CITATION: Bennett v. Hydro One Inc., 2017 ONSC 7065
COURT FILE NO.: CV-15-535019CP
DATE: 20171128

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
BILL BENNETT Plaintiff	*Kirk M. Baert, Garth Myers,* and *Ian C. Matthews* for the Plaintiff
– and –	
HYDRO ONE INC., HYDRO ONE BRAMPTON NETWORKS INC., HYDRO ONE REMOTE COMMUNITIES INC., NORFOLK POWER DISTRIBUTION INC., and HYDRO ONE NETWORKS INC. Defendants	*Laura K. Fric, Lawrence Ritchie,* and *Robert Carson* for the Defendants
Proceeding under the *Class Proceedings Act, 1992*	**HEARD**: November 20 and 22, 2017

PERELL, J.

REASONS FOR DECISION

A. Introduction

[1] It is known that because of a malfunctioning and a negligently implemented and administered customer information system ("CIS"), which was rolled out in 2013, Hydro One Networks undercharged some and overcharged some of its 1.3 million customers. Undercharging and overcharging could also have occurred for causes unrelated to the CIS, including smart meters that malfunctioned in measuring consumption or in communicating the measurements of consumption.

[2] Pursuant to the *Class Proceedings Act, 1992*,[1] Bill Bennett, one of Hydro One Networks' customers, on behalf of all of the customers, sues Hydro One Networks Inc., Hydro One Inc., Hydro One Brampton Networks Inc., Hydro One Remote Communities Inc., and Norfolk Power Distribution Inc. (collectively, "Hydro One Networks").

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[1] S.O. 1992, c. C.6.

[3] Mr. Bennett advances claims for breach of contract, negligence, and unjust enrichment on behalf of the Hydro One Network's customers who were overcharged. He seeks aggregate damages of $100 million, which he submits will obviate the need for any Class Member to prove that they are owed money by Hydro One Networks. He also seeks punitive damages of $25 million.

[4] In bringing his action, Mr. Bennett acknowledges that Hydro One Networks may attempt to set off or counterclaim against the Class Members who have no claim but who underpaid for the electricity they received. If Hydro One Networks were to advance counterclaims, Mr. Bennett would be a candidate to be not only a representative plaintiff but also a representative defendant.

[5] As a proposed representative plaintiff, Mr. Bennett moves for certification of his action as a class action. In my opinion, however, his action fails to satisfy the common issues and preferable procedure criteria for certification. Accordingly, for the reasons that follow, I dismiss the certification motion.

B. Factual and Procedural Background

1. Hydro One Networks

[6] Hydro One Inc. is a holding company that has no customers and no operations. It is a wholly-owned subsidiary of Hydro One Limited, whose shares trade on the Toronto Stock Exchange. The Province of Ontario owns 70.1% of the shares with the balance publicly owned.

[7] Hydro One Inc. owns: (1) Hydro One Networks Inc., which is an electricity distributor; (2) Hydro One Brampton Networks Inc., another electricity distributor, against whom the action has been discontinued; (3) Hydro One Remote Communities Inc., which distributes electricity to 21 northern communities and which has a discrete customer service and billing department from Hydro One Networks; and (4) Norfolk Power Distribution Inc., which up until September 2015, distributed electricity to about 18,000 customers, after which it ceased carrying on business and its operations were integrated into Hydro One Networks.

[8] Mr. Bennett pleads that the Defendants operate as a single economic unit. This is a contested fact, but the Defendants submit that Mr. Bennett causes of action are against only Hydro One Networks because Hydro One Inc. is not an operating company and because Hydro One Remote Communities Inc. and Norfolk Power Distribution Inc.'s customers were not impacted by the problems described below.

[9] The unnecessary joinder of these Defendants may be true, but this is a factual matter that goes to the defence of Mr. Bennett's action and not to the certification of the action. I am, therefore, for the purposes of the certification motion treating the Defendants as a single entity under the name Hydro One Networks.

[10] Hydro One Networks is Ontario's largest electricity transmission and distribution company and supplies residences, businesses, industries, and municipal utilities. It has approximately 1.3 million customers, approximately 25% of Ontario marketplace. It is registered as a distribution company under the *Electricity Act, 1998*,[2] and is regulated by the Ontario

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[2] S.O. 1998, c. 15, Sch. A.

Energy Board ("OEB") pursuant to the *Ontario Energy Board Act, 1998*.[3]

[11] Hydro One Networks' standard contract with its customers is known as its Conditions of Service. The contractual terms are informed by the Distribution System Code and the Retail Settlement Code promulgated by the OEB, which sets the minimum standards that must be met by every electricity distributor in carrying out its operations. The OEB requires Hydro One Networks to comply with a Distribution System Code and the Retail Settlement Code.

[12] Under s. 7.11 of the Distribution System Code, a distributor must issue an accurate bill to each of its customers and this requirement must be met at least 98 percent of the time on a yearly basis. A bill is accurate if it contains correct customer information, correct meter readings, and correct rates that result in an accurately calculated bill. This provision of the Distribution System Code was introduced in 2015, and Mr. Bennett relies on this provision to submit that it is an express term of the contract between Hydro One Networks and its customers that Hydro One Networks charges accurately for the electricity consumed. In any event, he submits that it is an implied term that Hydro One Networks will accurately charge its customers for the electricity they use.

[13] Pursuant to ss. 7.1.3, 7.2.4 and 7.3.3 of the Retail Settlement Code, a distributor is obliged to respond to customer inquiries regarding meter accuracy, distribution rates, and bill calculation errors. A distributor must adhere to certain protocols with respect to responding to overbilling or under-billing.

[14] The Conditions of Service contract states that Measurement Canada has jurisdiction, under the *Electricity and Gas Inspection Act*,[4] in a dispute between Hydro One Networks and its customer where a meter is in question.

[15] Section 1.9 of the Conditions of Service adopts s. 2.2.2. of the Distribution System Code that states that a distributor shall not, under any circumstances, be liable for punitive damages: *i.e.*, section 2.2.2 states:

> 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.

[16] Hydro One Networks' distribution business earns revenues by charging rates that are approved by the OEB. There are numerous rate classes depending upon types of user (*e.g.* residential, seasonal, general service) territory of distribution, time of use (off-peak, mid-peak, on-peak), and quantity of consumption. Some customers are billed monthly, some quarterly, some annually. There are a variety of billing plans including: "budget billing," where the charges are fixed monthly over the year and then adjusted at billing year end; "retailer billing," where the customer contracts with a retailer, e.g. Direct Energy, but Hydro One Networks sends the bill; and "summary billing," where commercial customers receive one consolidated bill for all their locations. Most residential customers are billed on time-of-use rates, but about 150,000 customers are billed on tiered rates, where there is a threshold rate and then another rate for additional consumption.

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[3] S.O. 1998, c. 15, Sch. B.
[4] R.S.C. 1985, c E-4

[17] With some exceptions, Hydro One Networks' customers are required to have wireless smart metering systems. For billing purposes, these smart meters measure, record, and then broadcast the consumption of electricity to Hydro One Networks. When a customer's smart meter fails to communicate, Hydro One Networks typically issues an estimated bill.

[18] Hydro One Networks has a customer relations centre to respond to customers' complaints about improper billing.

2. The Ontario Energy Board

[19] Because the OEB is part of the factual background to Mr. Bennett's proposed class action and because the OEB's duties and powers are relevant to the analysis of the preferable procedure criterion, discussed below, it is necessary to describe the role of the OEB as a public sector regulator, and, in particular, it is necessary to focus on its jurisdiction to resolve complaints about the services provided by distributors such as Hydro One Networks and the OEB's jurisdiction to enforce compliance with its directives as a regulator.

[20] Under the *Ontario Energy Board Act, 1998*, in carrying out its responsibilities, the OEB shall be guided by the objective to protect the interests of consumers with respect to prices and the adequacy reliability and quality of electricity service.[5]

[21] A person may not own or operate a distribution system without a license granted by the OEB.[6] The OEB may prescribe the conditions to a license.[7] The OEB may require conditions in a license that govern the conduct of a distributor and its affiliates, specify the methods to determine rates, and specify performance standards.[8] The OEB may incorporate codes as conditions of a license, including the Distribution System Code and the Retail Settlement Code.[9] A distributor may not charge for electricity except in accordance with an order of the OEB.[10]

[22] The OEB may receive complaints concerning conduct that may be in contravention of the Act and it may make inquiries, gather information, and attempt to mediate or resolve complaints.[11] The OEB may appoint inspectors who, among other things, may require a licensee to provide documents, records or information.[12] An inspector is empowered to enter any place that the inspector reasonably believes is likely to contain documents or records without a warrant to conduct inspections.[13] The chair of the OEB may appoint investigators.[14] Upon application by an investigator, a justice of the peace may issues a search warrant to be exercised by the investigator.[15]

[23] The OEB may make compliance orders.[16] If the OEB is satisfied that a person has

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[5] S.O. 1998, c. 15, Sched. B, s.1(1) para. 1.
[6] S.O. 1998, c. 15, Sched. B, s. 57 (a).
[7] S.O. 1998, c. 15, Sched. B, s. 70(1).
[8] S.O. 1998, c. 15, Sched. B, s. 70(2).
[9] S.O. 1998, c. 15, Sched. B, s. 70.1.
[10] S.O. 1998, c. 15, Sched. B, s. 78.
[11] S.O. 1998, c. 15, Sched. B, s. 105.
[12] S.O. 1998, c. 15, Sched. B, s. 107.
[13] S.O. 1998, c. 15, Sched. B, s. 108.
[14] S.O. 1998, c. 15, Sched. B, s. 112.1.
[15] S.O. 1998, c. 15, Sched. B, s. 112.0.2.
[16] S.O. 1998, c. 15, Sched. B, Part VII.1.

contravened or is likely to contravene an enforceable provision under the Act, the OEB may make an order requiring the person to comply and to take such action as the OEB may specify to remedy a contravention that has occurred.[17] If the OEB is satisfied that a person with a licence has contravened the Act, the OEB may impose an administrative penalty[18] or may make an order suspending or revoking the licence.[19] A person may give the OEB a written assurance of voluntary compliance, which has the same force and effect as an order of the OEB.[20]

[24] The OEB has in all matters within its jurisdiction authority to hear and determine all questions of law and of fact.[21] The OEB has the jurisdiction to hold hearings and make orders.

