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

**Ontario**
**SUPERIOR COURT OF JUSTICE**

B E T W E E N:

BILL BENNETT

Plaintiff

- and -

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

Defendants

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**RESPONDING FACTUM**
**(Motion for Certification)**

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April 13, 2017

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## PART I - OVERVIEW

1. At its core, this case is about customers of Hydro One Networks Inc. ("**Hydro One**") who, for a variety of reasons, many of which were unrelated, received bills that were either incorrect or delayed. Customers should not be asked to pay incorrect bills, and Hydro One is committed to ensuring that its customers pay only for the electricity that they consume. While Hydro One regrets the frustration, confusion and inconvenience that the billing issues caused for some of its customers, this case is not appropriate for certification.

2. The goals of a class proceeding would not be met by certifying this action. Indeed, all the goals of a class proceeding have already been realized.

3. Customers affected by the matters at issue have *already* received a result that is as good (or better) than they could hope to achieve in a class proceeding:

   (a) customers obtained 100% recovery of any amounts owed to them (with no deduction for contingency fees or otherwise);

   (b) Hydro One fixed the underlying billing system "defects" and corrected all bills affected by those defects; and

   (c) Hydro One implemented safeguards to prevent similar errors from occurring in the future, including proactive "safety net" controls to prevent bills from being sent without confirmation of their accuracy (including daily "spot checks" and manually reviewing all bills outside of a customer's usual patterns).

4. The billing issues complained of by the plaintiff were the subject of a rigorous and well-publicized 15-month investigation by the independent Ontario Ombudsman. All identified

customer complaints were fully addressed and resolved with the input and to the satisfaction of the Ombudsman. Hydro One accepted all 65 recommendations made by the Ombudsman, and vastly improved its billing system and customer service.

5. The uncontradicted evidence is that the problems identified by the Ombudsman, the Ontario Energy Board ("**OEB**"), and the company have been resolved, and there is no reason to be concerned to the contrary.

6. The evidence is that the problems that led to the varied complaints at issue in this case were the result of a myriad of disparate and unrelated circumstances. There is no evidence that latent defects exist today.

7. There will always be customers who are unhappy with their electricity bills, some of whom may well have legitimate complaints. However, these complaints have nothing to do with the system billing issues that occurred years ago – all of which have been addressed.

8. Moreover, any customers who believe that they have been overcharged have avenues of recourse that are superior to a class proceeding – including through (a) the Hydro One customer complaint system, (b) the Hydro One Ombudsman, and (c) the OEB complaint system – all of which are free, fast and effective and will lead to full compensation for any billing errors. The plaintiff's arguments assume that a trial and verdict are superior forms of process and redress. But as the circumstances of this case show, sometimes the public can obtain better results through other, less costly and more effective means.

9. A class proceeding would be both unnecessary and unmanageable. The proposed class of 1.3 million customers is overbroad and lacks any rational connection to the proposed common

issues. The vast majority of customers were unaffected by the system billing issues. Those who were affected had their issues rectified and likewise do not have a claim. To the extent that any billing complaints remain, those complaints would be idiosyncratic and could be resolved only through individual inquiries. There is no "common impact" or class-wide loss that would form the core of a class action.

10. The proposed common issues suffer from nearly every shortcoming, including: (i) they are not a substantial ingredient of, or necessary to resolve, each class member's claim; and (ii) they are dependent on individual findings of fact that have to be made with respect to each individual claimant. For example, the resolution of the proposed common issues regarding whether "Hydro One" was required to "employ a billing system that accurately and reliably bills customers" would be irrelevant – regardless of the answer – for any class members who: (i) did not experience billing issues; (ii) experienced issues that were not caused by the system (*i.e.* issues that were caused by human error or meter issues); (iii) had no loss; or (iv) have already been compensated.

11. Even if there are damages in this case (though there is no evidence that any of the proposed class members suffered damages), the assertion of aggregate damages should not be certified as a common issue for many reasons, including that the plaintiff failed to adduce evidence to show that statistical sampling could be used. There is no conflict in the expert evidence; there is simply no expert evidence in support of the plaintiff's proposed statistical

sampling methodology. The proposed methodology merely "wish[es] that techniques would exist and that the data would cooperate in the hands of the right expert."[1]

12. There is no evidence – and no reason to believe – that a class proceeding would further the interests of access to justice, behaviour modification or judicial economy. A preferable procedure has already been fully and effectively implemented, with customers receiving more than 100% recovery for any billing errors. Hydro One has spent more than $88 million to improve customer service and address the billing issues. It has already been roundly criticized in a public report from the Ontario Ombudsman and in the press. Hydro One's "behaviour" has been positively "modified" to the benefit of all of its customers.

13. More importantly, Hydro One has markedly improved its customer service and billing system, which is now in the healthiest condition in the history of the company. A class proceeding serves no end in these circumstances.

## PART II - FACTS

### A. Hydro One and the other Defendants

14. Hydro One is incorporated under the laws of Ontario. Among other activities, it operates an electricity distribution business which delivers electricity to about 1.3 million customers – more than 25% of all customers in Ontario. This business is extensively regulated by the Ontario Energy Board.[2]

15. The defendants' position is that there is no cause of action against the other defendants:

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1 Report of Dr. Vinita Juneja ("**NERA Report**"), ¶ 38, Responding Motion Record ("**RMR**"), volume 3, tab 2, p. 1687.

2 Affidavit of Oded Hubert sworn October 19, 2016 ("**Hubert Affidavit**"), ¶ 8, 12-13, RMR, volume 1, tab 1, p. 3-4; Annual Information Form for Hydro One Inc., RMR, volume 1, tab 1A, p. 49-60.

(a) **Hydro One Inc.** is a holding company. It has no customers and no operations. The other defendants are wholly-owned subsidiaries of Hydro One Inc.[3]

(b) **Hydro One Remote Communities Inc.** provides electricity to about 3,600 customers in 21 northern communities, mostly First Nations and Métis communities. It operates its own billing department and customer service team. A very small percentage of its customers were affected by billing issues, and Remote Communities quickly resolved them.[4]

(c) **Norfolk Power Distribution Inc.** formerly distributed electricity to about 18,000 customers in Norfolk County. At all relevant times, it operated its own billing system – not the CIS – and billing department. In September 2015, its operations were integrated into Hydro One's operations, and Norfolk ceased carrying on business.[5]

## B. The CIS Billing Issues

16. In May 2013, Hydro One switched to a new customer information system (the "**CIS**").[6] A customer information system is a software system used by many companies for various customer service functions, including preparing customer bills. The Hydro One CIS interacts with many other external systems to obtain customers' electricity usage data and other information.[7]

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3 Hubert Affidavit, ¶ 9, 16, 61, RMR, volume 1, tab 1, p. 3, 7, 23.
4 Hubert Affidavit, ¶ 16-19, RMR, volume 1, tab 1, p. 7-8.
5 Hubert Affidavit, ¶ 20, RMR, volume 1, tab 1, p. 8.
6 Throughout this factum, the defendants also use terms like "launch" and "rollout" to refer to the date that the CIS "went live" in May 2013.
7 See, *e.g.*, PwC Report, Plaintiff's Motion Record ("**MR**"), volume 4, tab 9S, p. 876, 887. For example, the CIS obtains smart meter usage data through the Meter Data Management and Repository ("MDM/R"), which is run by the Independent Electricity System Operator.

17. The CIS launched with a number of difficulties, and there were related customer relations deficiencies. Hydro One does not shy away from these facts. It has always accepted the findings of the Ombudsman and PwC (referred to in the plaintiff's factum).[8] However, as described below, these issues were addressed years ago.

18. From the time the CIS launched, it worked well for the vast majority of scenarios. Most bills were sent to customers on time, without any issues, but about 7% of customers experienced issues such as "no bills", large catch-up bills, or inaccurate bills.[9]

19. In the following months, Hydro One worked around-the-clock to resolve the issues. It moved dozens of employees out of their day-to-day roles to focus intensively on resolving the technical system problems and responding to customer inquiries. It also added more than 100 staff to the call centre. Since the CIS launched, Hydro One has spent more than **$88 million** to improve customer service and address issues relating to the CIS.[10]

20. There were a wide range of billing issues, and they affected different customers differently. These billing issues included, among others:

**(a) "No bills"**

21. When the CIS detected an irregularity on a bill, it generated an "exception," requiring manual review – and, if necessary, manual changes – before the bill could be sent. That is what the system is designed to do.[11]

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8 Hubert Cross-examination, Joint Record of Cross-examination Transcripts ("**Joint Record**"), tab B, p. 47-48, q. 28 and p. 50, q. 44. The Ontario Ombudsman's Report is at RMR, volume 1, tab 1H; the PwC "Lessons Learned" Report is at MR, volume 4, tab 9S.

9 Hubert Affidavit, ¶ 28-29, RMR, volume 1, tab 1, p. 12-13.

10 Hubert Affidavit, ¶ 40, 59, RMR, volume 1, tab 1, p. 17, 22.

11 Hubert Affidavit, ¶ 31-32, RMR, volume 1, tab 1, p. 13-14.

22. Many issues that caused exceptions were minor: for example, an exception arose if a customer's postal code had been entered without a space in the middle. But after the transition to the CIS, the number of exceptions prevented the company from reviewing and sending all of the bills in the monthly billing cycles. The effect was that, in some circumstances, no bill was sent to the customer during a specific billing period.[12]

23. Hydro One formed a team to identify and resolve the underlying causes of the exceptions. The team temporarily and purposely caused a high number of exceptions (requiring manual analysis and intervention) in order to identify the problems and ensure that billing errors were caught. The number of "no bills" peaked in early 2014 and then fell rapidly as the team resolved the issues. The "no bill" issues have been entirely resolved.[13]

24. Customer "no bill" issues were fully addressed. By late 2013, all customers that had gone more than three months without a bill were enrolled in an interest-free payment plan and given credits. Depending on the nature and severity of resulting issues, some customers received additional relief.[14]

**(b) Persistent Estimates**

25. Ontario has mandated smart meters for most customers, but there are unique challenges to this program in the rural and remote parts of the Province, where many Hydro One customers live or carry on business. The rugged geography and extensive tree coverage can block radio

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12 Hubert Affidavit, ¶ 31-32, RMR, volume 1, tab 1, p. 13-14.
13 Hubert Affidavit, ¶ 33(b), RMR, volume 1, tab 1, p. 14-15.
14 Hubert Affidavit, ¶ 33(a), RMR, volume 1, tab 1, p. 14.

signals, preventing smart meter communication. And some parts of Ontario lack the infrastructure needed to run the wireless smart meter systems.[15]

26. Almost all smart meter issues arise when a meter cannot transmit data. That is not caused by the CIS – the system at the basis of the plaintiff's claim. Instead, it is a telecommunications issue that prevents the data from reaching the CIS. When it happens, Hydro One typically sends the customer an "estimated" bill based on the customer's historical consumption. That is normal, industry practice and part of the Conditions of Service.[16] The meter continues to record and store usage data and, in the next billing cycle that usage is transmitted through the smart meter network or otherwise obtained (*e.g.*, by a manual reading), Hydro One bills the customer based on the actual usage.[17]

27. Where a previous bill was estimated or requires a correction, Hydro One usually cancels the previous bill and sends a corrected one (called a "re-bill"). This allows customers to review the bills in sequential order, and ensures that they have a complete set for their records. Hydro One usually sends all of the re-bills in a package with the current bill, under an explanatory cover letter.[18] In some cases, this results in large or unexpected "catch-up" bills.[19]

28. After the CIS rollout, customers who experienced more than three consecutive months of estimated bills had the issue fully addressed. They were automatically enrolled in an interest-

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15 Hubert Affidavit, ¶ 21-22, RMR, volume 1, tab 1, p. 8.
16 Conditions of Service, s. 2.4.4(C), RMR, volume 2, tab T, p. 564.
17 Hubert Affidavit, ¶ 22 (note 5), 23, 87(b), RMR, volume 1, tab 1, p. 8-9, 29-30.
18 Mr. Bennett alleges that he did not receive a cover letter when he received the set of 39 re-bills in 2015, but those bills were cancelled and rebilled to incorporate a credit in response to Mr. Bennett's complaints, as described below. Moreover, Hydro One specifically informed Mr. Bennett's then-lawyer that the revised and reissued bills would be sent: Correspondence, RMR, vol. 1, p. 288. Mr. Bennett received them seven days later.
19 Hubert Affidavit, ¶ 22 (note 5), 23, 87(b), RMR, volume 1, tab 1, p. 8-9, 29-30.

free payment plan. Depending on the nature and severity of the resulting issues, some customers received additional relief.[20]

**(c) Inaccurate Bills**

29. After the rollout of CIS, some customers were under-billed or over-billed. A few extreme examples occurred in the first months after the introduction of the CIS, which were often caused by human error – *e.g.*, data entry error – rather than a systemic issue in the CIS.[21]

30. Some customers were under-billed or over-billed as a result of technical issues with the CIS. Most errors were less than $20 and were often due to rounding of decimal places or proration issues during billing periods that straddled rate changes or account changes. When such an issue was identified, Hydro One addressed the situation:[22]

(a) For underbilling, Hydro One wrote off the difference. This occurred for about 13,650 customers, who were underbilled an average of $46.84.

