumers' Gas Co.*, [2001] O.J. No. 4651 (C.A.).
27. The Hon. Frank Iacobucci, "What Is Access to Justice in the Context of Class Actions?", *Accessing Justice: Appraising Class Actions Ten Years After Dutton, Hollick & Rumley*, ed. J. Kalajdzic (Lexis Nexis, 2011).
28. *Wilson v. Servier Canada Inc.*, [2000] O.J. No. 3392 (S.C.J.).
29. *1176560 Ontario Limited et al. v. The Great Atlantic and Pacific Company of Canada Limited*, [2002] O.J. No. 4781 (S.C.J.), aff'd [2004] O.J. No. 865 (Div. Ct.).
30. *Dolmage v. Ontario*, 2010 ONSC 1726, leave to appeal ref'd 2010 ONSC 6131 (Div. Ct.).
31. *Tiboni v. Merck Frost Canada Ltd.*, [2008] O.J. No. 2996 (S.C.J.).
32. *Campbell v. Flexwatt*, [1997] B.C.J. No. 2477 (C.A.).

**SCHEDULE “B”
RELEVANT STATUTES**

Class Proceedings Act, 1992

S.O. 1992, CHAPTER 6

Certification

5. (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
- (a) the pleadings or the notice of application discloses a cause of action;
 - (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
 - (c) the claims or defences of the class members raise common issues;
 - (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
 - (e) there is a representative plaintiff or defendant who,
 - (i) would fairly and adequately represent the interests of the class,
 - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
 - (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

Idem, subclass protection

- (2) Despite subsection (1), where a class includes a subclass whose members have claims or defences that raise common issues not shared by all the class members, so that, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, the court shall not certify the class proceeding unless there is a representative plaintiff or defendant who,
- (a) would fairly and adequately represent the interests of the subclass;
 - (b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the subclass and of notifying subclass members of the proceeding; and
 - (c) does not have, on the common issues for the subclass, an interest in conflict with the interests of other subclass members.

Evidence as to size of class

(3) Each party to a motion for certification shall, in an affidavit filed for use on the motion, provide the party's best information on the number of members in the class.

Adjournments

(4) The court may adjourn the motion for certification to permit the parties to amend their materials or pleadings or to permit further evidence.

Certification not a ruling on merits

(5) An order certifying a class proceeding is not a determination of the merits of the proceeding.

[...]

Aggregate assessment of monetary relief

24. (1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,

- (a) monetary relief is claimed on behalf of some or all class members;
- (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and
- (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

[...]

Individual issues

25. (1) When the court determines common issues in favour of a class and considers that the participation of individual class members is required to determine individual issues, other than those that may be determined under section 24, the court may,

- (a) determine the issues in further hearings presided over by the judge who determined the common issues or by another judge of the court;
- (b) appoint one or more persons to conduct a reference under the rules of court and report back to the court; and
- (c) with the consent of the parties, direct that the issues be determined in any other manner.

Directions as to procedure

(2) The court shall give any necessary directions relating to the procedures to be followed in conducting hearings, inquiries and determinations under subsection (1), including directions for the purpose of achieving procedural conformity.

Idem

(3) In giving directions under subsection (2), the court shall choose the least expensive and most expeditious method of determining the issues that is consistent with justice to class members and the parties and, in so doing, the court may,

(a) dispense with any procedural step that it considers unnecessary; and

(b) authorize any special procedural steps, including steps relating to discovery, and any special rules, including rules relating to admission of evidence and means of proof, that it considers appropriate.

BILL BENNETT
Plaintiff

HYDRO ONE INC., ET AL.
Defendants

and

Court File No.: CV-15-535019-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto
Proceeding under the *Class Proceedings Act, 1992*

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(Certification Motion Returnable May 9-11, 2017)

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