[25] The OEB has a call center to receive complaints about the distributors that it regulates, and it directs these complaints to the distributor for resolution. As noted above, the OEB has a compliance and enforcement process if the complaint is not resolved between the consumer and the distributor.

[26] Typically for customer and distributor disputes, if the OEB's investigation of the complaint is favourable to the customer, the complaint is resolved by a voluntary compliance order. The customer, however, has no right to initiate any further proceedings if not satisfied with the outcome of the OEB's investigation. If the distributor does not agree to a voluntary compliance order, the OEB may direct a hearing where it has the power to make a compliance order.

3. The Botched Cornerstone Project

[27] In 2006, Hydro One Networks began a four-phase business $180 million project, known as Cornerstone, which would replace Hydro One Networks' business processes and software applications. The fourth and final phase, which commenced in 2011, was to replace the customer information system ("CIS") for billing and customer service. The CIS is a software program that interacts with external systems to obtain customers' electricity usage data and the other information necessary to prepare bills.

[28] In May 2013, Hydro One Networks launched a new a CIS. The launch was a service provider and public relations disaster. Some customers did not receive a bill for extended periods of time. Other customers received incorrect bills. Most of the overcharges were small but some were gargantuan errors. Some customers, in a problem that Hydro One Networks attributes not to the CIS but to communications failures in the smart meter network in rural and remote parts of Ontario, received estimated bills that were followed by "catch up" bills that sometimes were very high and very burdensome.

[29] Thus, some of Hydro One Networks' customers experienced no bills, others persistent estimated bills, others catch-up bills, and others incorrect bills.

[30] There were also customers who were undercharged because of the botched CIS. Hydro's evidence is that the undercharges exceeded the overcharges. Mr. Bennett's position was that it remains to be determined the extent of overcharges and undercharges. Hydro One Networks,

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[17] S.O. 1998, c. 15, Sched. B, 112.3.
[18] S.O. 1998, c. 15, Sched. B, s. 112.5.
[19] S.O. 1998, c. 15, Sched. B, s. 112.4.
[20] S.O. 1998, c. 15, Sched. B, s. 112.7.
[21] S.O. 1998, c. 15, Sched. B, s.19(1).

however, submits that the very high majority of Hydro One Networks customers were not affected by the new CIS. It submits that those affected amounted to about 7% of its clientele. And it submits that there are no ongoing problems with the CIS, all of which have been fixed. These points are disputed by Mr. Bennett.

[31] In any event, the problems of the introduction of the new CIS caused a public storm of protest and anger. The Ontario Ombudsman, who under s. 14 (1) of the *Ombudsman Act*[22] is empowered to investigate the decisions of a public sector body, received an unprecedented number of complaints. On February 4, 2014, the Ontario Ombudsman, announced that he would commence an investigation about the complaints pursuant to s. 14(2) of the *Ombudsman Act*, which empowers the Ombudsman to make an investigation.

[32] The Ombudsman received over 10,500 complaints of which 3,735 were forwarded to Hydro One Networks. The Ombudsman's investigation lasted for 15 months. The Ombudsman's team interviewed 190 people and reviewed more than 100,000 emails and more than 23,000 pages of documents regarding the CIS system, its rollout and its functioning. The Ombudsman intervened to resolve approximately 3,700 complaints.

[33] While the Ombudsman's investigation was ongoing, in March 2014, Hydro One Networks sent its customers a letter apologizing for its billing and customer service issues.

[34] While the Ombudsman's investigation was ongoing, Hydro One Network's Board of Directors engaged PriceWaterhouseCoopers LLP ("PwC") to perform an independent review.

[35] In December 2014, PwC issued a report. The report found that from the outset, the new CIS was causing a higher than expected number of estimated bills, billing exceptions, and no-bills, and as these billing exceptions were remediated, one consequence was that there were large catch-up bills that generated excessive bank account withdrawals, further inquiries and complaints, cancelled rebills, and refund cheques. The authors of the PwC report stated that affected customers were not given an adequate response to their inquiries.

[36] Hydro One Networks accepted PwC's findings about the numerous errors made in implementing the CIS and management took steps to remedy the problems.

[37] The problems of the CIS launch also came to the attention of the OEB. The OEB monitored the billing issues and Hydro One's response. Throughout the period of the Ombudsman's investigation, Hydro One Networks met regularly with the OEB staff.

[38] Hydro One Networks established several teams to respond to the billing complaints and to report back to the Ombudsman. If the Ombudsman's office was satisfied with the resolution, the Ombudsman's file for the complaint was closed. Hydro One Networks' stated that all the files eventually were closed.

[39] It is Hydro One Networks' evidence that it responded and resolved all of the complaints about billing inaccuracies and that no customer has been overcharged. It submitted that it addressed all the complaints received from the Ombudsman and all other sources. That all of the problems had been resolved was disputed, however, by Mr. Bennett. He submitted that his complaint was not resolved and the full extent of the harm caused by the botched CIS remains to be determined.

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[22] R.S.O. 1990, c O.6.

[40] In May 2015, the Ombudsman's released a scolding and scalding report. He concluded, among other things, that thousands of customers were affected by a variety of defects that appeared after the CIS was introduced in May 2013. The Ombudsman reported that the CIS defects caused erroneous automatic withdrawals and inaccurate estimated bills. Because of the inept introduction of the CIS, more than 90,000 customers bills were delayed for months. The Ombudsman concluded that because of the defects in the system, Hydro One Networks issued a flurry of multiple invoices and huge "catch-up" bills, leaving customers frustrated and confused. He noted that many customers had large sums withdrawn automatically from their bank accounts without notice or explanation. The Ombudsman reported that Hydro One Networks identified 32,766 inaccurately billed accounts. The average overcharge was $26.32 ($504,410 in total). He also concluded that Hydro One Networks' call centre and its in-house customer relations centre were not properly trained to respond to the flood of calls and complaints and the service provided was rude, insensitive, and substandard. The Ombudsman reported that when faced with negative publicity, Hydro One's response was irresponsible and instead of acknowledging the tens of thousands of billing issues, it deflected criticism with spin, concealment, and misleading and upbeat messages.

[41] In his report, the Ombudsman made 65 recommendations all of which were subsequently accepted and implemented by Hydro One Networks. Indeed, some had been implemented before the Ombudsman's Report. Hydro One Networks stated that it spent more than $88 million to improve and address issues about the CIS, including improvements to the call centre and technical fixes of the CIS. It paid more than $12 million in goodwill credits to customers.

[42] In the fall of 2015, the Ontario government established a Hydro One Networks Ombudsman that operates independently of Hydro One Networks' management and who reports to the Board of Directors. Hydro One Networks Ombudsman oversees a complaints resolution process.

[43] For the purposes of the certification motion, Mr. Bennett retained Rajesh Gurusamy as an expert witness. Mr. Gurusamy is an expert in designing, configuring, customizing, planning and implementing systems like Hydro One Networks' CIS. He opined that Hydro One Networks' project was seriously flawed and resulted in the volumes of delayed or erroneous bills being produced, causing financial problems, understandable stress and lingering dissatisfaction amongst customers. He opined that Hydro One Networks breached various generally-accepted standards of care during every phase of its CIS Replacement project, including the post-implementation periods. He said that there was inadequate project scope management, reckless compromises to the planned testing strategy; and premature implementation of a "Go-Live" decision taken with no proof of readiness. He opined that the billing problems likely persist to this day.

4. Mr. Bennett's Personal Cause of Action

[44] Mr. Bennett has a cottage near the town of Gravenhurst. He is a customer of Hydro One Networks with a smart meter, and he was enrolled in the Budget Billing Payment Plan.

[45] In October 2011, the communications component on the smart meter at Mr. Bennett's cottage malfunctioned and it stopped transmitting the data it was collecting. It is to be observed that this problem has nothing directly to do with the CIS malfunctioning.

[46] During the period when the meter was malfunctioning, Mr. Bennett received estimated bills based on his historical usage. However, when the meter was examined, it was determined that Mr. Bennett had consumed more electricity than he had been billed. He received a "catch-up" bill, which due to a backlog at Hydro One Networks was not received until March 2014.

[47] On April 6, 2015, Mr. Bennett received 39 more revised bills for the period between October 2011 and February 2015. The bills indicated that he owed Hydro One Networks $2,587.69.