(b) For overbilling, Hydro One credited the customer's account for the difference. This occurred for about 19,160 customers. Hydro One sent residential customers that had been overbilled by $20 or more an apology letter and explanation, giving the customer the option to request a cheque instead of credits.

31. The Ombudsman's report references figures that show that Hydro One was able to identify the affected overbilled customers and correct the issues, noting the amounts.[23]

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20 Hubert Affidavit, ¶ 35, RMR, volume 1, tab 1, p. 15.
21 Hubert Affidavit, ¶ 37, RMR, volume 1, tab 1, p. 16.
22 Hubert Affidavit, ¶ 38, RMR, volume 1, tab 1, p. 16; Ombudsman's Report, para. 79, RMR, volume 1, tab H, p. 182.
23 Ombudsman's Report, para. 79, RMR, volume 1, tab H, p. 182.

32. After the CIS rollout, Hydro One added a number of controls to prevent such issues from happening in the future. For example:

(a) invoices with usage or billing amounts that are outside of the customer's historical patterns automatically generate exceptions and must be reviewed manually before being sent; and

(b) Hydro One performs daily spot checks of 150 randomly selected bills to ensure correctness.[24]

33. There is simply no reason to believe that there are any existing systemic issues in the CIS or otherwise causing Hydro One to overbill or otherwise erroneously bill customers.

## C. The Ontario Ombudsman's Investigation

34. On February 4, 2014, the Ontario Ombudsman publicly announced that he would conduct an investigation into the billing issues at Hydro One. He invited complaints about billing and customer service, and assured customers that his office would work with Hydro One to address them.[25]

35. This publicity and invitation were very successful. According to the Ombudsman, his office received 10,565 complaints in total, with more than 1,500 complaints in the first three days after the announcement alone. After reviewing the complaints, the Ombudsman's office

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[24] Hubert Affidavit, ¶ 33(b), 38-39, RMR, volume 1, tab 1, p. 14-17; Hubert Cross-examination, Joint Record, tab B, p. 85-86, q. 201.

[25] Hubert Affidavit, ¶ 41-45, RMR, volume 1, tab 1, p. 17-18; February 7, 2013 Press Release, RMR, volume 1, tab 1G, p. 157: "Our staff will work to resolve individual cases with Hydro One even as we dig into the broader systemic issues at the heart of this investigation."

sent about 3,735 of them to Hydro One (many complaints were misdirected or unrelated – *e.g.* the complaints related to other utility companies or the price of electricity).[26]

36. The Ombudsman assembled a team of more than 30 people to conduct an investigation into Hydro One and address complaints. Hydro One established a team to work with the Ombudsman. This team had standing calls with the Ombudsman's Director of Investigations (and her team) to discuss the status and resolution of specific complaints, and reported regularly on the investigation, status and response for each and every complaint received.[27]

37. During this process, Hydro One reported the details to the Ombudsman once a complaint was addressed. The Ombudsman's office would contact the customer to confirm the resolution and, once satisfied, would notify both Hydro One and the customer that the complaint was officially closed. If the customer later changed his or her mind about the resolution, the Ombudsman would, in some cases, reopen the complaint and the process would begin again. Hydro One believes that all of the complaints from the Ombudsman were addressed to the satisfaction of both Hydro One and the Ombudsman's office.[28] The Ombudsman's Report trumpets the number of complaints that were successfully resolved in this process:

> Not all complaints to our Office required referral to or follow-up by Hydro One. However, since April 2013, **4,142** complaints have been resolved through our intervention and Hydro One's efforts.[29]

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[26] Hubert Affidavit, ¶ 41-45, RMR, volume 1, tab 1, p. 17-18. The Ombudsman's office also informed Hydro One that the Ombudsman had received many complaints about smart meters and separate, unrelated regulatory issues.

[27] Hubert Affidavit, ¶ 47-49, RMR, volume 1, tab 1, p. 19-20. Another team of billing, complaint resolution and customer service representatives met regularly with the Ombudsman's teams to discuss the status of Hydro One's recovery efforts (*e.g.*, the number of "no bills" and estimated bills) and complaint resolution.

[28] Hubert Affidavit, ¶ 49-51, 56, RMR, volume 1, tab 1, p. 20-21.

[29] Ombudsman's Report, ¶ 16, RMR, volume 1, tab H, p. 168.

38. Many of the complaints that Hydro One received from the Ombudsman related to "no bills", estimated bills, and long waits dealing with Hydro One's customer service operations.[30] A small proportion of the complaints involved overbilling or large catch-up bills. In all such cases, Hydro One's approach was to ensure that the customer paid only for the electricity consumed and to automatically enroll the customer in an interest-free payment plan to make any required payments. In most cases, Hydro One also gave the customer goodwill credits.[31]

39. It is important to recognize that the Ombudsman's investigation was not limited to addressing specific or individual complaints. The Ombudsman interviewed 190 people, and requested and reviewed more than 100,000 emails from Hydro One and more than 23,000 pages of documents from Hydro One regarding the CIS system, its rollout and its functioning.[32]

## D. Customer Complaints

40. Throughout the proposed class period – including the Ombudsman's investigation – Hydro One[33] also investigated and addressed complaints received from a variety of other sources, including:

(a) ***Ontario Energy Board***: The OEB is Hydro One's primary regulator. It is responsible for Hydro One's licensing and compliance. It promulgates and enforces regulatory codes – including the Distribution System Code – that are primary sources of Hydro One's regulatory obligations as a distributor.[34]

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30 Ombudsman's Report, ¶ 13, RMR, volume 1, tab H, p. 168.
31 Hubert Affidavit, ¶ 50, RMR, volume 1, tab 1, p. 20.
32 Ombudsman's Report, ¶ 18, 23, RMR, volume 1, tab H, p. 168-169.
33 The complaints are addressed by the "Customer Relations Centre." Its team of nine people is dedicated to investigating and addressing customer complaints: Hubert Affidavit, ¶ 26, RMR, volume 1, tab 1, p. 10.
34 Hubert Affidavit, ¶ 57, RMR, volume 1, tab 1, p. 22.

The OEB receives complaints in person, by phone, email, mail and other means. As a first step, the OEB reviews the information in the complaint and may request additional information from the customer. It then forwards the complaint to Hydro One. Hydro One typically receives about 10 to 13% of its complaints through the OEB.[35]

If the customer is not satisfied, the OEB will escalate the complaint for further review by OEB Staff. Escalated customer complaints can be addressed without formal enforcement proceedings through compliance plans or the distributor altering its practices to become compliant. If necessary, the OEB may open a formal compliance file or commence enforcement proceedings.[36]

During the Ombudsman's investigation, Hydro One representatives met regularly with the OEB. The OEB focused on ensuring that customer complaints were addressed and that billing issues were addressed to its satisfaction.[37]

(b) ***Hydro One Ombudsman***: In 2015, the Ontario government implemented a dedicated Hydro One Ombudsman.[38] This office is independent of Hydro One's business and reports only to the Hydro One board of directors.[39] Part of the Hydro One Ombudsman's role is to help customers frame their complaints more clearly, thereby better facilitating a more prompt and satisfactory resolution of the real

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35 Hubert Affidavit, ¶ 26(b), RMR, volume 1, tab 1, p. 10; Flowchart of OEB Complaint Process, RMR, volume 1, tab 1B, p. 114.

36 Flowchart of OEB Complaint Process, RMR, volume 1, tab 1B, p. 114; Ron W. Clark, Scott A. Stoll, and Fred D. Cass, *Ontario Energy Law: Electricity*, (Markham: LexisNexis Canada Inc., 2012) at 556-7.

37 Hubert Affidavit, ¶ 58, RMR, volume 1, tab 1, p. 22.

38 Hubert Affidavit, ¶ 26(c-d), RMR, volume 1, tab 1, p. 11; *Electricity Act, 1998*, S.O. 1998, c. 15, Sched. A, s. 48.3. The Ontario Ombudsman no longer has jurisdiction over Hydro One.

39 Hubert Affidavit, ¶ 26(d), RMR, volume 1, tab 1, p. 11.

concerns.[40] The Hydro One Ombudsman has various procedural options to seek to resolve complaints, including mediating disputes.[41]

(c) ***Member of Provincial Parliament offices***: A significant portion of the complaints received by Hydro One come from MPP offices. Most MPP offices are experienced at handling these complaints and communicate directly with both Hydro One and the customers.[42]

(d) ***Hydro One's Call Centre***: Hydro One's Customer Relations Centre typically receives about 10 to 15% of all complaints through escalation from the call centre.[43]

41. All of these avenues are free to customers and confidential. They are all available today, and all of them were available throughout the proposed class period (except as noted above with respect to the dedicated Hydro One Ombudsman, which opened for business in March 2016).[44]

## E. The OEB's Compliance Monitoring

42. It is important to note that the OEB also monitored the billing issues and Hydro One's response in the period following the CIS rollout. Throughout the same period as the Ombudsman's investigation, Hydro One was focused not only on addressing customer complaints, but also on ensuring Hydro One's compliance with the regulatory codes, with

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40 Hubert Affidavit, ¶ 106(c), RMR, volume 1, tab 1, p. 33.
41 Excerpt from Hydro One Ombudsman website, RMR, volume 1, tab 1E, p. 142.
42 Hubert Affidavit, ¶ 26(a), RMR, volume 1, tab 1, p. 10.
43 Hubert Affidavit, ¶ 26(g), RMR, volume 1, tab 1, p. 12.
44 Hubert Affidavit, ¶ 27, RMR, volume 1, tab 1, p. 12.

particular interest in the status of "no bills", prolonged estimates, and customer service, and ensuring that these issues and customer complaints were addressed to the OEB's satisfaction.[45]

43. Toward the end of this process, the OEB amended the Distribution System Code to add what are loosely termed "billing accuracy" requirements; which require a distributor to issue "accurate" bills at least 98% of the time over the course of the year.[46] The billing accuracy requirements came into force on **April 15, 2015**, almost two years after the CIS went live. Hydro One understands that the requirements were added, at least in part, as a result of the CIS issues.[47]

44. Accordingly, the plaintiff is incorrect to suggest that the Ombudsman and the OEB were mere "complaint takers", and that all Hydro One did was react to individual customer complaints.[48] Both the Ombudsman and the OEB oversaw the resolution of the billing issues from a systemic perspective *and* from the perspective of resolving individual complaints. The OEB also monitored and ensured Hydro One's compliance with its regulatory obligations. As a result, the systemic issues relating to CIS were addressed holistically and proactively by independent parties tasked by statute to protect the public and assist customers.[49] There is no reason to think any issue remains.

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45 Hubert Affidavit, ¶ 58, RMR, volume 1, tab 1, p. 22.

46 A bill is not considered "accurate" for the purposes of those requirements if it is based on an estimate. Because of the challenges of operating smart meters in rural and remote areas of the Province, the OEB exempted Hydro One from the billing accuracy requirements for 170,000 hard-to-reach customers. The OEB accepted that "it is not possible to economically make all meters communicate reliably enough to issue regular monthly [time-of-use] bills based on actual meter readings," and that "the costs associated with the options available to make the meters communicate reliably enough are excessively high and would result in upward pressure on rates": OEB Decision dated September 24, 2015, RMR, volume 2, tab 1S, p. 491.

47 Hubert Affidavit, ¶ 90-93, RMR, volume 1, tab 1, p. 30-31.

48 Plaintiff's Factum, para. 88-90.

49 *Ontario Energy Board Act, 1998*, SO 1998, c 15, Sch B, s. 1(1): "The Board, in carrying out its responsibilities under this or any other Act in relation to electricity, shall be guided by the following objectives: 1. To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service. […]."; *Ombudsman Act*, RSO 1990, c O.6, s. 14(1): "The function of the Ombudsman is to investigate any […] act done or omitted in the course of the administration of a public sector body and affecting any person or body

## F. The Three Complaints Received in this Action

45. The plaintiff provided only three examples of customer complaints. All of the customers were customers of Hydro One; none were customers of Norfolk or Remote Communities. (Hydro One Inc., being a holding company, has no customers.)[50]

46. Hydro One confirmed in the affidavit of its representative, Mr. Oded Hubert, that each of these customers has been invoiced only for the electricity that he or she actually consumed.[51] The plaintiff did not present any evidence to the contrary and did not cross-examine Mr. Hubert with respect to that evidence. There is no reason to think that the plaintiff or anyone else is being incorrectly billed or that past errors have not been corrected.