[48] Mr. Bennett complained about the billing, and he sought assistance with respect to his customer service issues from the Ontario Ombudsman, the OEB, the Minister of Energy, and his local MPP. Mr. Bennett was not satisfied with their responses, and his evidence was that "the complete and utter fiasco that I have experienced since the implementation of Hydro One's new billing and customer information system, and the mismanagement of my account, remains unresolved."

[49] In October 2015, Hydro One Networks replaced the defective meter at Mr. Bennett's cottage.

[50] In 2015, Hydro One gave Mr. Bennett credits of $1,345.40 and $567.12.

5. Mr. Bennett's Class Action

[51] On August 24, 2015, Mr. Bennett commenced a proposed class action. He sued the Defendants for negligence, breach of contract, and unjust enrichment due to the Defendants' alleged failure to properly plan for and implement a customer information system.

[52] Mr. Bennett brought his action on behalf of himself and a class of all persons and entities, who purchased electricity from Hydro One between May 2013 and the date of the certification order.

6. The Aggregate Damages Issue

[53] Mr. Bennett contends that with the use of statistical evidence there is a methodology by which the Class Members' claims can be determined in the aggregate. Mr. Bennett retained Errol Soriano, to provide an opinion that aggregate damages could be certified as a common issue. Mr. Soriano is a Chartered Professional Accountant and a Chartered Business Valuator. His practice is dedicated exclusively to matters involving quantification of financial loss and the valuation of business interests.

[54] Mr. Soriano opined that he can calculate the loss suffered by the class on an aggregate basis with a reasonable degree of precision, based on the difference between the amounts invoiced by Hydro One to the class (the "Invoiced Amounts") and the dollar value of the amounts that the Defendants should have charged the class members in accordance with the stipulated rates and actual consumption (the "Proper Amounts"). He said that this calculation was possible because the Invoiced Amounts can be determined by Hydro One's business records and the customer categorization, consumption volumes, and applicable rates necessary to calculate the Proper Amounts are available from Hydro One's database records.

[55] Mr. Soriano also proposed a methodology, to be carried out in cooperation with a statistician, to calculate aggregate damages based on a statistically valid sample of the class

members. Mr. Soriano's opinion was that aggregate damages can be calculated by analyzing a statistically valid sample of the putative Class members and then extrapolating the results of the analysis to the population that is the putative class.

[56] In response to Mr. Soriano evidence, Hydro One Networks retained Vinita M. Juneja of the City of New York, a Managing Director of NERA Economic Consulting, an international firm that provides economic and financial analysis for complex legal and business matters. Dr. Juneja has a B.A. (University of Western Ontario) M.A. (Harvard University) and a Ph.D. (Harvard University) in economics. She provided an expert's report.

[57] Dr. Juneja opined that based on her review of the actual data, a sampling approach was inappropriate and problematic because a sample would need to reflect the many variations in the population and the various individualized issues that determine each invoice and using a sampling approach would likely result in more error and provide a biased and imprecise answer.

C. Discussion and Analysis

1. General Principles: Certification

[58] The court has no discretion and is required to certify an action as a class proceeding when the following five-part test in s. 5 of the *Class Proceedings Act, 1992* is met: (1) the pleadings disclose a cause of action; (2) there is an identifiable class of two or more persons that would be represented by the representative plaintiff; (3) the claims of the class members raise common issues; (4) a class proceeding would be the preferable procedure for the resolution of the common issues; and (5) there is a representative plaintiff who: (a) would fairly and adequately represent the interests of the class; (b) 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 (c) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[59] For an action to be certified as a class proceeding, there must be a cause of action shared by an identifiable class from which common issues arise that can be resolved in a fair, efficient, and manageable way that will advance the proceeding and achieve access to justice, judicial economy, and the modification of behaviour of wrongdoers.[23] On a certification motion, the question is not whether the plaintiff's claims are likely to succeed on the merits, but whether the claims can appropriately be prosecuted as a class proceeding.[24] The test for certification is to be applied in a purposive and generous manner, to give effect to the goals of class actions; namely: (1) providing access to justice for litigants; (2) encouraging behaviour modification; and (3) promoting the efficient use of judicial resources.[25]

[60] The purpose of a certification motion is to determine how the litigation is to proceed and not to address the merits of the plaintiff's claim; there is to be no preliminary review of the merits

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[23] *Sauer v. Canada (Attorney General)*, [2008] O.J. No. 3419 at para. 14 (S.C.J.), leave to appeal to Div. Ct. refused, [2009] O.J. No. 402 (Div. Ct.).
[24] *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 16.
[25] *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at paras. 26 to 29; *Hollick v. Toronto (City)*, 2001 SCC 68 at paras. 15 and 16.

of the claim.[26] However, the plaintiff must show "some basis in fact" for each of the certification criteria other than the requirement that the pleadings disclose a cause of action.[27] The "some basis in fact" test sets a low evidentiary standard for plaintiffs, and a court should not resolve conflicting facts and evidence at the certification stage or opine on the strengths of the plaintiff's case.[28] In particular, there must be a basis in the evidence to establish the existence of common issues.[29] To establish commonality, evidence that the alleged misconduct actually occurred is not required; rather, the necessary evidence goes only to establishing whether the questions are common to all the class members.[30] The representative plaintiff must come forward with sufficient evidence to support certification, and the opposing party may respond with evidence of its own to challenge certification.[31] Certification will be denied if there is an insufficient evidentiary basis for the facts on which the claims of the class members depend.[32]

[61] On a certification motion, evidence directed at the merits may be admissible if it also bears on the requirements for certification but, in such cases, the issues are not decided on the basis of a balance of probabilities but rather on that of the much less stringent test of "some basis in fact".[33] The evidence on a motion for certification must meet the usual standards for admissibility.[34] While evidence on a certification motion must meet the usual standards for admissibility, the weighing and testing of the evidence is not meant to be extensive, and if the expert evidence is admissible, the scrutiny of it is modest.[35] In a class proceeding, the close scrutiny of the evidence of experts should be reserved for the trial judge.[36]

2. Cause of Action Criterion

(a) General Principles: Cause of Action Criterion

[62] The first criterion for certification is that the plaintiff's pleading discloses a cause of action. The "plain and obvious" test for disclosing a cause of action from *Hunt v. Carey Canada,*[37] is used to determine whether a proposed class proceeding discloses a cause of action for the purposes of s. 5(1)(a) of the *Class Proceedings Act, 1992*. To satisfy the first criterion for

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[26] *Hollick v. Toronto (City)*, 2001 SCC 68 at paras. 28 and 29.
[27] *Hollick v. Toronto (City)*, 2001 SCC 68 at paras. 16-26.
[28] *Pro-Sys Consultants v. Microsoft*, 2013 SCC 57; *McCracken v. CNR Co.*, 2012 ONCA 445.
[29] *Dumoulin v. Ontario*, [2005] O.J. No. 3961 at para. 25 (S.C.J.); *Fresco v. Canadian Imperial Bank of Commerce*, [2009] O.J. No. 2531 at para. 21 (S.C.J.); *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42 at para. 140.
[30] *Pro-Sys Consultants v. Microsoft*, 2013 SCC 57 at para. 110.
[31] *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 22.
[32] *Williams v. Canon Canada Inc.*, 2011 ONSC 6571, aff'd 2012 ONSC 3992 (Div. Ct.); *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (C.A.), leave to appeal to S.C.C. ref'd [2003] S.C.C.A. No. 106; *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540 (C.A.), leave to appeal to S.C.C. ref'd, [2005] S.C.C.A. No. 545; *Taub v. Manufacturers Life Insurance Co.* (1998), 40 O.R. (3d) 379 (Gen. Div.), aff'd (1999), 42 O.R. (3d) 576 (Div. Ct.).
[33] *Hollick v. Toronto (City)*, 2001 SCC 68 at paras. 16-26; *Cloud v. Canada* (2004), 73 O.R. (3d) 401 at para. 50 (C.A.), leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50, rev'g (2003), 65 O.R. (3d) 492 (Div. Ct.).
[34] *Martin v. Astrazeneca Pharmaceuticals PLC,* 2012 ONSC 2744; *Williams v. Canon Canada Inc.*, 2011 ONSC 6571, aff'd 2012 ONSC 3992 (Div. Ct.); *Ernewein v. General Motors of Canada Ltd.* 2005 BCCA 540 (C.A.), leave to appeal to S.C.C. ref'd, [2005] S.C.C.A. No. 545; *Schick v. Boehringer Ingelheim (Canada) Ltd.*, 2011 ONSC 63 at para.13.
[35] *Griffin v. Dell Canada Inc.*, [2009] O.J. No. 418 at para. 76 (S.C.J.).
[36] *Stanway v. Wyeth Canada Inc.*, 2011 BCSC 1057, aff'd 2012 BCCA 260.
[37] [1990] 2 S.C.R. 959.

certification, a claim will be satisfactory, unless it has a radical defect or it is plain and obvious that it could not succeed.[38]

[63] In a proposed class proceeding, in determining whether the pleading discloses a cause of action, no evidence is admissible, and the material facts pleaded are accepted as true, unless patently ridiculous or incapable of proof. The pleading is read generously and it will be unsatisfactory only if it is plain, obvious, and beyond a reasonable doubt that the plaintiff cannot succeed.[39]

(b) **Analysis: Cause of Action Criterion**

[64] Save for the pleading of an express contract term, Hydro One Networks does not dispute that Mr. Bennett has pleaded reasonable causes of action for negligence, breach of contract, and undue influence, and it rather objects to the joinder of Hydro One Limited, Hydro One Remote Communities Inc., and Norfolk Power Distribution Inc., because it submits that there is no reasonable cause of action against these entities.

[65] I disagree with this facts-based argument, which is more suitable for a motion for summary judgment than for a certification motion. For the reasons set out above, the claims against Hydro One Limited, Hydro One Remote Communities Inc. and Norfolk Power Distribution Inc. satisfy the cause of action criterion notwithstanding Hydro One Networks' improper joinder argument.

[66] With respect to the cause of the action for breach of a term of an express contract, keeping in mind that the proposed class period begins in 2013, there is some traction to Hydro One Networks' argument that between 2013 and 2015, there was no express term of the Conditions of Service about accurate billing.

[67] However, since Hydro One's argument is more about the particulars of pleading claims and defences, and since Hydro One Networks concedes that it should correctly charge for electricity, and since deleting the allegation of an express term would change nothing about the viability of a breach of contract cause of action, practically speaking, in the context of a certification motion, Hydro One Networks' argument is a waste of breath argument that does not get in the way of my conclusion that Mr. Bennett's action satisfies the cause of action criterion.

3. Identifiable Class Criterion

(a) **Introduction**

[68] Mr. Bennett proposes the following class definition:

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[38] *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 at p. 679 (C.A.), leave to appeal to S.C.C. ref'd, [1999] S.C.C.A. No. 476; *176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 at para. 19 (S.C.J.), leave to appeal granted, 64 O.R. (3d) 42 (S.C.J.), aff'd (2004), 70 O.R. (3d) 182 (Div. Ct.).

[39] *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 25; *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 at para. 41 (C.A.), leave to appeal to the S.C.C. refused, [2005] S.C.C.A. No. 50, rev'g, (2003), 65 O.R. (3d) 492 (Div. Ct.); *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 at p. 469 (Div. Ct.).

> All persons and entities, other than the Excluded Persons, who purchased electricity from Hydro One between May 2013 and the date of the certification order in this action.
>
> "Excluded Persons" are the defendants, their current and former officers and directors, members of their immediate families, and their legal representatives, heirs, successors or assigns.

(b) **General Principles: Identifiable Class Criterion**

[69] The second certification criterion is the identifiable class criterion. The definition of an identifiable class serves three purposes: (1) it identifies the persons who have a potential claim against the defendant; (2) it defines the parameters of the lawsuit so as to identify those persons bound by the result of the action; and (3) it describes who is entitled to notice.[40]

[70] In *Western Canadian Shopping Centres v. Dutton*,[41] the Supreme Court of Canada explained the importance of and rationale for the requirement that there be an identifiable class:

> First, the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria.

[71] In identifying the persons who have a potential claim against the defendant, the definition cannot be merits-based.[42] In *Frohlinger v. Nortel Networks Corp.*[43] at para. 21, Justice Winkler, as he then was, explained why merits-based definitions are prohibited; he stated:

> 21. The underlying reason for each of these prohibitions is readily apparent. Merits-based class definitions require a determination of each class member's claim as a pre-condition of ascertaining class membership. Carrying that concept to its logical conclusion, it would mean that at the conclusion of a class proceeding, only those individuals who were successful in their claims would be members of the class and, therefore, bound by the result. Theoretically, unsuccessful claimants would not be "class members" and would be free to commence further litigation because s. 27(3) of the CPA, which states in part:
>
> > A judgment on common issues of a class or subclass binds every class member who has not opted out of the class proceeding ...,
>
> would not bind them or bar them from commencing further actions.

[72] In defining the persons who have a potential claim against the defendant, the definition, there must be a rational relationship between the class, the cause of action, and the common

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[40] *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Gen. Div.).

[41] 2001 SCC 46 at para. 38.

[42] *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 38; *Frohlinger v. Nortel Networks Corp.*, [2007] O.J. No. 148 at para. 21 (S.C.J.); *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (C.A.), leave to appeal to S.C.C. ref'd [2003] S.C.C.A. No. 106; *Keatley Surveying Ltd. v. Teranet Inc.*, 2012 ONSC 7120 at paras. 159-167.

[43] [2007] O.J. No. 148 (S.C.J.).

issues, and the class must not be unnecessarily broad or over-inclusive.[44] An over-inclusive class definition binds persons who ought not to be bound by judgment or by settlement, be that judgment or settlement favourable or unfavourable.[45] The rationale for avoiding over-inclusiveness is to ensure that litigation is confined to the parties joined by the claims and the common issues that arise.[46] The class should not be defined wider than necessary, and where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended.[47]

[73] A proposed class definition, however, is not overbroad because it may include persons who ultimately will not have a claim against the defendants.[48]

(c) **Analysis: Identifiable Class Criterion**

[74] In my opinion, Mr. Bennett's proposed class definition satisfies the identifiable class criterion. Without being merits-based, the proposed definition identifies the persons who have a potential claim against Hydro One Networks. The proposed definition defines the parameters of the lawsuit to identify those persons bound by the result of the action, and it describes those who are entitled to notice.

[75] Hydro One Networks, however, argues that the definition is over-inclusive or overbroad. Upon analysis, however, Hydro One Networks argument is directed more at the common issues criterion than it is at the identifiable class criterion.

[76] In other words, accepting Mr. Bennett's class definition, Hydro One Network's argument is that the definition, which is technically proper, does not rationally connect to the asserted common issues and, therefore, the definition is over-inclusive or overbroad. In still other words, Hydro One Networks' argument essentially is that the proposed definition does not confine the litigation to persons who can and should be bound by the proposed common issues.

[77] In my opinion, Hydro One Networks' arguments about overbreadth are best dealt with as part of the analysis of the common issues criterion. As Justice Winkler noted in *Frohlinger v. Nortel Networks Corp.*,[49] it is the element of commonality, which must be assessed on a case-by-case basis, that determines the viability of a class definition. In my opinion, since the overbreadth factor of a class definition is analytically connected to the commonality aspect of the common issues criterion, it should be analysed in the context of that criterion to which I am about to turn.

[78] Thus, I conclude that in the immediate case, the identifiable class criterion has been satisfied subject to Mr. Bennett satisfying the common issues criterion.

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[44] *Pearson v. Inco Ltd.* (2006), 78 O.R. (3d) 641 at para. 57 (C.A.), rev'g [2004] O.J. No. 317 (Div. Ct.), which had aff'd [2002] O.J. No. 2764 (S.C.J.).
[45] *Robinson v. Medtronic Inc.*, [2009] O.J. No. 4366 at paras. 121-146 (S.C.J.).
[46] *Frohlinger v. Nortel Networks Corp.*, [2007] O.J. No. 148 at para. 22 (S.C.J.).
[47] *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 21; *Fehringer v. Sun Media Corp.*, [2002] O.J. No. 4110 at paras. 12-13 (S.C.J.), aff'd [2003] O.J. No. 3918 (Div. Ct.).
[48] *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 at para. 10 (Gen. Div.) at para. 10; *Boulanger v. Johnson & Johnson Corp.*, [2007] O.J. No. 179 at para. 22 (S.C.J.), leave to appeal ref'd [2007] O.J. No. 1991 (Div. Ct.); *Ragoonanan v. Imperial Tobacco Inc.* (2005), 78 O.R. (3d) 98 (S.C.J.), leave to appeal ref'd [2008] O.J. No. 1644 (Div. Ct.); *Silver v. Imax Corp.*, [2009] O.J. No. 5585 at para. 103-107 (S.C.J.) at para. 103-107, leave to appeal to Div. Ct. refused 2011 ONSC 1035 (Div. Ct.).
[49] [2007] O.J. No. 148 at para. 24 (S.C.J.).

4. Common Issues Criterion

[79] Mr. Bennett proposes the following common issues:

Negligence

1. Do the Defendants owe the class a duty of care to take reasonable steps to ensure that they:

    (a) employ a billing system that accurately and reliably bills customers for the amount of electricity actually consumed;

    (b) employ a system or process to ensure that bills issued to customers accurately state the consumption of electricity upon which the bill is based; and/or

    (c) employ a system of process to ensure that they provide timely, effective, accurate and informed customer service that is responsive to questions posed by Class Members about meter accuracy, distribution rates and billing errors;

2. Did the Defendants breach the standard of care? If so, how?

3. If the answer to (2) is yes, did the breach of the Defendants' standard of care cause damages to the class?

4. If the answer to (3) is yes,

    (a) can damages be assessed on an aggregate basis?

    (b) if so, what is the quantum of aggregate damages owed to the Class Members?

Breach of Contract

5. Was it a term of Class Members' contracts with the Defendants that the Defendants will:

    (a) employ a billing system that accurately and reliably bills customers for the amount of electricity actually consumed;

    (b) employ a system or process to ensure that bills issued to customers accurately state the consumption of electricity upon which the bill is based;

    (c) employ a system of process to ensure that they provide timely, effective, accurate and informed customer service that is responsive to questions posed by Class Members about meter accuracy, distribution rates and billing errors; and/or

    (d) observe a duty of good faith and fair dealing with customers.