### (a) Bill Bennett

47. Mr. Bennett's billing issue arose in about October 2011 – about 18 months before the CIS went live – when the communications component on his smart meter stopped transmitting data. The meter continued to accurately measure and record usage.[52]

48. His billing issue was not caused by the CIS.[53]

49. In October 2013, Hydro One removed the relevant meter and installed a new one. It tested the old meter and confirmed that the component that records electricity consumption was accurate; the only part that had not been working properly was the communications component.[54]

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of persons in his, her or its personal capacity;" and s. 14(2): "The Ombudsman may make any such investigation on a complaint made to him or her by any person affected [...]."

50 Hubert Affidavit, ¶ 61, 77, 81, 84, 86, RMR, volume 1, tab 1, p. 23-29.

51 Hubert Affidavit, ¶ 69, 79, 80, 86, RMR, volume 1, tab 1, p. 24-29.

52 Hubert Affidavit, ¶ 63, RMR, volume 1, tab 1, p. 23.

53 Hubert Affidavit, ¶ 63, RMR, volume 1, tab 1, p. 23.

54 Hubert Affidavit, ¶ 64, RMR, volume 1, tab 1, p. 23.

50. Complaints about meter accuracy have their own framework for investigation and resolution. Nearly all smart meters accurately record electricity usage. When a customer disputes the accuracy, Hydro One can send a field staff member to test the meter at the customer's premises. The test takes about an hour and the test itself costs about $200 per meter to Hydro One, in addition to travel and other costs. Hydro One can also send the meter to Measurement Canada, where the meter will be tested in a laboratory, which is more expensive. The customer will be charged a fee (which is not the full cost) only if the customer requested the Measurement Canada test and the test confirms the accuracy.[55]

51. The Hydro One Conditions of Service, which are the contract between Hydro One and its customers, expressly provide that "Measurement Canada has jurisdiction, under the *Electricity and Gas Inspection Act*, in a dispute between Hydro One and its Customer where a meter is in question."[56] The Conditions of Service provide that if "Hydro One is satisfied with meter operation and accuracy of billing, and the Customer is not satisfied, the Customer will be referred to Measurement Canada," and where the services of Measurement Canada are requested "Measurement Canada will follow its dispute investigation process and issue a decision."[57]

52. During the period that the communications module was not working, Mr. Bennett was enrolled in a budget billing payment plan, and his bills were estimated based on his historical usage. His meter revealed, however, that during that period Mr. Bennett had consumed more electricity than his historical patterns. Accordingly, his next bill involved a catch-up payment for

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55 Hubert Affidavit, ¶ 23 and note 6, RMR, volume 1, tab 1, p. 9.
56 Conditions of Service, s. 2.3.7.7, RMR, volume 2, tab 1T, p. 554.
57 Conditions of Service, s. 2.3.7.7, RMR, volume 2, tab 1T, p. 554.

the electricity that he had actually consumed. Due to a backlog from the CIS issues, Mr. Bennett's bill correction was delayed, and his bills were not printed and sent until March 2014.[58]

53. Mr. Bennett seems to be under the mistaken impression that he was billed for more electricity than he consumed. His affidavit states:

> I allege on my own behalf and on behalf of a class of Hydro One's customers that Hydro One failed to properly plan for and implement a new billing and customer information system. As a result of this failure, Hydro One's customers were the victims of a variety of billing issues causing myself and others to be invoiced for our supposed electricity usage in amounts that were greater than what was consumed. [Emphasis added.][59]

54. That is simply not correct. Hydro One confirmed in Mr. Hubert's affidavit that Mr. Bennett has never been invoiced for usage in amounts that were greater than he had consumed. Both his initial meter and his replacement meter were tested and confirmed to be accurate.[60]

55. Mr. Bennett's affidavit states that he was concerned about the increased consumption of electricity on his bills from November 2013 to March 2014,[61] but in fact that winter was one of the coldest winters on record in Ontario's history. Moreover, when the meter was tested at Mr. Bennett's cottage in 2014, the technician saw that there was a water line heater leading to the lake and an electric "dock bubbler", which is a commonly-used technique on the Muskoka lakes to try to prevent ice damage to docks: the bubbler is used to reduce or prevent ice buildup around the dock.[62]

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58 Hubert Affidavit, ¶ 65-66, RMR, volume 1, tab 1, p. 23-24.
59 Bennett Affidavit sworn March 24, 2016, ¶ 5, MR, volume 1, tab 5, p. 58.
60 Hubert Affidavit, ¶ 69, RMR, volume 1, tab 1, p. 24.
61 Bennett Affidavit sworn March 24, 2016, ¶ 5, MR, volume 1, tab 5, p. 63: "In May 2014, I received an envelope from Hydro One containing four separate "catch up" bills disclosing a significant increase in electricity costs and consumption for the period starting November 8, 2013, through March 11, 2014."
62 Hubert Affidavit, ¶ 70-71, RMR, volume 1, tab 1, p. 24-25.

56. In February 2015, Mr. Bennett's then-lawyer wrote to Hydro One. She acknowledged that tests had previously confirmed the accuracy of Mr. Bennett's meter, but alleged that "there must be errors inherent in the smart meter".[63] On March 30, 2015, Hydro One responded and, although it maintained that the meters were accurate, Hydro One gave Mr. Bennett a credit of $1,345.40. In recognition of the fact that Mr. Bennett received estimated bills for a period, Hydro One also gave him an additional credit of $567.12. To incorporate these credits, Hydro One cancelled and rebilled the invoices, which resulted in Mr. Bennett receiving a package of 39 revised bills on April 6, 2015.[64]

57. Mr. Bennett continues to dispute the accuracy of his bills. On cross-examination, he confirmed that he is alleging in his claim that the meters did not accurately record his usage.[65] This has nothing to do with CIS. (Indeed, the plaintiff's experts accept and rely upon the accuracy of Hydro One's records of electricity usage.[66])

58. Moreover, disputes regarding meter accuracy: (1) are inherently individual and cannot be addressed in the proposed common issues or the proposed damages methodology; and (2) ultimately fall within the jurisdiction of Measurement Canada and its own dispute resolution process. The plaintiff's lawyers refused further questions asked of Mr. Bennett regarding his belief that his billing issues are related to an "inaccurate" meter.[67]

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63 Hubert Affidavit, ¶ 72, RMR, volume 1, tab 1, p. 25; Correspondence, RMR, volume 1, tab J, p. 281.
64 Hubert Affidavit, ¶ 73-74, RMR, volume 1, tab 1, p. 25; Correspondence, RMR, volume 1, tab J, p. 285.
65 Bennett Cross-examination, Joint Record, tab C, Q. 36, p. 134.
66 Soriano Report, ¶ 22-23, MR, volume 1, tab 7A, p. 134; Gurusamy cross-examination, Joint Record, Q. 64-65, 67-70; p. 23-26; Hubert Affidavit, ¶ 87, RMR, volume 1, tab 1, p. 29-30: "Where 'actual consumption' is available from the MDM/R [...] the CIS automatically uses the 'actual consumption' from the MDM/R [...]."
67 Bennett Cross-examination, Joint Record, tab C, Q. 28-29, 37-38, p. 132-133, 134-135.

**(b) Mary Bates**

59. Ms. Bates' complaint focuses on "no bills" and customer service. There was, first, a lengthy delay in sending her October 2013 bill; and then in early 2014 she did not receive bills for January, February or March. She complained to the Ontario Ombudsman and her MPP.[68]

60. The plaintiff argues that Ms. Bates' experience shows that procedures like complaints to an MPP do not provide access to justice. That argument is premised in part on Ms. Bates' statement that "Neither the Ombudsman's Office nor my MPP's office have been able to help resolve my problems with Hydro One."[69] That statement was shown to be incorrect in Mr. Hubert's affidavit. In fact, Ms. Bates' MPP successfully resolved her issue:[70]

(a) On March 24, 2014, Hydro One received Ms. Bates' complaint from her MPP's office. Hydro One contacted Ms. Bates on April 11, 2014, to confirm that the issue had been resolved and that she would receive her bills promptly. Hydro One also explained the resolution to the MPP's office.

(b) Hydro One then sent Ms. Bates a package with her current bill and, for her information only, her bills from October 2013 to March 2014. On top of the package was a cover letter, which apologized for not issuing her bills on time and explained that Hydro One had given her goodwill credits of $72.71 as an apology. The letter invited her to call if she would like to have this amount paid to her by cheque, rather than applied as a credit.

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68 Hubert Affidavit, ¶ 78, RMR, volume 1, tab 1, p. 26-27.
69 Plaintiff's Factum, ¶ 98.
70 Hubert Affidavit, ¶ 78-79, RMR, volume 1, tab 1, p. 26-27.

### (c) The Third Complainant[71]

61. The plaintiff's lawyers also asked the defendants to "urgently investigate to see what can be done for" another customer who alleged that, despite using only 35 kWh per day, "Hydro One continued to send [...] estimated bills for **150-200** kWh per day."[72]

62. The actual facts were much different. All of the alleged overbilling occurred before the launch of the CIS. The customer has essentially acknowledged that the post-CIS billing was accurate.[73]

63. Equally importantly, the complaint about overbilling had no merit. In 2012, the customer's meter recorded increased usage. The customer refused to pay and, although Hydro One maintains that the meter was accurate, it reduced the amounts owing, in part to try to convince the customer to pay some of the arrears. In 2014, the customer moved houses and stopped paying altogether. The customer currently owes $3,827.64.[74]

### (d) Hydro One's request for additional complaints went unanswered.

64. In 2015, Hydro One's lawyers wrote to the plaintiff's lawyers, asking them to provide the details of other complaints that they believe are legitimate so that the defendants could

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71 This customer is anonymously referred to as the Third Complainant to protect the customer's privacy, because the customer did not file an affidavit.

72 Correspondence between counsel, RMR, volume 1, tab 1M, p. 314.

73 Correspondence between counsel, RMR, volume 1, tab 1M, p. 319-320. The customer claimed to have taken readings from February 2013 to February 2014, and "proved [the] annual usage was only 22,018 [kWh]," which translates to an average daily use of about 60.3 kWh. Hydro One's actual readings for a similar, but slightly different, time period showed that the customer used and was billed for an average of about 61.9 kWh per day. For 2014, Hydro One billed the customer for an average daily usage of about 58 kWh.

74 Hubert Affidavit, ¶ 82, RMR, volume 1, tab 1, p. 28; Correspondence between counsel, RMR, volume 1, tab 1M, p. 319-320.

investigate them and, if there is an error, to seek to rectify them. Hydro One did not receive any other complaints from the plaintiff or his lawyers.[75]

## G. The Proposed Class and Differences in How Customers are Billed

65. The plaintiff proposes 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." It would consist of about 1.3 million customers, including:

- residential customers,
- commercial customers, ranging from small businesses operating at one location to large enterprises operating throughout Ontario,
- large industrial customers,
- institutional customers such as churches and schools, and
- local distribution companies – *i.e.*, municipal utilities.[76]

66. The defendants' expert, Dr. Vinita Juneja of NERA Economic Consulting, reviewed anonymized data for all 1.3 million customers, and consumption and billing data for a sample of accounts. Her report explains that there are "thousands of types and sub-types of customers" that vary along key characteristics, and "[m]any of these variations affect how a customer's bill is calculated."[77] These variations are significant because billing differs widely among Hydro One's customers – and this is significant because no model that can be built to calculate damages that would be any more efficient than examining all accounts individually. For example:[78]

(a) ***Frequency:*** Most customers are billed monthly. About 130,000 are billed quarterly. During the proposed class period, some customers were billed annually.

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75 Hubert Affidavit, ¶ 83-84, RMR, volume 1, tab 1, p. 28.
76 Hubert Affidavit, ¶ 8, 12, 14, RMR, volume 1, tab 1, p 3-5.
77 Report of Dr. Vinita Juneja ("**NERA Report**"), ¶ 15, RMR, volume 3, tab 2, p. 1678.
78 Hubert Affidavit, ¶ 15, RMR, volume 1, tab 1, p. 5.

(b) ***Summary Billing:*** Many commercial customers that operate throughout the province receive one summarized bill rather than bills for each location.