6. Were the terms of the contract between the Defendants the class breached?

7. If the answer to (6) is yes,

    (a) can damages be assessed on an aggregate basis?

    (b) if so, what is the quantum of aggregate damages owed to the Class Members?

Unjust Enrichment

8. Were the Defendants enriched?

9. If the answer to (8) is yes, were the Class Members correspondingly deprived?

10. If the answer to (9) is yes, was there a juristic reason for the Defendants' enrichment?

11. If the answer to (10) is no, can damages be assessed on an aggregate basis?

12. If the answer to (11) is yes, what is the quantum of aggregate damages owed to the Class Members?

Punitive Damages

13. Should the Defendants pay punitive damages? If so, in what amount, and to whom?

(a) General Principles: Common Issues

[80] The third criterion for certification is the common issues criterion. For an issue to be a common issue, it must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of each class member's claim.[50] The underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis of an issue that is a substantial ingredient of each class member's claim and thereby facilitate judicial economy and access to justice.[51] All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. The answer to a question raised by a common issue for the plaintiff must be capable of extrapolation, in the same manner, to each member of the class.[52] In *Pro-Sys Consultants v. Microsoft*,[53] the Supreme Court of Canada describes the commonality requirement as the central notion of a class proceeding which is that individuals who have litigation concerns in common ought to be able to resolve those common concerns in one central proceeding rather than through an inefficient multitude of repetitive proceedings.

[81] Where questions relating to causation or damages are proposed as common issues, the plaintiff must demonstrate with supporting evidence that there is a workable methodology for determining such issues on a class-wide basis.[54]

[82] An issue is not a common issue if its resolution is dependent upon individual findings of fact that would have to be made for each class member.[55] Common issues cannot be dependent upon findings which will have to be made at individual trials, nor can they be based on assumptions that circumvent the necessity for individual inquiries.[56] However, the commonality requirement does not mean that an identical answer is necessary for all the members of the class, or even that the answer must benefit each of them to the same extent; it is enough that the answer to the question does not give rise to conflicting interests among the members; success for one member must not result in failure for another.[57]

[83] The common issue criterion presents a low bar.[58] An issue can be a common issue even if

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[50] *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 18.

[51] *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at paras. 39 and 40

[52] *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 40; *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540 (C.A.), leave to appeal to S.C.C. ref'd, [2005] S.C.C.A. No. 545; *Merck Frosst Canada Ltd. v. Wuttunee*, 2009 SKCA 43 at paras. 145-46 and 160, leave to appeal to S.C.C. refused, [2008] S.C.C.A. No. 512; *McCracken v. CNR*, 2012 ONCA 445 at para. 183.

[53] 2013 SCC 57 at para. 106.

[54] *Pro-Sys Consultants v. Microsoft* 2013 SCC 57 at paras. 114-119; *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (C.A.), leave to appeal to S.C.C. ref'd [2003] S.C.C.A. No. 106.

[55] *Fehringer v. Sun Media Corp.*, [2003] O.J. No. 3918 at paras. 3, 6 (Div. Ct.).

[56] *Nadolny v. Peel (Region)*, [2009] O.J. No. 4006 at paras. 50-52 (S.C.J.); *Collette v. Great Pacific Management Co.*, [2003] B.C.J. No. 529 at para. 51 (B.C.S.C.), varied on other grounds (2004) 42 B.L.R. (3d) 161 (B.C.C.A.); *McKenna v. Gammon Gold Inc.*, [2010] O.J. No. 1057 at para. 126 (S.C.J.), leave to appeal granted [2010] O.J. No. 3183 (Div. Ct.), varied 2011 ONSC 3882 (Div. Ct.).

[57] *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1 at paras. 44–46.

[58] *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236 at para. 42 (C.A.); *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 at para. 52 (C.A.), leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50, rev'g (2003),

it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution.[59] Even a significant level of individuality does not preclude a finding of commonality.[60]A common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation.[61]

(b) **Common Issues No.'s 1 and 2 (Negligence)**

[84] The essence of common issues No.'s 1 and 2 is the proposition that Hydro One Networks breached the standard of care to provide bills that accurately charge for electricity. The underlying allegation is one of systemic negligence with the notion that for a variety of systemic reasons, including possibly erroneous programming and inadequate preparation and training, the specifics of which are generalized by the pleading of systemic negligence, there were a multitude of errors of different types that led to underbilling or overbilling. Mr. Bennett cannot yet specify whether the putative class members suffered or benefited from the systemic negligence associated with the CIS?

[85] This reliance on systemic negligence as opposed to a discrete common error that potentially could harm all the class members is a critical because it differentiates the case at bar from the precedent cases, most particularly, *Markson v. MBNA Canada Bank*[62] and *Fulawka v. Bank of Nova Scotia*,[63] upon which Mr. Bennett principally relies. The misplaced reliance on systemic negligence is the fatal flaw in the theory of commonality for the case at bar. Unlike some cases of systemic negligence, where the negligence produces a common harm, the case at bar produces no common harm but rather the alleged systemic negligence produces a multiplicity of errors some harmful, some neutral, and some even beneficial and a windfall to putative Class Members.

[86] In the case at bar, any dispute about the accuracy of the bills eventually requires an individual inquiry, and this individuality distinguishes this case from the illegal interest, overtime miscalculation, or price-fixing class action cases that rely on systemic misconduct or a conspiracy, because in those cases, the systemic misconduct produced a potentially common (singular) adverse consequence for the class members. In the immediate case, there is a multiplicity of errors and even taking the billing errors collectively, there is the prospect that some would have occurred regardless of the CIS. In some cases, simple human error might explain a billing error in a putative Class Member's individual case. The systemic common issues are not a substantial ingredient and may not even be an ingredient of the putative Class Members' claims of a billing error.

[87] In *Markson v. MBNA Canada Bank, supra,* Mr. Markson alleged that the combined effect

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65 O.R. (3d) 492 (Div. Ct.); *203874 Ontario Ltd. v. Quiznos Canada Restaurant Corp.*, [2009] O.J. No. 1874 (Div. Ct.), aff'd [2010] O.J. No. 2683 (C.A.), leave to appeal to S.C.C. refused [2010] S.C.C.A. No. 348.

[59] *Cloud v. Canada (Attorney General),* (2004), 73 O.R. (3d) 401 (C.A.), leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50, rev'g (2003), 65 O.R. (3d) 492 (Div. Ct.).

[60] *Hodge v. Neinstein*, 2017 ONCA 494 at para. 114; *Pro-Sys Consultants v. Microsoft,* 2013 SCC 57 at para. 112; *Western Canadian Shopping Centres Inc. v. Dutton,* 2001 SCC 46 at para. 54.

[61] *Harrington v. Dow Corning Corp.*, [2000] B.C.J. No. 2237 (C.A.), leave to appeal to S.C.C. ref'd [2001] S.C.C.A. No. 21.

[62] 2007 ONCA 334, leave to appeal to SCC ref'd [2007] S.C.C.A. No. 346.

[63] 2012 ONCA 1148, leave to appeal to S.C.C. ref'd [2012] S.C.C.A. No. 326.

of a flat fee and the interest rate charged by MBNA Canada Bank on credit card cash advances amounted to criminal rate of interest contrary to s. 347 of *Criminal Code*.[64] In *Markson*, the flat fee was charged in every transaction and all the class members were at risk of being charged a criminal rate of interest. In contrast, in the case at bar, there is no identified common cause for the billing errors that is necessarily connected to the CIS. In the case at bar, the proof of systemic negligence would not reveal whether the positive or negative billing errors were caused by improper classification of the consumer, improper classification of rates to the customer, improper application of the rates, improper calculation of consumption, human errors, software design errors, data input errors, or operational errors. In the case at bar, while it is true that all class members are at risk of being improperly charged, it requires an individual examination to determine whether the overcharge is explained by some defect connected to the CIS or is explained by some other defect not connected to the CIS; for example, a smart meter with a mechanical defect or a communications failure.

[88] In *Markson v. MBNA Canada Bank*, Justice Rosenberg for the Court of Appeal stated that the motions judge was undoubtedly correct that if a multitude of transactions had to be examined individually, the case would not be suitable for certification, but for the appeal, Mr. Markson had recast his case and for the first time submitted that s. 23 (statistical evidence) and s. 24 (aggregate assessment) offered a solution to the common issues problem, and Justice Rosenberg agreed that this was the solution to the common issues problem.[65] As I shall explain below, in the case at bar, sections 23 and 24 do not assist Mr. Bennett.

[89] Mr. Bennett submits that this identification of the source of error can be determined and can only be determined after documentary discovery and oral discoveries. He argues that the analysis of the experts, who will be able to compare the issued bills with the bills that ought to have been issued, will identify and aggregate the effect of the errors. Mr. Bennett denies that his proposed class action is in effect an audit, investigation, or fishing expedition to find as opposed to proving a cause of action, but in truth, that inquisitorial design is the essential nature of Mr. Bennett's systemic negligence claim. Such a design is not appropriate for a class action.