(c) ***Budget Billing:*** About 158,000 customers are enrolled in "budget billing," which means, in essence, that their payments are "smoothed" for consistency over twelve equal monthly payments (with adjustments at prescribed intervals). For example, a customer might be billed lower amounts in the winter and higher amounts in the summer than the customer would otherwise be billed.[79]

(d) ***Time-of-Use Pricing vs. Two-Tiered Pricing:*** Most residential customers in Ontario are billed for the electricity they consume using time-of-use pricing (*i.e.*, off-peak, mid-peak and on-peak). However, about 150,000 customers are billed on two-tiered rates, which generally means that they are charged one rate up to a certain threshold and another rate for all additional consumption. They typically receive manual meter reads by a Hydro One agent or the customers report their own readings to Hydro One.

(e) ***Retailer Billing:*** About 60,000 customers have entered into a contract with an electricity retailer, such as Direct Energy Marketing Inc. or Bullfrog Power Inc., to purchase electricity from the retailer. The customer's contract with the retailer sets the electricity price and other charges. Hydro One sends the bill to the customer based, in part, on rates and other information provided by the retailer.

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[79] Hubert Affidavit, ¶ 15(c), RMR, volume 1, tab 1, p. 5; Conditions of Service, s. 2.4.4., RMR, volume 2, tab 1T, p. 564.

(f) ***Spot Market Pricing:*** A small number of residential customers pay actual wholesale market prices for electricity. The prices change every hour. To participate, customers require an interval meter.

67. Hydro One's distribution business earns revenues mainly by charging rates approved by the OEB. Different rate classes apply to different customers. These rate classes vary by, among other things, density (*i.e.*, the number of customers who live in a defined area), the type of customer (*e.g.*, residential, seasonal, etc.), and the amount of electricity consumed.[80]

## H. The Proposed Aggregate Damages Methodology

68. Hydro One disputes that the plaintiff suffered any damage. The plaintiff's proposed aggregate damages methodology is flawed. This factum describes the plaintiff's methodology in the common issues analysis below at paragraphs 84 to 99.

## I. The Plaintiff's *Suspicion* That There Could Be Unrectified Billing Issues

69. The plaintiff incorrectly states that "Hydro One did not file any evidence responding to Mr. Gurusamy's expert report."[81] Hydro One filed the affidavit of its representative, Mr. Hubert,[82] and cross-examined Mr. Gurusamy. Much of Mr. Gurusamy's report addressed the merits of the claims regarding billing issues and was simply irrelevant to the certification issues.

70. Mr. Gurusamy's main report essentially consists of him cherry-picking statements from the Ombudsman and PwC reports and giving them the most extreme interpretation. That approach led him to give unreserved opinions on some of the ultimate issues on the merits of the

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80 Hubert Affidavit, ¶ 13, RMR, volume 1, tab 1, p. 4.

81 Plaintiff's Factum, ¶ 29.

82 Mr. Hubert stated that Hydro One disagrees with many of the statements and conclusions set out in Mr. Gurusamy's reports, but does not intend to respond to them at this time. If necessary, Hydro One will respond to them at a later date: Hubert Affidavit, ¶ 88, RMR, volume 1, tab 1, p. 30.

claim – "I have arrived at the opinion that [...] Hydro One breached various generally accepted standards of care during every phase of its CIS Replacement project" – this is despite not having examined Hydro One's data or interviewed any Hydro One employees or anyone involved in the CIS project.[83]

71. The plaintiff's factum incorrectly states that Mr. Gurusamy's evidence provides a basis for believing that systemic problems persist in the CIS.[84] There is no basis in fact for such a statement in Mr. Gurusamy's evidence or otherwise:

(a) This statement stems from Mr. Gurusamy's incorrect assumption that parallel testing was not conducted: "It appears from the documents I reviewed that this most important aspect of the implementation's quality assurance was not performed at all."[85] Neither the Ombudsman's Report nor the PwC Report – the primary documents Mr. Gurusamy reviewed and relied upon – states that parallel testing was not performed. If testing of this importance – in Mr. Gurusamy's words, "the most important aspect of the implementation's quality assurance" – was not conducted, PwC would have identified this issue alongside its other criticisms. PwC *did* have access to relevant data, documents and employees.[86]

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83 Gurusamy Report dated April 13, 2016, MR, volume 1, tab 8B, p. 173; Gurusamy Cross-examination, Joint Record, Q. 96-101, p. 33.

84 Plaintiff's Factum, ¶ 31.

85 Gurusamy Report dated April 13, 2016, ¶ 8.2.5, MR, volume 1, tab 8B, p. 199-200.

86 PwC Report, MR, volume 4, tab 9S, p. 882.

(b) The plaintiff then elevated this baseless assumption to a "fact": "Given Hydro One's failure to conduct parallel testing or another comparable method of testing accuracy, it remains possible" that underlying defects persist.[87]

72. These statements reflect mere suspicion based on nothing but a baseless assumption and should not be given any weight. All of the evidence is, in fact, to the contrary – *i.e.*, as described above, Hydro One has resolved the underlying defects in the CIS and has taken robust steps to ensure that all billing issues have been resolved, including by implementing "safety net" controls and daily spot checks, and by working with the OEB to ensure compliance with the regulatory obligations.[88]

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87 Plaintiff's Factum, ¶ 31.

88 For example, see ¶ 23, 32, 37 and 44 above.

## PART III - ISSUES & LAW

73. The defendants' primary position is that certification should be denied because:

(a) **The common issues are not truly common, nor are they necessary:**

(i) the vast majority of customers do not have a claim and therefore lack any connection to the proposed common issues:

(A) *Unaffected* customers have no claim;

(B) *Affected* customers have no claim because their billing issues have already been corrected;

(ii) the myriad of different billing issues did not have a "common impact" on customers;

(iii) the proposed "systemic" common issues would not advance the claims for billing issues that were not caused by the CIS;

(iv) no customer has suffered damages; and

(v) alternatively, the assertion of aggregate damages should not be certified as a common issue because:

(A) the prerequisites in section 24(1) of the CPA will not be satisfied;

(B) the plaintiff failed to lead any expert evidence on statistical sampling to support the viability of his proposed methodology; and

(C) the proposed methodology would introduce error because it ignores the many individual nuances in bill calculation.

(b) **A class action is not the preferable procedure:**

(i) the individual issues overwhelm the common issues, rendering the proposed class proceeding unmanageable;

(ii) a cost-benefit analysis confirms that a class proceeding would not be justified;

(iii) a preferable procedure already occurred *via* the Ombudsman's process;

(iv) other avenues remain that are preferable to a class proceeding; and

(v) behaviour modification has already been achieved.

74. In the alternative, there are significant problems with the proposed cause of action, class definition, common issues and representative plaintiff that would need to be resolved before this action could be certified.

## A. The common issues are not truly common, nor are they necessary.

75. There is no rational connection between the pleaded or potential causes of action, the proposed class, and the proposed "systemic" common issues, which are irrelevant for most, if not all, customers. This section separately considers the proposed common issues relating to billing accuracy[89] and customer service.[90] Specific comments on each of the proposed common issues are set out in Schedule "C".

### (a) Most customers do not have a claim and therefore lack any connection to the proposed common issues.

#### (i) Unaffected customers have no claim.

76. Most customers were not affected by any of the CIS billing issues, let alone by erroneous bills.[91] Unaffected customers do not have a claim.[92]

#### (ii) Affected customers have no claim because their billing issues have already been corrected.

77. The billing issues have already been corrected. If a customer disputes the accuracy of the correction – though there is no evidence that any customer does – the customer's claim could only be determined in an individual inquiry. This individuality also distinguishes this case from illegal interest, overtime or price-fixing cases alleging systemic misconduct (*or just about any*

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89 Proposed common issues 1(a-b), 2-4, 5(a-b), 6-12.

90 Proposed common issues 1(c), 2-4, 5(c-d), 6-7.

91 Hubert Affidavit, ¶ 28-29 RMR, volume 1, tab 1, p. 12-13.

92 See, *e.g.*, *Loveless v. Ontario Lottery and Gaming Corp.*, 2011 ONSC 4744, ¶ 52-59 per Strathy J. (as he then was): "only a small fraction of the class – described at the hearing as a needle in a haystack – have actually suffered a loss as a result of retailer fraud. [...] [The proposed class] includes people who cannot possibly have an interest in the outcome of the litigation and they should not be bound by a decision on the common issues."

*proposed class action*) because the focus here is not on whether Hydro One must correct erroneous bills – Hydro One agrees that customers are entitled to bills that are free from error; rather, Hydro One believes that it has already identified and corrected erroneous bills. There is no evidence to the contrary.

**(b) There were a myriad of different billing issues and they did not have a common impact.**

78. Different billing issues affected different customers differently. Some customers received erroneous bills. Others did not receive a bill for a month or more. Others received estimated bills. Some received larger- or smaller-than-expected catch-up bills.

79. Crucially, these differences impair commonality because the billing issues did not have a "common impact"[93]: an erroneous and uncorrected bill might have caused loss, but a customer did not necessarily suffer a loss if the customer did not receive a bill for a month or received an estimated bill. That distinguishes this case from illegal interest, overtime or price-fixing cases alleging systemic misconduct, where the issue, if proven, would presumably have a similar *type of impact* on affected class members.[94]

80. The plaintiff's proposed aggregate damage methodology seems to acknowledge the distinction between billing issues that resulted in erroneous bills and billing issues that did not,

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93 *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, [2013] 3 S.C.R. 477, ¶ 115 [*Pro-Sys*]: "The requirement at the certification stage is not that the methodology quantify the damages in question; rather, the critical element that the methodology must establish is the ability to prove 'common impact' [...] That is, plaintiffs must demonstrate that 'sufficient proof [is] available, for use at trial, to prove antitrust impact common to all the members of the class"; *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (C.A.), ¶ 31 [*Chadha*].

94 See, *e.g.*, in analyzing whether there was some basis in fact for establishing common issue relating to commonality of harm or loss in *Pro-Sys*, the Supreme Court of Canada stated at ¶ 114-115: "The role of the expert methodology is to establish that the overcharge was passed on to the indirect purchasers, making the issue common to the class as a whole."

because the methodology seeks damages only for erroneous bills.[95] Individual inquiries would be required for all other types of billing issues to determine what effect – if any – the billing issue had on the customer.

**(c) The proposed "systemic" common issues would not advance the claims for billing issues that were not caused by the CIS.**

81. The proposed common issues assume that billing errors were caused by the CIS but erroneous bills, while rare, are often caused by: (i) human error – *e.g.*, a customer calls in a manual meter reading but transposes the numbers, or an electricity retailer provides an incorrect rate to Hydro One – or (ii) other idiosyncratic circumstances.[96] Mr. Bennett is a useful example: his billing issues arose 18 months before the CIS came online, and were caused by a faulty communications component on his meter. That is an idiosyncratic billing issue that has nothing to do with the alleged defects in the CIS.[97]

82. This extinguishes commonality in three ways:

(a) First, if there are erroneous bills that were not caused by defects in the CIS, any possible resolution of the proposed common issues about systemic defects would be irrelevant. It would make no difference for such claims whether Hydro One is required to "employ a billing system that accurately and reliably bills customers."[98] The systemic common issues would not be a substantial ingredient – or even an ingredient – for claims of billing issues were not caused by systemic defects.

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95 In other words, it seeks damages only for the difference between the "Invoiced Amounts" and "Proper Amounts".

96 Hubert Affidavit, ¶ 37-38, 87(c), RMR, volume 1, tab 1, p. 16, 30.

97 Hubert Affidavit, ¶ 62-63, RMR, volume 1, tab 1, p. 23.

98 *I.e.*, proposed common issues 1(a-b) and 5 (a-b).

(b) Second, causation cannot be established on a class-wide basis. The Court would need to determine whether a particular billing issue was caused by the CIS or by idiosyncratic circumstances. There is no workable methodology to assess this on a class-wide basis. As described in more detail in the next section, the plaintiff's methodology would indiscriminately attribute all alleged loss to systemic errors.

(c) Third, the answers to the proposed common issues regarding breach and loss also depend on individual findings of fact that would have to be made for each customer and cannot be extrapolated, in the same manner, to each member of the class. For example, Hydro One does not breach its obligations if a customer reports an incorrect meter reading or a retailer provides an incorrect rate, leading to an incorrect bill. The Court would need to know all of the particular circumstances to know whether the alleged breach or unjust enrichment has occurred.

83. The proposed common issues fail to satisfy the requirement that a common issue must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of that claim.[99] The proposed common issues would not advance any customers' claims, regardless of the answers.

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[99] *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158, ¶ 18 [*Hollick*].