[90] Having regard to the common issue of systemic negligence that Mr. Bennett proposes, his proposed class definition is over-inclusive or overbroad. The prohibition against over-inclusion centers on the notion that there must be a rational connection between inclusion of the class member and the resolution of the common issues, which is the major operative goal of the class action procedure. If there is no connection, then the inclusion of the class member is arbitrary and the class action is overbroad, with the result that both the identifiable class and also the common issues criteria are not satisfied. If there is a connection between class membership and the common issue but the connection is not rational, then the putative class members should not be bound by the outcome of the class action, and, once again, the result is that both the identifiable class criterion and also the common issues criterion are not satisfied.

[91] Mr. Bennett's proposed class action has a class definition that upon analysis is overbroad. In the immediate case, the common issues of systemic negligence do not advance the class members' claims, which remains based on their individual circumstances on a case-by-case basis inside or even outside the operation of the CIS. In the case at bar, there is no rational relationship between the class and the cause of action for systemic negligence and thus it can be said that the

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[64] R.S.C. 1985, c. C-46.

[65] 2007 ONCA 334 at paras. 37-38, leave to appeal to SCC ref'd [2007] S.C.C.A. No. 346.

class definition is overbroad.

[92] Another way of understanding why the case at bar is different than *Markson v. MBNA Canada Bank* is to imagine that the *Markson* case was advanced as a systemic negligence case. Such a case would capture the illegal interest charges, but because of the over-generalization of attributing the harm to system negligence, the case would also capture other errors or illegal charges with the result that the common issues would want for commonality, aggregate damages would not be a possibility, and the case would be unmanageable and not a preferable procedure.

[93] *Fulawka v. Bank of Nova Scotia*,[66] was a case that included an allegation of a systemic breach. In that case, Mr. Fulawka sued the Bank of Nova Scotia for not paying overtime pay. It is to be noted that Mr. Fulawka's case against the Bank was not an overtime misclassification case like *McCracken v. Canadian National Railway*,[67] where the issue was whether employees entitled to overtime pay had been wrongly classified as management and not entitled to overtime pay, and there was thus no issue in the *Fulawka* case about entitlement to overtime pay; rather, the common issues in the *Fulawka* case centered on whether the Bank had systemically and unlawfully restricted the employees to the overtime pay for which they were entitled.

[94] In the *Fulawka* case, the Court of Appeal held that while there was no common issue about aggregate damages, there was a useful series of common issues about the systemic practices of the bank that allegedly denied the employees their overtime pay. Chief Justice Winkler, who wrote the judgment for the Court of Appeal, concluded that the common issues about systemic practices would advance both the class members' claims for individual payments and also the collective's claims for declaratory and injunctive relief. Mr. Bennett relies on the *Fulawka* case to argue for the productivity and utility of his proposed common issues on liability and declaratory relief.

[95] Although Mr. Bennett also relies on systemic wrongdoing to advance claims for monetary and non-monetary relief, the design of his proposed class action does not present a common issue about wrongdoing or about declaratory relief, but rather his proposed class action presents as an investigation about whether there are common causes for the billing irregularities. Mr. Bennett's proposed class action even includes the possibility that it will be discovered after documentary and oral discoveries and the work of the computer scientists that some of Hydro One Network's consumers have been misclassified, which as *McCracken v. Canadian National Railway* demonstrates is not an issue that can be said to be common across a class of putative class members.

[96] Upon analysis, the common issue of whether Hydro One Networks was systemically negligent is not a substantial ingredient of each member's claim and for some class members, the common issue of systemic negligence would be an ingredient of Hydro One Systems' potential counterclaim. All members of the class would not benefit from the successful prosecution of the action and indeed some would be potentially harmed if Hydro One were to assert a counterclaim.

[97] I conclude that common issues No.'s 1 and 2 do not satisfy the common issues criterion.

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[66] 2012 ONCA 1148, leave to appeal to S.C.C. ref'd [2012] S.C.C.A. No. 326.
[67] 2012 ONCA 445, rev'g 2010 ONSC 4520.

(c) **Common Issues No.'s 5 and 6 (Breach of Contract)**

[98] For similar reasons as those set out above, there is no common issue about breach of contract.

(d) **Common Issues No.'s 8, 9, and 10 (Unjust Enrichment)**

[99] For similar reasons as those set out above, there is no common issue about unjust enrichment.

(e) **Common Issues No. 3 (Causation of Damages)**

[100] For similar reasons as those set out above, there is no common issue about causation of damages. There is no basis in fact for concluding that causation can be established on a class-wide basis. The court needs to consider each class member's complaint to determine whether a particular billing issue was caused by the CIS or by idiosyncratic circumstances. The proposed common issues regarding causation of loss depend on individual findings of fact for each customer, and the answers cannot be extrapolated, in the same manner, to each class member

[101] I disagree with Mr. Bennett's argument that he has met the very low standard of showing a plausible methodology to prove that the systemic negligence caused damages to the class of consumers of Hydro One Networks. Mr. Bennett's expert witness, Mr. Soriano, has rather produced a plausible methodology to prove that the systemic negligence produced errors, some of which were of the opposite of showing causation of damages but rather might be a windfall to an individual putative class member.

(f) **Common Issues No.'s 4, 7, 11, and 12 (Aggregate Damages)**

[102] For similar reasons and for technical reasons, there is no common issues about aggregate damages (Common Issues No.'s 4, 7, 11, and 12).

[103] Section 24(1) of the *Class Proceedings Act, 1992* stipulates when the court may assess aggregate damages. Section 24(1) states:

> ***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.

[104] For an aggregate assessment of damages to be available no questions of fact or law other than those relating to the assessment of monetary relief must remain to be determined in order to establish the amount of the defendant's monetary liability. An antecedent finding of liability is required before resorting to the aggregate damages provision of the *Class Proceedings Act, 1992*, and if liability cannot be established through the common issues, then an aggregate damages

common issue cannot be certified.[68]

[105] In the case at bar, there inevitably will be individual issues trials to determine both liability and damages. There is no general experience of damages arising from the alleged systemic negligence or systemic breach of contract. In other words, the preconditions of paragraphs 24(1)(b) and (c) are not satisfied in the case at bar and, therefore, the aggregate damages issues are not certifiable as common issues.

[106] The case at bar is different from *Markson v. MBNA Canada Bank*, *supra*, where every customer of MBNA Canada Bank was exposed to the risk of suffering an illegal interest charge and where Mr. Markson might be able to prove that MBNA Canada violated s. 347 of the *Criminal Code* for some of those customers, after which resort could be had to sections 23 and 24 of the *Class Proceedings Act, 1992* to calculate the global damages figure.

[107] In the case at bar, every class member is not exposed to the risks of systemic negligence associated with the CIS. While, it might be possible, as proposed by Mr. Soriano, to calculate the aggregate of the deviation in Proper Amounts from the Invoiced Amounts, that deviation simply assumes or attributes the deviation as having been caused by systemic negligence associated with the CIS.

[108] In *Markson v. MBNA Canada Bank*, *supra,* in interpreting the operation of sections 23 and 24 of the *Class Proceedings Act, 1992*, Justice Rosenberg was concerned that the defendant MBNA Canada Bank should not be allowed to structure its affairs so as to avoid a possible class proceeding or to make it practically impossible to determine the extent of its misconduct. In the immediate case, the non-available of sections 23 and 24 does not arise from the same concern because it cannot be said that all putative class members are exposed to a common risk of a particular wrongdoing, and while a pleading of systemic negligence will in some cases avoid the necessity of individual issues trials, the case at bar is not such a case.

[109] Thus, the damages cannot be aggregated, and Common Issues No.'s 4, 7, 11, and 12 (Aggregate Damages) are not certifiable as common issues.

(g) **Common Issue No. 13 (Punitive Damages)**

[110] In cases where individual issues trials are inevitable, it has become *de rigueur* to certify the common issue of whether the defendant's conduct would justify an award of punitive damages but not to certify the issue of determining the amount of those damages. It is also normative that punitive damages standing alone cannot justify the certification of an action as a class proceeding.[69]

[111] In the case at bar, I shall not certify Common Issue No. 13 (Punitive Damages). The matter of punitive damages is peripheral and it stands alone as the only question that, technically speaking, is certifiable. Punitive damages alone cannot justify the certification of an action as a class proceeding.

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[68] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 131; *Fulawka v. Bank of Nova Scotia* 2012 ONCA 1148, leave to appeal to S.C.C. ref'd [2012] S.C.C.A. No. 326; *Kalra v. Mercedes Benz*, 2017 ONSC 3795.

[69] *Gariepy v. Shell Oil Co.*, [2002] O.J. No. 2766 (S.C.J.) at para. 75, aff'd [2004] O.J. No. 5309 (Div. Ct.); *Nadolny v. Peel (Region)*, [2009] O.J. No. 4006 (S.C.J.) at para. 104.

5. Preferable Procedure Criterion

(a) General Principles: Preferable Procedure

[112] Under the *Class Proceedings Act, 1992*, the fourth criterion for certification is the preferable procedure criterion. Preferability captures the ideas of: (a) whether a class proceeding would be an appropriate method of advancing the claims of the class members; and (b) whether a class proceeding would be better than other methods such as joinder, test cases, consolidation, and any other means of resolving the dispute.[70]

[113] In *AIC Limited v. Fischer*,[71] the Supreme Court of Canada emphasized that the preferability analysis must be conducted through the lens of judicial economy, behaviour modification, and access to justice. Justice Cromwell for the court stated that access to justice has both a procedural and substantive dimension. The procedural aspect focuses on whether the claimants have a fair process to resolve their claims. The substantive aspect focuses on the results to be obtained and is concerned with whether the claimants will receive a just and effective remedy for their claims if established. Thus, for a class proceeding to be the preferable procedure for the resolution of the claims of a given class, it must represent a fair, efficient, and manageable procedure that is preferable to any alternative method of resolving the claims.[72] Arguments that no litigation is preferable to a class proceeding cannot be given effect.[73] Whether a class proceeding is the preferable procedure is judged by reference to the purposes of access to justice, behaviour modification, and judicial economy and by taking into account the importance of the common issues to the claims as a whole, including the individual issues.[74]

[114] Relevant to the preferable procedure analysis are the factors listed in s. 6 of the *Class Proceedings Act, 1992*, which states:

> 6. The court shall not refuse to certify a proceeding as a class proceeding solely on any of the following grounds:
>
> 1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.
>
> 2. The relief claimed relates to separate contracts involving different Class Members.
>
> 3. Different remedies are sought for different Class Members.
>
> 4. The number of Class Members or the identity of each Class Member is not known.
>
> 5. The class includes a subclass whose members have claims or defences that raise common issues not shared by all Class Members.

[115] To satisfy the preferable procedure criterion, the proposed representative plaintiff must show some basis in fact that the proposed class action would: (a) be a fair, efficient and manageable method of advancing the claim; (b) be preferable to any other reasonably available

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[70] *Markson v. MBNA Canada Bank*, 2007 ONCA 334 at para. 69, leave to appeal to SCC ref'd [2007] S.C.C.A. No. 346; *Hollick v. Toronto (City)*, 2001 SCC 68.

[71] 2013 SCC 69 at paras. 24-38.

[72] *Cloud v. Canada (Attorney General) Cloud v. Canada*, (2004), 73 O.R. (3d) 401 at para. 52 (C.A.), leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50, rev'g (2003), 65 O.R. (3d) 492 (Div. Ct.).

[73] *1176560 Ontario Limited v. The Great Atlantic and Pacific Company of Canada Ltd.* (2002), 62 O.R. (3d) 535 at para. 45 (S.C.J.), aff'd (2004), 70 O.R. (3d) 182 (Div. Ct.).

[74] *Markson v. MBNA Canada Bank*, 2007 ONCA 334; *Hollick v. Toronto (City)*, 2001 SCC 68.

means of resolving the class members' claims; and (c) facilitate the three principal goals of class proceedings; namely: judicial economy, behaviour modification, and access to justice.[75]

[116] In considering the preferable procedure criterion, the court should consider: (a) the nature of the proposed common issue(s) and their importance in relation to the claim as a whole; (b) the individual issues which would remain after determination of the common issue(s); (c) the factors listed in the *Act*; (d) the complexity and manageability of the proposed action as a whole; (e) alternative procedures for dealing with the claims asserted; (f) the extent to which certification furthers the objectives underlying the *Act*; and (g) the rights of the plaintiff(s) and defendant(s).[76]

[117] The court must identify alternatives to the proposed class proceeding.[77] The proposed representative plaintiff bears the onus of showing that there is some basis in fact that a class proceeding would be preferable to any other reasonably available means of resolving the class members' claims, but if the defendant relies on a specific non-litigation alternative, the defendant has the evidentiary burden of raising the non-litigation alternative.[78] It is not enough for the plaintiff to establish that there is no other procedure which is preferable to a class proceeding; he or she must also satisfy the court that a class proceeding would be fair, efficient and manageable.[79]

[118] In *AIC Limited v. Fischer,* Justice Cromwell pointed out that when the court is considering alternatives to a class action, the question is whether the alternative has potential to provide effective redress for the substance of the plaintiff's claims and to do so in a manner that accords suitable procedural rights. He said that there are five questions to be answered when considering whether alternatives to a class action will achieve access to justice: (1) Are there economic, psychological, social, or procedural barriers to access to justice in the case?; (2) What is the potential of the class proceeding to address those barriers?; (3) What are the alternatives to class proceedings?; (4) To what extent do the alternatives address the relevant barriers?; and (5) How do the two proceedings compare?[80]

[119] And in light of the Supreme Court of Canada's directives in *Hryniak v. Mauldin*[81] and *Bruno Appliance and Furniture, Inc. v. Hryniak,*[82] one should now add to the preferable procedure factors the factor of the relationship between access to justice, which is the preeminent concern of class proceedings, and proportionality in civil procedures. The proportionality analysis, which addresses how much procedure a litigant actually needs to obtain access to justice, fits nicely with the focus on judicial economy and with the part of the preferable procedure analysis that considers manageability and whether the claimants will receive a just and effective remedy for their claims.

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[75] *AIC Limited v. Fischer*, 2013 SCC 69; *Hollick v. Toronto (City)*, 2001 SCC 68; *Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp.*, 2014 ONCA 901.

[76] *Cloud v. Canada (Attorney General) Cloud v. Canada*, (2004), 73 O.R. (3d) 401 at para. 52 (C.A.), leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50, rev'g (2003), 65 O.R. (3d) 492 (Div. Ct.); *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (C.A.), leave to appeal to S.C.C. ref'd [2003] S.C.C.A. No. 106.

[77] *AIC Limited v. Fischer*, 2013 SCC 69 at para. 35; *Hollick v. Toronto (City),* 2001 SCC 68 at para. 28.

[78] *AIC Limited v. Fischer*, 2013 SCC 69 at paras. 48-49.

[79] *Amyotrophic Lateral Sclerosis Society of Essex County v. Windsor (City)*, 2015 ONCA 572 at para. 62; *Caputo v. Imperial Tobacco Ltd.*, [2004] O.J. No. 299 at para. 62-67 (S.C.J.).

[80] *AIC Limited v. Fischer*, 2013 SCC 69 at paras. 27-38; *Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp.*, 2014 ONCA 901 at para. 125.

[81] 2014 SCC 7.

[82] 2014 SCC 8.

[120] In cases, particularly cases where the individual class members' respective harm is nominal, or cases where an aggregate assessment of damages in whole or in part is possible, a class action may more readily satisfy the preferable procedure criterion because the common issues trial may be the only viable means for remedying the wrong and for calling the wrongdoer to account because individual litigation may be prohibitively expensive.[83]

[121] In undertaking a preferable procedure analysis in a case in which individual issue trials are inevitable, it should be appreciated that the *Class Proceedings Act, 1992* envisions the prospect of individual claims being litigated and sections 12 and 25 of the *Act* empowers the court with tools to manage and achieve access to justice and judicial economy in those circumstances, and, thus, the inevitability of individual issues trials is not an obstacle to certification. In the context of misrepresentation claims, numerous actions have been certified notwithstanding individual issues of reliance and damages.[84]

[122] That said, in a given particular case, the inevitability of individual issues trials may obviate any advantages from the common issues trial and make the case unmanageable and thus the particular case will fail the preferable procedure criterion.[85] Or, in a given case, the inevitability of individual issues may mean that while the action may be manageable, those individual issue trials are the preferable procedure and a class action is not the preferable procedure to achieve access to justice, behaviour modification, and judicial economy. A class action may not be fair, efficient and manageable having regard to the common issues in the context of the action as a whole and the individual issues that would remain after the common issues are resolved.[86] A class action will not be preferable if, at the end of the day, claimants remain faced with the same economic and practical hurdles that they faced at the outset of the proposed class action.[87]

(b) **Analysis: Preferable Procedure**

[123] In my opinion, Mr. Bennett's proposed class action does not satisfy the preferable procedure criterion. The absence of productive common issues entails that the proposed class action is not fair, efficient, and manageable nor useful. It is axiomatic that if there are no common issues, then there is no basis-in-fact for a class action satisfying the preferable

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[83] *Markson v. MBNA Canada Bank*, 2007 ONCA 334; *Marcantonio v. TV/ Pacific Inc.*, [2009] O.J. No. 3409 (S.C.J.) at para. 9; *Silver v. IMAX Corp.*, [2009] O.J. No. 5585 at paras. 215-216 (S.C.J.), leave to appeal to Div. Ct. refused, 2011 ONSC 1035 (Div. Ct.).

[84] *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236 at paras. 48-49 (C.A.), rev'g (1999), 44 O.R. (3d) 173 (S.C.J.), leave to appeal to S.C.C. refused, [2000] S.C.C.A. No. 660; *Canadian Imperial Bank of Commerce v. Deloitte & Touche*, [2003] O.J. No. 2069 at para. 35 (Div. Ct.); *Lewis v. Cantertrot Investments Ltd.*, [2005] O.J. No. 3535 at para. 20 (S.C.J.); *Hickey-Button v. Loyalist College of Applied Arts & Technology* (2006), 267 D.L.R. (4th) 601 (Ont. C.A.); *Murphy v. BDO Dunwoody LLP*, [2006] O.J. No. 2729 (S.C.J.); *Silver v. Imax Corp.*, [2009] O.J. No. 5585 (S.C.J.), leave to appeal to Div. Ct. refused, 2011 ONSC 1035 (Div. Ct.); *Ramdath v. George Brown College of Applied Arts & Technology*, 2010 ONSC 2019 at para. 103; *Cannon v. Funds for Canada Foundation*, 2012 ONSC 399 at paras. 340, 350-351, leave to appeal to Div. Ct. refused, 2012 ONSC 6101 (Div. Ct.); *OPA v. Ottawa Police Services Board*, 2014 ONSC 1584 at para. 59 (Div. Ct.); *Fantl v. Transamerica Life Canada*, 2016 ONCA 633.