**(d) Aggregate damages should not be certified as a common issue.**

**(i) The plaintiff has not met the prerequisites.**

84. Aggregate damages cannot be certified as a common issue because there is no "reasonable likelihood" that the preconditions in section 24(1)(b) or (c) of the *CPA* can be met.[100]

(a) Section 24(1)(b) requires that "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." As such, aggregate damages provisions are "applicable only once liability has been established, and provid[e] a method to assess the quantum of damages on a global basis, but not the fact of damage".[101] However, the plaintiff is relying on the aggregate damages methodology to establish not only the amount of monetary liability, but also breach, causation and the fact of damage. The methodology would search for any discrepancy between the amounts billed and the amounts that the plaintiff's expert thinks should have been billed, and then *assume* breach and causation because the calculation would be performed only at the aggregate level.[102] Without examining the circumstances that caused the loss for a particular customer, it is impossible to know whether the calculated "loss" was caused by an issue with the CIS or by some other party or intervening event – or whether it is a loss at all.

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100 *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443, ¶ 111-114 [*Fulawka*], leave to appeal to S.C.C. refused, [2012] S.C.C.A. No. 326.

101 *Pro-Sys*, ¶ 131-132.

102 Reply Soriano Report, ¶ 10(e), Reply Motion Record, tab 1A, p. 7: "However, I do not propose to assess the Proper Amounts on an individual by individual basis because I do not foresee a need for that level of granularity."

(b) Section 24(1)(c) requires that the aggregate of the defendants' liability "can reasonably be determined without proof by individual class members." As explained below, the plaintiff's methodology proposes to rely entirely on the defendants' records to discover errors, but that methodology could not actually uncover an error. The CIS automatically prepares the bill using the information that is recorded in the defendants' records,[103] so the only way to identify an error is to use external data to show that the information in the defendant's records is wrong – *e.g.*, a finding by Measurement Canada that the consumption recorded by a particular smart meter was inaccurate. That can only be determined in individual inquiries and with proof by individual class members.

**(ii) The plaintiff has not shown a workable methodology.**

85. The plaintiff's method is impermissible because it is purely hypothetical.[104] Mr. Soriano proposes to extrapolate the results of a sample to the entire class.[105] He acknowledges, nonetheless, that statistical sampling involves "complex undertakings outside [his] area of expertise", and that a statistician should select the samples.[106] The plaintiff did not put forward any evidence from a statistician that statistical sampling could be used.

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103 Hubert Affidavit, ¶ 87, RMR, volume 1, tab 1, p. 29-30.

104 *Pro-Sys*, ¶ 118: "The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question"; *Fulawka*, ¶ 137-139.

105 Soriano Report, ¶ 25(a), volume 1, tab 7A, p. 135: he proposes to analyze "a statistically valid sample of the putative Class members (and then extrapolat[e] the results of [his] analysis to the population that is the putative Class)."

106 Soriano Report, ¶ 25(a), volume 1, tab 7A, p. 135.

86. In response, someone with this expertise, Dr. Juneja of NERA Economic Consulting, opined that, based on her review of the actual data, Mr. Soriano's proposed sampling approach would not be appropriate to calculate class-wide damages:[107]

> A sampling approach, as proposed by Mr. Soriano, would not be appropriate for calculating alleged class-wide damages on an aggregate basis for all Hydro One customers. Because a representative sample necessarily must reflect the variation in the population, one would still need to make a calculation that takes into account the various types of individualized issues that determine each customer's invoice. Furthermore, using a sampling approach to calculate aggregate damages, if any, will likely result in more error as one needs to extrapolate from a small sample to the whole. [...] Simply put, a sampling approach may end up providing a biased and less precise answer, while remaining just as costly as performing the calculation on the full dataset.

87. Mr. Soriano's reply was not convincing – and certainly provides no basis in fact to think any methodology could exist. He acknowledged that sampling "would have to be properly controlled", but did not provide any evidence to describe how a sample could be constructed, or how such a sample could be properly controlled.[108]

88. The plaintiff essentially argues that the methodology is sufficient because the motions judge cannot resolve conflicts in the expert evidence.[109] But there are no conflicts. The plaintiff did not lead expert evidence to show that statistical sampling is viable.[110] In the face of expert evidence that sampling would not be appropriate, it cannot be sufficient to simply assume that sampling would work, or to "wish that techniques would exist and that the data would cooperate

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107 NERA Report, ¶ 5(d), RMR, volume 3, tab 2, p. 1673-1674.

108 Reply Soriano Report, ¶ 6(d), Reply Motion Record, tab 1A, p. 6.

109 Plaintiff's Factum, ¶ 75.

110 In *Dine v. Biomet Inc.*, 2016 ONSC 4039 (Div. Ct.), ¶ 34-36, Then J. explained the Supreme Court of Canada's approach with respect to the motions judge's ability to assess expert evidence: "The Supreme Court seems to draw a distinction between three situations: weighing the plaintiff's evidence in its own right; weighing the plaintiff's evidence while considering evidence brought by the defence to fill gaps in the record on matters not directly addressed by the plaintiff, and relying on this defence evidence to find the plaintiff failed to establish 'some basis in fact'; and weighing the plaintiff's evidence against directly contradictory evidence from the defence. While the first two assessments are appropriate (see *Sun-Rype* and *AIC*), *Microsoft* suggests at para. 126 that, where there is conflicting evidence at certification, the motion judge should decline to resolve the conflict and permit the issue to proceed to trial." [Emphasis added.]

in the hands of the right expert so that alleged damages 'can be calculated on an aggregate basis with a reasonable degree of precision.'"[111]

**(iii) The methodology is inherently flawed: it cannot detect errors.**

89. The plaintiff's methodology is premised on two critical but conflicting assumptions:

(a) the rates and consumption data stored in Hydro One's systems are accurate;[112] and

(b) billing errors occurred because the CIS used incorrect rates and consumption data.[113]

90. The problem is that these assumptions essentially cancel each other out. The methodology proposes to calculate the "proper" invoices using the identical rates and consumption data that Hydro One used to prepare the allegedly incorrect invoices. The plaintiff's methodology would not detect potential errors in the rates or consumption data – indeed, the methodology is premised on the assumed accuracy of the data and uses it.[114]

91. However, the uncontradicted evidence is: (a) the CIS automatically uses the applicable rates for each customer;[115] and (b) when actual consumption is available, the CIS automatically

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[111] NERA Report, ¶ 38, RMR, volume 3, tab 2, p. 1687.

[112] Soriano Report, ¶ 22-23, MR, volume 1, tab 7A, p. 134; Gurusamy cross-examination, Joint Record, Q. 64-65, 67-70; p. 23-26; Hubert Affidavit, ¶ 87, RMR, volume 1, tab 1, p. 29-30: "Where 'actual consumption' is available from the MDM/R [...] the CIS automatically uses the "actual consumption" from the MDM/R [...]."

[113] Soriano Report, ¶ 4, MR, volume 1, tab 7A, p. 129-130: "The comments in this letter are based on the premise that the financial damages, if any, are to be calculated as the difference between the amounts invoiced by the defendants to the proposed Class after May 2013 (the 'Invoiced Amounts') and the dollar value of the amounts that the defendants should have charged according to stipulated rates and actual consumption (the 'Proper Amounts'). [Emphasis added.]"

[114] Soriano Report, ¶ 22-23, MR, volume 1, tab 7A, p. 134. Regardless, to the extent that any potential inaccuracy exists, it could only be determined in an individual inquiry – *e.g.*, a customer proving that his or her meter inaccurately recorded usage – which would foreclose the use of aggregate damages because of the requirement in section 24(1)(c) of the *CPA* – see, *e.g.*, *Fulawka*, ¶ 111-114.

[115] In the rare cases when those stipulated rates are incorrect, it is almost always caused by human error relating to the entry of customer data – *e.g.*, an electricity retailer provides an incorrect value to Hydro One: Hubert Affidavit, ¶ 87, RMR, volume 1, tab 1, p. 29-30.

uses that actual consumption to prepare the invoices.[116] There is no evidence or basis to believe anything to the contrary.[117]

92. As such, is simply impossible for the plaintiff's proposed methodology to achieve anything other than replicating the same bills that Hydro One's CIS system produces. The "class action" would only go in a circle to end up at the same place it started. There is therefore no value to the parties or the Court in undertaking this time consuming and expensive exercise.

**(iv) A "top-down" approach is flawed.**

93. Moreover, the plaintiff's methodology would become unfair and susceptible to greater error once his expert attempts to extrapolate his sample findings to the larger set(s) of class members without accounting for individualized issues. Mr. Soriano stated in reply that he would not "assess the Proper Amounts on an individual by individual basis because [he] do[es] not foresee a need for that level of granularity."[118] His approach is incorrect. And he acknowledged that he did not have the expertise to state otherwise.

94. The only way to accurately account for individual issues is by assessing a specific customer's invoices chronologically, invoice by invoice, to account for aspects of the bill that are not directly proportionate to consumption.[119] These aspects include, among other things:

(a) **payment history**, including any late payment charges, arrears, or long-term payment plans;

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[116] Where actual consumption is not available and consumption must be estimated, the difference is temporary. At the next billing cycle that actual consumption is available, the system automatically incorporates the actual consumption, cancels and rebills the previous estimated period, and presents the updated amounts on the current invoice. In other words, once the actual consumption is available, there will be no difference between the Invoiced Amounts and Proper Amounts: Hubert Affidavit, ¶ 87, RMR, volume 1, tab 1, p. 29-30.

[117] The plaintiff did not file reply evidence or cross-examine Mr. Hubert on those statements. There is no conflict on this point.

[118] Reply Soriano Report, ¶ 10(e), Reply Motion Record, tab 1A, p. 7.

[119] NERA Report, ¶ 40-46, RMR, volume 3, tab 2, p. 1688-1670.

(b) **individual billing adjustments**, including corrections to previous bills and discretionary credits, such as goodwill credits;

(c) **credits for certain types of customers**, including standard reductions like the Ontario Clean Energy Benefit[120] (a 10% credit that applied only on the first 3,000 kWh of usage) and/or the Rural or Remote Rate Protection[121] credit; and

(d) **budget billing plans**, which result in an Invoiced Amount that typically will not match the theoretical "Proper Amount" based on actual usage.

95. Further, it is necessary to perform a bottom-up approach, invoice by invoice, because some rates and credits change at individual usage thresholds. Dr. Juneja listed several obvious examples:

> Mr. Soriano's "aggregate level" approach would be particularly egregious in that it would appear to ignore the components of a bill that incorporate an individual's threshold of electricity consumption. For bills prior to 2016, customers received the "Ontario Clean Energy Benefit," a 10% credit on the first 3,000 kWh of usage. Tiered customers were billed two different rates contingent on whether they exceeded a certain usage threshold. In addition, general demand rate type customers rely on an additional KW and KVA metered usage metric to calculate certain portions of their bill. An "aggregate level" approach to such calculation ignores such core aspects of the billing calculation, and introduces an error of unknown magnitude.[122]

96. As a result, the top-down approach proposed by the plaintiff would be inaccurate and unfair. There is no workable methodology.

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120 *Ontario Clean Energy Benefit Act, 2010*, S.O. 2010, C. 26, Sched. 13; O. Reg. 495/10, *General*.

121 *Ontario Energy Board Act, supra*, s. 79; O Reg 442/01, *Rural or Remote Electricity Rate Protection*.

122 NERA Report, ¶ 34, RMR, volume 3, tab 2, p. 1685. Mr. Soriano stated in his reply report that his approach "will account for each of these Individual Issues," [¶ 10(f)] but, the defendants submit, that statement should not be given any weight because he does not explain how he would account for them, nor does he offer any evidence by which his methodology could be assessed.

**(v) In any event, there is no basis in fact to believe that the proposed methodology would result in damages.**

97. There is no evidence of any customers for which the Invoiced Amounts exceed the Proper Amounts, and no basis in fact to believe that the proposed methodology would result in damages.

98. The plaintiff relies on a statement from *Markson* for the proposition that aggregate damages may be ordered even where damages are not suffered by every single member of the class: "it may be that in the result some class members who did not actually suffer damage will receive a share of the award. However, that is exactly the result contemplated by s. 24(2) and (3)."[123] The Court of Appeal's reasoning in *Markson* was premised on the assumption that a portion of the class may actually have suffered damage, and another portion of the class would nonetheless receive a share. The *CPA* cannot contemplate a similar result for the circumstances of this case, where the plaintiff is proposing to take damages that a handful of customers may have suffered for individual reasons, and share them with 1.3 million other customers who are not similarly positioned.

99. Unlike the approach in *Markson*, an aggregate damages approach in this case could present a conflict between the class members. If a customer has been overcharged, that customer should be repaid the difference. But an aggregate damages approach would decrease that customer's recoverable amount twice – first, because class counsel and the Class Proceedings Fund would combine to take, say, 35% to 45% of any recovery,[124] and second, because the rest

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[123] Plaintiff's Factum, ¶ 69(c).

[124] The plaintiff's lawyer's refused the cross-examination questions asking what their contingency rate is, so we are guessing that it is between 25% and 35%. The plaintiff also testified that he was unaware that the Class Proceedings Fund would be entitled to 10%: "Q: Do you understand that in exchange for providing that financial support the class proceedings fund would be entitled to 10 per cent of any settlement or damages

of the 1.3 million class members would take their proportionate share of that customer's recovery. The irony is that affected customers would be forced to opt out of the class action to obtain 100% recovery and access to justice, and that they can achieve full recovery through any of the free, efficient methods of making a complaint that are described below.

**(e) The proposed common issues regarding customer service cannot be certified.**

100. The customer service issues are also not suitable for certification.

101. First, the issues are not common to all class members: a customer could not have a claim unless, at a minimum: (i) the customer made an inquiry; *and* (ii) Hydro One breached the applicable standard of care or obligation in responding; *and* (iii) the customer suffered compensable harm. Necessarily, whether any of these steps occurred is an individual issue. The plaintiff has not proposed a methodology to address these issues.

102. Second, Hydro One's obligations vary based on the type of customer and nature of the inquiry. Hydro One is required to refer certain inquiries to third parties – *e.g.*, it must refer certain inquiries regarding meter accuracy to Measurement Canada,[125] and certain inquiries from "retailer-enrolled" customers to the retailer when the inquiry relates to bill calculation errors or other matters.[126]

103. Third, the plaintiff has not shown that these issues are capable of resolution on a class-wide basis. The plaintiff's aggregate damages expert ignores the customer service claims, and

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awarded? A: I'm not too sure how I would be aware of that fact." Bennett cross-examination, Joint Record, tab C, Q. 69-70, p. 142.

125 Conditions of Service, s. 2.3.7.7, RMR, vol. 2, tab 1T, p. 554.

126 Retail Settlement Code, s. 7.1.3, 7.2.4, and 7.3.3, RMR, vol. 3, tab 1AA, pp. 1503-1509. For example, section 7.1.3 requires Hydro One to refer all inquiries about bill calculation errors to the retailer if the inquiries are made by customers enrolled in retail-consolidated billing. In contrast, section 7.2.4 requires Hydro One to answer inquiries about bill calculation errors from customers enrolled in distributor-consolidated billing.

focuses instead entirely on billing accuracy. The litigation plan similarly does not address this issue.

**(f) There is no basis for a common issue regarding punitive damages.**

104. The Distribution System Code states that a distributor (*i.e.*, Hydro One) shall not, under any circumstances, be liable for punitive damages:

> **2.2.2** Despite section 2.2.1; neither the distributor nor the customer shall be liable under any circumstances whatsoever for any loss of profits or revenues, business interruption losses, loss of contract or loss of goodwill, or for any indirect, consequential, incidental or special damages, including but not limited to punitive or exemplary damages, whether any of the said liability, loss or damages arise in contract, tort or otherwise.[127]

105. Section 1.9 of the Conditions of Service is identical.[128] These provisions applied throughout the proposed class period. There is therefore no basis on which proposed common issue #13 ("*Should the Defendants pay punitive damages*?") could be certified.[129]

**B. A class proceeding is not the preferable procedure.**

106. The plaintiff has not met his burden of establishing preferability:[130]

(a) A class action is inferior to other means of resolving the claims. A preferable procedure has already occurred: the Ombudsman's process achieved timely and effective access to justice, and behaviour modification (including the 65 recommendations and improvements to Hydro One's billing system and customer

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127 Distribution System Code, s. 2.2, RMR, volume 2, tab 1V, p. 796.

128 Conditions of Service, s. 1.9, RMR, volume 2, tab 1T, p. 505-506.

129 In any event, punitive damages can only be assessed after liability is established. Since liability cannot be established without individual inquiries into, at a minimum, breach, causation and damages, it is premature to certify a common issue regarding punitive damages. *Arora v. Whirlpool Canada LP*, 2012 ONSC 4642 [*Arora*], ¶ 355 ("In class actions in which liability, causation, and or damages remain to be determined, it will be premature and without purpose to certify punitive damages as a common issue."), aff'd on other grounds, 2013 ONCA 657.

130 *AIC Limited v. Fischer*, [2013] 3 S.C.R. 949, ¶ 48-49 [*AIC*].

service). New regulations regarding billing accuracy have been promulgated. All of this is beyond what could be achieved in a class action.

(b) If a customer is unsatisfied or did not use the Ombudsman's process, that customer still has avenues of recourse that are preferable to a class proceeding, including through the Hydro One Ombudsman or OEB. Those processes are free, fast and effective, and provide 100% recovery. If a customer is still not satisfied, the customer can bring an individual action or a dispute to Measurement Canada.

(c) Finally, a class action would not be a fair, efficient or manageable method to advance the claims. The class action would collapse into individual trials to determine whether customers were overcharged, becoming unmanageable and overwhelming any benefit that could be obtained from a common issues trial.

**(a) A class action would be unmanageable: complex and idiosyncratic individual issues overwhelm the common issues.**

107. A class action will not be the preferable procedure if the common issues are "overwhelmed or subsumed by the individual issues such that the resolution of the common issues will, in substance, mark just the beginning of the process leading to a final disposition of the claims of class members."[131]

108. A class action would collapse into complex individual trials to determine whether any customers were overcharged. In some cases that would require meter testing in Measurement Canada's dispute resolution process (where testing is even possible for meters that were removed or redeployed years ago), expert evidence and complex bill calculations that may span several

[131] See, *e.g.*, *Arora*, *supra*, ¶ 371.

years. And to recover, the customer would then need to establish that the overcharge was caused by defects in the CIS.

109. This case is similar to that of *Williams v. Mutual Life Assurance Co.* A class action would "result in a multitude of individual trials, which will completely overwhelm any advantage to be derived from a trial of the few common issues."[132] Certification should be refused on this basis alone.

**(b) A cost-benefit analysis confirms that a class proceeding would not be justified.**

110. The Supreme Court of Canada has directed that in comparing possible alternatives, "it is important to adopt a practical cost-benefit approach to this procedural issue, and to consider the impact of a class proceeding on class members, the defendants, and the court".[133]

111. Given the number and diversity of customers, and the complexity of electricity regulation, the proposed class proceeding would impose substantial costs on the parties and the Court. It would also distract Hydro One, as it would require significant time commitments if the defendants are forced to recreate and reconcile years of bills to disprove an aggregate damages methodology or respond to a deluge of unmeritorious individual claims.[134]

112. These burdens cannot be justified. There is no evidence that any class member has unrectified losses caused by the CIS. The plaintiff's request will require him to spend years

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[132] *Williams v. Mutual Life Assurance Co; Zicherman v. Equitable Life Insurance Co. of Canada (appeal by Kumar)*, [2003] O.J. No. 1160 (C.A.), ¶ 53, quoting *Mouhteros v. DeVry Canada Inc.*, [1998] O.J. No. 2786 (Gen. Div.).

[133] *AIC, supra*, ¶ 21.

[134] Even if you were to undertake that exercise for 5% of customers and assume that each bill requires an average of 2 minutes of analysis (even before accounting for individual adjustments), it would involve more than 2.5 million individual bills and more than 75,000 hours – which would take more than four years for a team of ten people working on that project five days a week, eight hours a day, without vacation.

searching for an affected customer not because he knows one exists, but because he asserts that one could exist. It is not the role of class actions or the court to pursue such endeavours. Hydro One is highly regulated, and the public has been and is well protected.

113. These burdens also cannot be justified because, to the extent that there are customers who may be affected – or even think they may be affected – they continue to have avenues of recourse that are superior to a class proceeding, including through the Hydro One Ombudsman and the OEB, as described below.

114. The time and expense required to defend a class action would be disproportionate and punitive to Hydro One, which has already spent more than **$88 million** since the CIS went live to improve customer service and address issues relating to the CIS. The plaintiff's claim seeks to punish Hydro One through an award of punitive damages, but Hydro One has already paid a heavy price, including a heavy reputational price, for the billing issues. And it has already modified its behaviour, making vast improvements in customer service and enhancing its billing system so that it is in the healthiest state in the company's history.

115. The proposed class action and costs of its defence would also be punitive to Hydro One's customers and the public. This case is similar to *Grace v. Fort Erie (Town)*, where the Court refused to certify a proposed class action brought by ratepayers against their municipality. The Court found that taxpayers would be suing themselves: some residents would receive nothing, some would receive a small sum of money, and class counsel would receive millions:[135]

> Should this action be certified we would have the situation where the townspeople of Fort Erie would be suing themselves through their municipal corporation. The trial, should this matter proceed as a class action, would likely last for months, at legal costs in the millions of dollars. Should the plaintiff and

[135] *Grace v. Fort Erie (Town)*, [2003] O.J. No. 3475 (S.C.J.), ¶ 154.

> the represented claimants win, a number of those residents would receive a small sum of money, likely $100.00 to $350.00. The balance of the class would receive nothing. Their legal counsel would receive millions and the claimants' municipality would ultimately recover those millions of dollars from its ratepayers by taxation.

116. If Hydro One has overcharged a particular customer, it should pay that customer the difference and it is committed to doing so. But it should not be asked to pay damages that would ultimately not directly benefit the customer – but would instead benefit other people seeking a piece of the recovery pie. This accords with the restrictions on liability in the Distribution System Code and the Conditions of Service, which provide that Hydro One shall be liable to a customer only for any damages that arise directly out of Hydro One's negligence in providing distribution services to the customer:[136]

> 2.2.1 A distributor shall only be liable to a customer and a customer shall only be liable to a distributor for any damages which arise directly out of the willful misconduct or negligence:
>
> 1. Of the distributor in providing distribution services to the customer;
>
> 2. Of the customer in being connected to the distributor's distribution system; or
>
> 3. Of the distributor or customer in meeting their respective obligations under this Code, their licences and any other applicable law.
>
> 2.2.2 Despite section 2.2.1; neither the distributor nor the customer shall be liable under any circumstances whatsoever for any loss of profits or revenues, business interruption losses, loss of contract or loss of goodwill, or for any indirect, consequential, incidental or special damages, including but not limited to punitive or exemplary damages, whether any of the said liability, loss or damages arise in contract, tort or otherwise.

### (c) A preferable procedure has *already* occurred: the Ombudsman's process.

117. The Ombudsman's process was highly publicized and widely used. In cross-examination, the plaintiff acknowledged that "it was very well known" that the Ombudsman was conducting

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[136] Distribution System Code, s. 2.2, RMR, volume 2, tab 1V, p. 796; Conditions of Service, s. 1.9, RMR, volume 2, tab 1T, p. 505-506.

an investigation; he knew from newspaper reports that he could request the Ombudsman's assistance.[137] In the three days after the Ombudsman announced the investigation, more than 1,500 customers submitted complaints. The Ombudsman ultimately received more than 10,000 complaints.

118. The Ombudsman's complaint process had many advantages, including:

(a) *It was free.* Customers did not need a lawyer. The Ombudsman dedicated a team to receiving complaints and working with Hydro One to resolve them. The Ombudsman monitored the status and resolution of all complaints.

(b) *It was fast.* Although there was some initial backlog due to volume, all complaints were resolved during the investigative process.

(c) *Customers were given a range of remedies.* In addition to resolving any billing errors, Hydro One worked with affected customers to set up interest-free payment plans and, in most cases, gave the customers goodwill credits.

119. The process also achieved behaviour modification:

(a) *The 65 Recommendations*: Before releasing his report, the Ontario Ombudsman sent Hydro One 65 recommendations to improve billing and customer service. Hydro One had already implemented the vast majority of them, and accepted all of them. The Ombudsman's final report described the recommendations and appended a letter from Hydro One explaining the steps that the company had

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[137] Bennett cross-examination, Joint Record, tab C, Q. 46-47, p. 137-138.

already taken and would take to meet (or exceed) all of them.[138] A Court would not have the same broad powers or resources to investigate the processes and make detailed recommendations.

(b) *Identifying and Resolving Issues of Concern to Customers*: The number and range of complaints gave Hydro One more visibility into the issues that were concerning its customers, allowing the company to be more proactive in seeking to address them. Throughout 2014, Hydro One made significant customer service improvements, implementing new bill literacy training for call centre agents and establishing an independent Customer Service Advisory Panel to ensure assessment and accountability of the company's measureable customer service commitments. (The Panel's work is complete.)[139]

(c) In addition, as noted above, Hydro One has since instituted new proactive steps to ensure billing accuracy on a daily basis, and new regulatory requirements have been implemented to require "billing accuracy". These requirements are overseen by the OEB.

120. The process achieved judicial economy because it did not require litigation. Customers participated in the resolution process and complaints were not closed until the Ombudsman's office was satisfied with the resolution. If the customer later changed its mind about the resolution, the Ombudsman would, in some cases, reopen the complaint and the process would begin again.[140] In any event, if the customer was not satisfied, the customer had alternatives

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138 Hubert Affidavit, ¶ 54-55, RMR, volume 1, tab 1, p. 21.
139 Hubert Affidavit, ¶ 52-53, RMR, volume 1, tab 1, p. 21.
140 Hubert Affidavit, ¶ 49, RMR, volume 1, tab 1, p. 20.

(including individual actions) as described in the next section that were available throughout the entire proposed class period and are still available.

**(d) Customers still have access to processes that are preferable to a class action.**

121. Hydro One remains committed to ensuring that customers pay only for the electricity that they consume. Any customers who believe that they were overcharged can make complaints through a number of channels, including the Hydro One Ombudsman and the OEB. All of these procedures are frequently used.[141] As Mr. Bennett acknowledged on cross-examination, it is widely known that the OEB and other procedures can be used to resolve issues:

> 45. Q. How did you find out that you could make a complaint or inquiry about your bills through the Ontario Energy Board?
>
> A. How did I learn to use – there, again, it's basically public knowledge that you can use the Ontario Energy Board if you can't get your issues resolved [Emphasis added].[142]

122. Unlike a class action, to obtain recourse through these alternative procedures, it would *not* be necessary to prove systemic failure. A customer would simply need to show that it was overbilled and that its bills have not been corrected. (In individual inquiries in the proposed class action, however, the customer *would* have to prove that the overbilling was caused by the CIS to establish liability.)

123. The plaintiff's primary argument is that the OEB process cannot be the preferable procedure because it does not have the same jurisdiction or remedial powers as this Court.[143] That incorrectly anticipates the defendants' argument:

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[141] In 2014 and 2015, Hydro One received thousands of complaints. In the first seven months after the Hydro One Ombudsman opened its doors (*i.e.*, until the date of Mr. Hubert's affidavit), Hydro One received complaints from approximately 395 customers by way of the Hydro One Ombudsman. In 2015, Hydro One received approximately 433 complaints from the OEB: Hubert Affidavit, ¶ 26, RMR, volume 1, tab 1, p. 10-11.

[142] Bennett Cross-examination, Joint Record, tab C, Q. 45, p. 137.

(a) The OEB process can efficiently resolve many claims, even if it might not resolve *every* claim. Even if the OEB cannot resolve some claims, there are other venues to resolve such claims. The Court must consider all of the alternatives *globally*,[144] including individual actions and the Measurement Canada dispute process.

(b) The OEB process need not decide the precise legal or factual questions raised by the common issues, provided it can effectively resolve claims.[145]Administrative procedures may be preferable even where damages are not available as a remedy,[146] but, in any event, the OEB does have the power to award restitution-based damages in compliance proceedings.[147]

(c) **The OEB has jurisdiction to address the issues raised in this action** – *e.g.*, the OEB can order restitution-based damages or penalties, or require a distributor to rectify a billing error, even if the OEB would not refer to such a remedy as "damages for breach of contract". The *Ontario Energy Board Act* gives the OEB exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by the *Ontario Energy Board Act* or any other Act,[148] including enforcing the regulatory codes. The point is that the plaintiff's jurisdictional arguments elevate form over substance because the OEB plainly has

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143 Plaintiff's Factum, ¶ 85.
144 *Hollick, supra*, ¶ 30; *AIC, supra*, ¶ 35-36.
145 *AIC, supra*, ¶ 19.
146 *Lauzon v. Canada (Attorney General)*, 2014 ONSC 2811, ¶ 62-63, 66, aff'd 2015 ONSC 2620 (Div. Ct.).
147 *Summitt Energy Management Inc. v. Ontario (Energy Board)*, 2013 ONSC 318 (Div. Ct.). Section 112.3(1) of the *Ontario Energy Board Act* gives the Ontario Energy Board the power in a compliance proceeding to take such action as the board may specify to remedy a contravention that has occurred.
148 *Ontario Energy Board Act, supra*, s. 19(6). The Ontario Energy Board has the authority to hear and determine all questions of law and fact.

the jurisdiction to resolve billing issues. (To be clear, the defendants are not arguing that this Court lacks jurisdiction to hear the pleaded claims.)

(d) The Ombudsman's process showed that a binding decision or formal "damages" will often be unnecessary. In those complaints, customers participated in the process and the decision as to whether the resolution was adequate. Moreover, independent parties like the Hydro One Ombudsman and the OEB have significant expertise in the complex field of electricity regulation, and can help customers frame their complaints effectively.

(e) Finally, to the extent that a binding decision is necessary and the OEB chooses not to provide it, those cases can be determined in individual court actions or alternative proceedings such as Measurement Canada's dispute process.

124. From a policy perspective, it is valuable for the OEB to participate in the escalated complaint process so that it has insight into the types of issues concerning customers and how those issues are being handled by the company. Where appropriate, the OEB can achieve behaviour modification by changing the regulations to address customer issues, initiate compliance proceedings, or take a variety of other steps to rectify legitimate issues.[149] The role of non-court procedures is especially important where, as here, the plaintiff advances claims arising within a carefully regulated environment.[150]

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[149] Clark *et al*, *Ontario Energy Law: Electricity*, *supra* at 556-7.
[150] *Penney v. Bell Canada*, 2010 ONSC 2801, ¶193.

**(e) A class action is not the preferable procedure for achieving access to justice.**

125. Although the plaintiff has not specifically identified the alleged barriers to access to justice, he may be arguing that they are economic (his factum states: "costs of pursuing an action on an individual basis may be prohibitive and uneconomical"[151]) or procedural ("There is no other type of proceeding capable of providing the same access to justice"[152]).

126. However, the outset of the plaintiff's proposed individual inquiry process looks very much like the OEB complaints process. The litigation plan contemplates that the customer would prepare and submit a claim form with supporting documentation and/or expert evidence, as applicable.[153] Presumably, class counsel is not committing to represent each customer in this process, so the customer would be left alone to prepare a claim and marshal evidence (which may be complex), without the benefit of a lawyer or the assistance of a third party like the Hydro One Ombudsman or the OEB.[154] Under the plaintiff's litigation plan, however, a customer would be in essentially the same position that the customer is currently in, but with fewer options for assistance.

127. In a recently released decision, the British Columbia Court of Appeal confirmed that a class action would not be the preferable procedure for resolving the claims that the defendant car rental companies "engaged in a systematic practice of improperly charging or over-charging customers" for repair costs.[155] The Court of Appeal stated that the common issues "would merely be a prelude to many individual trials" and would fail to significantly advance the customers' claims of billing errors, regardless of how the common issues were decided:

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151 Plaintiff's Factum, ¶ 103.
152 Plaintiff's Factum, ¶ 102.
153 Litigation Plan, ¶ 26(a), MR, volume 1, tab 4A, p. 54.
154 If the customer wants to pursue the individual inquiry (or wants the assistance of a lawyer in that inquiry), the customer will be forced to incur essentially the same costs that the customer would incur in an individual action.
155 *Vaugeois v. Budget Rent-A-Car of B.C. Ltd.*, 2017 BCCA 111, ¶ 3.

> Further, in the case at bar, unlike many proposed class actions, not only will success for the class fail to significantly advance the cause of any individual plaintiff [...] but it can also be said that dismissal of the class action will not finally determine the claim of any class member. **Even if the class fails to make out the existence of the "scheme", consumers who have been wrongly billed for repairs will still have a claim.** The fact the litigation will not finally determine claims, either way, must be weighed in assessing whether certification will serve the end of judicial economy. [Bold emphasis added; underlined emphasis in original.][156]

## C. If this action were capable of certification, the plaintiff would need to resolve issues with the proposed causes of action, class definition and representative plaintiff.

### (a) The proposed causes of action must be narrowed and clarified.

128. While the section 5(1)(a) test is a low hurdle, it is an important one because the pleaded claims will have a significant effect on the cost, complexity and conduct of the action, including the scope of documentary production obligations and the parameters of the broader discovery process. It is therefore in the interests of all parties to narrow and correct the pleaded causes of action.

#### (i) There is no claim against Hydro One Inc., Norfolk or Remote Communities.

129. The plaintiff does not have, nor has he pleaded, a viable cause of action against Hydro One Inc., Norfolk or Remote Communities.[157] As described at the start of this factum, these defendants either do not carry on operations at all, or operated their own billing and customer service departments distinct from Hydro One. To the extent that these defendants currently have (or ever had) customers, those customers were not parties to a contract with Hydro One.[158]

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156 *Ibid.*, ¶ 8, 14.

157 See, *e.g.*, *Hughes v. Sunbeam*, [2002] O.J. No. 3457 (C.A.),¶ 18 ("In Ontario, a statement of claim must disclose a cause of action against each defendant."), leave to appeal refused, [2002] S.C.C.A. No 446.

158 The plaintiff argues that there is only one contract which applied to all customers, *i.e.*, the Conditions of Service between Hydro One and its customers: Plaintiff's factum, ¶ 25. To be clear, those Conditions of Service do not apply to customers of Remote Communities or Norfolk: Conditions of Service, s. 1, RMR, vol. 2, p. 498.

130. Contrary to the plaintiff's argument, the evidence does not "demonstrate[] that, for the purposes of procuring, designing, implementing and testing the CIS, the defendants operate as a single integrated unit."[159] His examples do not support that statement. For example, referring to Hydro One Networks Inc. as Hydro One does not mean that all of the defendants worked together to *design* the CIS. And some examples are obviously false: Norfolk does not "utilize the CIS."[160] Norfolk was not even acquired until 15 months after the CIS went live, and never used it.[161] In fact, there is no evidence that any of the defendants other than Hydro One were involved in "procuring, designing, implementing and testing the CIS."

**(ii) There is no claim for breach of *express* terms of contract.**

131. Although the statement of claim repeatedly refers to alleged express or implied contractual terms, there are no express contractual terms that relate to the alleged breaches of the contract. The plaintiff has failed to identify the alleged *express* terms – and, in any event, no express terms in the Conditions of Service require Hydro One to "employ a billing system" in the manner pleaded.[162]

**(iii) Punitive damages are barred by the Distribution System Code and by the Conditions of Service.**

132. It is plain and obvious that there is no cause of action for punitive damages. For the reasons described above, both the Distribution System Code and the Conditions of Service bar that claim.

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[159] Plaintiff's Factum, ¶ 14.
[160] Plaintiff's Factum, ¶ 14(c).
[161] Hubert Affidavit, ¶ 20, RMR, volume 1, tab 1, p. 8.
[162] See, *e.g.*, Statement of Claim, MR, volume 1, tab 3, ¶ 28-30.

**(b) The proposed class is overly broad.**

**(i) Most class members have no claim, let alone one that raises a common issue.**

133. The plaintiff has not met his burden of showing that the class is not unnecessarily broad – *i.e.*, "that the class could not be defined more narrowly without arbitrarily excluding people who share the same interest in the resolution of the common issues."[163] An overly broad class would bind some who should not be bound,[164] and is "not commensurate with the access to justice objective of class proceedings."[165] And it burdens the parties as to what must be proven.[166]

134. The vast of majority of the proposed class members have no claim, not even a "colourable" claim.[167] This case is missing the rational connection that is required between the proposed cause of action, proposed class and proposed common issues.[168] This Court has rejected overly broad class definitions that would include many people without a claim, such as:

| Case | Judge | Proposed Class | Excerpt |
|---|---|---|---|
| *Mouhteros v. DeVry Canada*[169] | Winkler J. | About **17,227** people: All DeVry students in the period. | "Many of these students may have no claim, let alone a claim which raises a common issue." |
| *Loveless v. OLG*[170] | Strathy J. | Up to **10 million** people: Everyone who bought lottery tickets from 1975 to 2009. | "only a small fraction of the class – described at the hearing as a needle in a haystack – have actually suffered a loss as a result of retailer fraud. [...] [It] includes people who cannot possibly have an interest in the outcome of the litigation and they should not be bound by a decision on the common issues." |

163 *Hollick, supra*, ¶ 21.
164 *Loveless, supra*, ¶ 54.
165 Warren K. Winkler, *et al.*, *The Law of Class Actions in Canada* (Toronto: Thomson Reuters, 2014) at 94.
166 *Ibid.*
167 See, *e.g.*, *Hollick*, ¶ 19; *Dine v. Biomet*, 2015 ONSC 7050, note 9.
168 *Hollick, supra*, ¶ 19.
169 *Mouhteros, supra*, ¶ 18.
170 *Loveless, supra*, ¶ 52-59.

**(ii) The common issues would require an array of subclasses.**

135. This action would require subclasses, each with claims or defences that are not shared by all members of the proposed class. They would include, at a minimum:

(a) ***Customers of Norfolk and Remote Communities*** (about 18,000 and 3,600 customers, respectively).

(b) ***Customers exempted from the billing accuracy requirements*** (about 170,000 customers).

(c) ***Customers enrolled in retailer billing*** (about 60,000 customers) – These bills are based, in part, on information from the retailer. And Hydro One's regulatory obligations regarding customer service differ among these customers.

(d) ***Customers enrolled in budget billing*** (about 158,000 customers) – The amount payable usually does not correlate to the customer's actual consumption.

(e) ***Customers claiming inaccurate meters*** (at least Mr. Bennett) – The claims require individual proceedings in Measurement Canada's dispute resolution process.

(f) ***Customers affected between May 2013 and August 24, 2013*** – The plaintiff alleges that after the CIS went live in May 2013, problems arose "immediately."[171] The Notice of Action was not issued until August 24, 2015. Thus, there are limitation defences for issues that arose between May 2013 and August 24, 2013.

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[171] See, *e.g.*, Plaintiff's Factum, ¶ 2: "The launch of Hydro One's new billing and customer information system led to immediate and monumental problems."

**(c) Mr. Bennett is not an adequate or appropriate representative plaintiff.**

**(i) Mr. Bennett does not share common issues with the proposed class.**

136. Mr. Bennett does not have a claim that is a "genuine representation of the claims of the members of the class."[172] His billing issue was not caused by the CIS or alleged systemic issues relating to the CIS. His allegation that his meters were inaccurate raises complex individual issues that fall within the jurisdiction of Measurement Canada and its decision-making process. He does not share the proposed common issues with other class members and therefore is not an adequate representative plaintiff.

**(ii) Different plaintiffs would be required to represent the subclasses.**

137. Each subclass would require a separate representative plaintiff with a litigation plan who would fairly represent the interests of the subclass.[173]

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172 *Arora*, *supra*, ¶ 391.
173 *CPA*, s. 5(2).

## PART IV - RELIEF REQUESTED

138. There is no basis to believe that the proposed class proceeding is necessary or in the interests of the proposed class. The defendants submit that it would not further the interests of access to justice, behaviour modification or judicial economy. The defendants therefore ask this Court to dismiss the plaintiff's motion for certification, with costs.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 13th day of April, 2017

Laura K. Fric

Lawrence Ritchie

Robert Carson

# TAB A

## SCHEDULE "A"

## LIST OF AUTHORITIES

1. *AIC Limited v. Fischer*, [2013] 3 S.C.R. 949
2. *Arora v. Whirlpool Canada LP*, 2012 ONSC 4642; aff'd on other grounds 2013 ONCA 657
3. *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (C.A.)
4. *Dine v. Biomet Inc.*, 2015 ONSC 7050, leave to appeal to Div. Ct. refused, 2016 ONSC 4039
6. *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443, leave to appeal to SCC refused, [2012] SCCA No. 326
7. *Grace v. Fort Erie (Town)*, [2003] O.J. No. 3475 (S.C.J.)
8. *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158
9. *Hughes v. Sunbeam*, [2002] O.J. No 3457 (C.A.), leave to appeal to SCC refused, [2002] SCCA No. 446
10. *Lauzon v. Canada (Attorney General)*, 2014 ONSC 2811; aff'd 2015 ONSC 2620 (Div. Ct.)
11. *Loveless v. Ontario Lottery and Gaming Corp.*, 2011 ONSC 4744
12. *Markson v. MBNA Canada Bank*, 2007 ONCA 334
13. *Mouhteros v. DeVry Canada Inc.*, [1998] O.J. No. 2786 (Gen. Div.)
14. *Penney v. Bell Canada*, 2010 ONSC 2801
15. *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, [2013] 3 S.C.R. 477
16. *Summitt Energy Management Inc. v. Ontario (Energy Board)*, 2013 ONSC 318 (Div. Ct.)
17. *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*, 2013 SCC 58
18. *Williams v. Mutual Life Assurance Co; Zicherman v. Equitable Life Insurance Co. of Canada (appeal by Kumar)*, [2003] O.J. No. 1160 (C.A.)
19. *Vaugeois v. Budget Rent-A-Car of B.C. Ltd.*, 2017 BCCA 111
20. Ron W. Clark, Scott A. Stoll, and Fred D. Cass, *Ontario Energy Law: Electricity* (Markham: LexisNexis Canada Inc., 2012)
21. Warren K. Winkler, et al., *The Law of Class Actions in Canada* (Toronto: Thomson Reuters, 2014)

# TAB B

## SCHEDULE "B"

## STATUTES & REGULATIONS

*Class Proceedings Act*, 1992, S.O. 1992, c. 6, ss. 5(1)(2), 24(1)

**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. 1992, c. 6, s. 5 (1).

**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. 1992, c. 6, s. 5 (2).

[...]

**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. 1992, c. 6, s. 24 (1).

[...]

***Electricity Act*, 1998, S.O. 1998, c. 15, Sched. A, s. 48.3**

**Office of the ombudsman**

**48.3** The board of directors of Hydro One Inc. shall appoint an ombudsman for Hydro One Inc. and its subsidiaries to act as a liaison with customers and shall establish procedures for the ombudsman to inquire into and report to the board of directors of Hydro One Inc. on matters raised with the ombudsman by or on behalf of customers. 2015, c. 20, Sched. 9, s. 4.

***Ontario Clean Energy Benefit Act, 2010*, S.O. 2010, C. 26, Sched. 13**

**Purpose**

1. The purpose of this Act is to provide financial assistance in respect of electricity costs. 2010, c. 26, Sched. 13, s. 1.

[...]

**Financial assistance**

4. (1) Subject to subsection (1.1), a consumer who has an eligible account during a billing period is entitled to receive financial assistance in respect of the cost of electricity during the billing period in an amount equal to 10 per cent of the base invoice amount for the billing period in respect of the eligible account. 2010, c. 26, Sched. 13, s. 4 (1); 2012, c. 8, Sched. 38, s. 1 (1).

**Maximums**

(1.1) A consumer is entitled to receive financial assistance under subsection (1) in accordance with the following rules:

1. A consumer (except a consumer described in paragraph 2) is entitled to receive financial assistance in respect of the cost of a maximum of 3,000 kilowatt hours of electricity per eligible account per month, as determined in accordance with the regulations.

[...]

***Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B, ss. 1(1), 79, 112.3(1), 19(6)**

**Board's objectives, electricity**

**1** (1) The Board, in carrying out its responsibilities under this or any other Act in relation to electricity, shall be guided by the following objectives:

1. To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.

...

[...]

**Jurisdiction exclusive**

**19** (6) The Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this or any other Act. 1998, c. 15, Sched. B, s. 19 (6).

[...]

**Rural or remote consumers**

**79** (1) The Board, in approving just and reasonable rates for a distributor who delivers electricity to rural or remote consumers, shall provide rate protection for those consumers or prescribed classes of those consumers by reducing the rates that would otherwise apply in accordance with the prescribed rules. 1998, c. 15, Sched. B, s. 79 (1).

***Ombudsman Act*, RSO 1990, c O.6, ss. 14(1), 14(2)**

**Function of Ombudsman**

14. (1) The function of the Ombudsman is to investigate any decision or recommendation made or any act done or omitted in the course of the administration of a public sector body and affecting any person or body of persons in his, her or its personal capacity. R.S.O. 1990, c. O.6, s. 14 (1); 2014, c. 13, Sched. 9, s. 6 (1).

**Investigation on complaint**

(2) The Ombudsman may make any such investigation on a complaint made to him or her by any person affected or by any member of the Assembly to whom a complaint is made by any person affected, or of the Ombudsman's own motion. R.S.O. 1990, c. O.6, s. 14 (2).

# TAB C

## SCHEDULE "C"
## REASONS THE PROPOSED COMMON ISSUES CANNOT BE CERTIFIED

| Plaintiff's Proposed Common Issue | Reason It Cannot Be Certified |
|---|---|
| **Billing Issues** | |
| *(1) & (5). [Was it a term of the class members' contracts that the defendants / do the defendants owe the class a duty of care to ensure that the defendants]:*<br><br>*(a) employ a billing system that accurately [and reliably] bills customers for the amount of electricity actually consumed?*<br><br>*(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?* | Not a necessary ingredient of each class member's claim. Few, if any, customers have a claim and, by framing the issues on a "systemic" basis, the plaintiff made the issues irrelevant for any class members who experienced billing issues caused by factors other than the CIS. The answers to these issues would therefore not advance the litigation for the class (¶ 75-83).<br><br>(Moreover, framing the issues in this way burdens class members as to what they must prove in individual inquiries: the customers must ultimately prove that it was the CIS that caused their billing issues, rather than human error or other idiosyncratic factors like equipment malfunction. (¶ 81, 122)) |
| *(2) & (6). Did the defendants breach the standard of care [or the terms of the contract]?* | Cannot be answered on a class-wide basis. It requires individual inquiries into, among other things, the type of customer, whether the customer experienced a billing issue, the nature of the billing issue, and its impact (¶ 78-83). The different billing issues did not have a "common impact" (¶ 79).<br><br>Even if a customer experienced a billing issue, it is impossible to know whether it was a breach unless you assess the individual cause and effect of the billing issue. For example, if a retailer provided an incorrect rate to Hydro One, and the customer received an incorrect bill as a result, that is not necessarily a breach by Hydro One (¶ 81-83). |
| *(3). [...] did the breach of the defendants' standard of care cause damages to the class?* | Cannot be answered on a class-wide basis. It requires individual inquiries into, among other things, the nature of the billing issue, its cause, and its effect on the customer's bill. Some billing issues did not cause loss (¶ 76-80). In any event, there is no basis in fact for this common issue because there is no evidence that any customer has suffered damages caused by the alleged breaches. |
| *(8). Were the defendants enriched?* | Cannot be answered on a class-wide basis. There is no workable methodology to assess any of these issues. They require individual inquiries into the customer's circumstances including, among other things, whether the customer experienced a billing issue, the cause, whether the customer paid the bills, whether the customer is "out of pocket", etc. |
| *(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?* | |

| | |
|---|---|
| **Customer Service** | |
| *(1)(c). Do the defendants owe the class a duty of care to take reasonable steps to ensure that they employ a system or 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?* | This issue is not a significant ingredient of each class member's claim. It will not advance the litigation for any class members except possibly those who, at a minimum, made an inquiry, received an inadequate response, and suffered compensable harm (¶ 101-103).<br><br>Hydro One's regulatory obligations vary based on the type of customer and nature of the inquiry. (¶ 102).<br><br>The three distributors operated distinct customer service departments, and Hydro One Inc. does not have customers or provide customer service (¶ 15). |
| *(5)(c). Was it a term of class members' contracts [...] that the defendants will 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?* | |
| *(5)(d). Was it a term of class members' contracts [...] that the defendants will observe a duty of good faith and fair dealing with customers?* | |
| *(2). Did the defendants breach the standard of care? If so, how?* | Cannot be answered on a class-wide basis. It requires individual inquiries into, among other things, the type of customer, the nature of the inquiry, and the response (¶ 101). |
| *(6). Were the terms of the contract between the defendants and the class breached?* | |
| *(3). [...] did the breach of the defendants' standard of care cause damages to the class?* | Cannot be answered on a class-wide basis. It requires individual inquiries into the customer's interactions with Hydro One and their impact (¶ 101). |
| **Aggregate Damages** | |
| *(4), (7) & (10). [...] can damages [for billing issues] be assessed on an aggregate basis?* | Plaintiff has not met the prerequisites (¶ 84) or put forward expert evidence to support a workable methodology based on statistical sampling (¶ 85-88). Further, the proposed methodology is flawed and would yield an inaccurate result (¶ 89-99). |
| *(4), (7) & (10). [...] can damages [for customer service] be assessed on an aggregate basis?* | No methodology proposed. |
| **Punitive Damages** | |
| *(13). Should the defendants pay punitive damages? If so, in what amount, and to whom?* | Punitive damages are barred by the Distribution System Code and the Conditions of Service (¶ 104-105). And it would be premature to certify a common issue because liability, causation, and or damages cannot be determined on a class-wide basis (¶ 105, note 129). |

| | | | |
|---|---|---|---|
| **BILL BENNETT**<br>Plaintiff | and | **HYDRO ONE INC. ET AL.**<br>Defendants | Court File No: CV-15-535019-00CP |

*ONTARIO*
**SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT TORONTO

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