[85] *Mouhteros v. DeVry Canada Inc.* (1998), 41 O.R. (3d) 63 (Gen. Div.); *Arabi v. Toronto-Dominion Bank*, [2006] O.J. No. 2072 (S.C.J.), aff'd [2007] O.J. No. 5035 (Div. Ct.).

[86] *Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp.*, 2014 ONCA 901.

[87] *Fantl v. Transamerica Life Canada*, 2016 ONCA 633 at para. 26.

procedure criterion.[88]

[124] The case at bar flounders on the preferable procedure criterion much for the same reasons that *Vaugeois v. Budget Rent-A-Car of B.C. Ltd.*[89], a British Columbia proposed class action, was not certified. In this case, the plaintiff's allegation was that contrary to British Columbia's *Business Practices and Consumer Protection Act*, the defendant engaged in a systemic practice of improperly charging or over-charging consumers for repairs to rented cars. The plaintiff sued for civil conspiracy, breach of statute, constructive trust, waiver of tort, and unjust enrichment. The court noted that even if the defendant succeeded in defeating the systemic negligence claim, the common issues trial would not be determinative because the class members still would have individual claims of being overcharged. And if the plaintiff was successful at the common issues trial, there would nevertheless by a host of issues that remained to be determined at individual issues trials. The British Columbia agreed with the motions judge that in these circumstances a class action was not the preferable procedure and would not advance the class members' cases.

[125] *Tiemstra v. Insurance Corp. of British Columbia*;[90] *Mouhteros v. DeVry Canada Inc.*;[91] *Williams v. Mutual Life Assurance Co.; Zicherman v. Equitable Life Insurance Co. of Canada*;[92] *Dennis v. Ontario Lottery and Gaming Corp.*[93]; *Penney v. Bell Canada*;[94] *Loveless v. Ontario Lottery and Gaming Corp.*;[95] and *Green v. The Hospital for Sick Children*[96] are other examples of cases where a class action is the inferior and not the preferable route to behaviour modification, judicial economy, and substantive and procedural justice.

[126] Returning to the case at bar, assuming that there were some viable common issues to be decided, for those class members that were victims and not beneficiaries of Hydro One Networks' conduct, the resolution of the common issues of liability in their favour would be of little assistance to them as they proceeded to individual issues trials. The imposition of an expensive class action before the individual issues trials simply delays the individual issues trial.

[127] It is true, as submitted by Mr. Bennett, that part of the rationale for introducing class action legislation was to provide access to justice and behaviour modification for the circumstances where a wrongdoer otherwise could capture enormous profits from a multitude of petty misdeeds. Thus, with a class size of 1.3 million customers and a claim of $100 million, it seems that the theory of Mr. Bennett's action is that the average loss per customer is about $77 per putative Class Member. In contrast, Hydro's belief is that the number of customers that were overcharged was around 90,000 and the average overcharge was $26.32 per customer ($504,410 in total). Regardless of whom is correct about the extent of the overpricing, it is obvious that it would be prohibitively expensive for an individual to sue for a loss between $25 to $100. However, it does not follow that a class action will always be the preferable response to these

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[88] *O'Brien v. Bard*, 2015 ONSC 2470 at para. 221; *Vester v. Boston Scientific Ltd.*, 2015 ONSC 7950
[89] 2017 BCCA 111, aff'g 2015 BCSC 802 (B.C.S.C.).
[90] [1996] B.C.J. No. 952 (S.C.), aff'd [1997] B.C.J. No. 1628 (C.A.).
[91] [1998] O.J. No. 2786 (Gen. Div.).
[92] [2003] O.J. No. 1160 and 1161 (C.A.), aff'g [2001] O.J. No. 4952 (Div. Ct.), which aff'd (2000), 51 O.R. (3d) 54 (S.C.J.).
[93] 2010 ONSC 1332, aff'd 2011 ONSC 7024, aff'd 2013 ONCA 501, leave to appeal refused [2013] S.C.C.A. No. 373.
[94] 2010 ONSC 2801.
[95] 2011 ONSC 4744.
[96] 2017 ONSC 6545.

circumstances or that a class action is always the necessary or feasible response to these circumstances. Sometimes, a class action, even if certified, leaves too much to be done at the individual issues trials and impedes rather than removes the barriers to access to justice.

[128] The point is that a class action will not be preferable if claimants remain faced with the same economic and practical hurdles that they faced at the outset of the proposed class action. In this last regard, it is useful to point out that at individual issues trials, class members lose their invulnerability to an adverse costs award and they must pay legal fees to their own lawyers or they must pay Class Counsel assuming that Class Counsel stays on the record after the common issues trial.

[129] I appreciate that s. 25 of the *Class Proceedings Act, 1992* empowers the court to design expedient and efficient procedural mechanisms and that in an appropriate case that resource could be used to reduce the individual issues phase to a very simple fill-in-the-form-based procedure, but those efficiencies must be matched with a meaningful common issues phase and if simplified the procedure must still be procedurally fair to the defendant. The appropriate circumstances seem to have been present in cases like *Markson v. Markson v. MBNA Canada Bank*[97] and *Lundy v. VIA Rail Canada Inc.,*[98] but they are not present in the case at bar.

[130] There is a second reason that Mr. Bennett's proposed class action does not satisfy the preferable procedure criterion. In the circumstances that was the fiasco of the Cornerstone Project, the alternative of the administrative procedures of the OEB is preferable.[99] The OEB's complaint process has the potential to provide more effective substantive and procedural justice for the putative class members' and the OEB process better fulfills the access to justice and behaviour modification objectives that underlie the *Class Proceedings Act, 1992.*

[131] Mr. Bennett submits that the OEB does not have the substantive law juridical resources of the Superior Court, and thus the OEB cannot provide effective redress for the substance of the plaintiff's claims and it cannot provide access to justice in a manner that accords suitable procedural rights. Mr. Bennett argues that the OEB cannot be the preferable procedure because it cannot offer the same remedial relief available from the court. He submits that the OEB does not have jurisdiction over the claims for negligence, breach of contract, and unjust enrichment, cannot answer the proposed common issues, has extremely limited participatory rights for class members, and the initiative to institute proceedings is a matter for the OEB and not the customer.

[132] I disagree that resort to the OEB is not the superior choice. Since the OEB has in all matters within its jurisdiction authority to hear and determine all questions of law and of fact,[100] it may be that the OEB has equivalent jurisdiction to that available to the court, but regardless, the OEB has adequate jurisdiction to redress problems of electricity consumers being overpriced.[101] The OEB has the jurisdiction to determine whether Hydro One Networks has overcharged a customer, and, indeed, that jurisdiction apparently had an influence in the

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[97] 2007 ONCA 334, leave to appeal to SCC ref'd [2007] S.C.C.A. No. 346.
[98] 2015 ONSC 1879; 2015 ONSC 3531; 2015 ONSC 7063; and 2016 ONSC 425.
[99] *Hollick v. Toronto (City),* 2001 SCC 68; *Halabi v. Becker Milk Co.* (1998), 39 O.R. (3d) 2662 (Gen. Div.); *Grace v. Fort Erie (Town),* [2003] O.J. No. 3475 (S.C.J.); *Penney v. Bell Canada,* 2010 ONSC 2801; *Lauzon v. Canada (Attorney General),* 2014 ONSC 2811, aff'd 2015 ONSC 2620 (Div. Ct.).
[100] S.O. 1998, c. 15, Sched. B, s.19(1).
[101] *Summitt Energy Management Inc. v. Ontario (Energy Board),* 2013 ONSC 318 (Div. Ct.).

settlements already reached between customers and Hydro One Networks in the aftermath of the Cornerstone Project and the CIS problems. In terms of behaviour management, the OEB has enormous powers to influence the behaviour of Hydro One Networks, and, once again, the OEB's authority apparently was brought to bear in the immediate case.

[133] From the perspective of individual consumers, it should be recalled that the legislature directed that under the *Ontario Energy Board Act, 1998*, in carrying out its responsibilities, the OEB shall be guided by the objective to protect the interests of consumers with respect to prices and the adequacy reliability and quality of electricity service.[102] Accepting that individual consumers cannot initiate OEB proceedings, it does not follow that the OEB will not respond in appropriate cases in accordance with its statutory mandate.

[134] While an aspect of the legislative purposes of the *Class Proceedings Act, 1992* is to provide access to justice for small claims that would be economically unviable to litigate, the Act does not oust all alternatives measures, particularly ones prescribed by other public law statutes. In *Hollick v. Toronto (City),*[103] Chief Justice McLachlin stated that the preferability analysis requires the court to look to all reasonably available means of resolving the class members' claims, and not just at the possibility of individual actions.

[135] I conclude that Mr. Bennett's action does not satisfy the preferable procedure criterion.

6. Representative Plaintiff Criterion

(a) General Principles: Representative Plaintiff Criterion

[136] The fifth and final criterion for certification as a class action is that there is a representative plaintiff who would adequately represent the interests of the class without conflict of interest and who has produced a workable litigation plan.

[137] The representative plaintiff must be a member of the class asserting claims against the defendant, which is to say that the representative plaintiff must have a claim that is a genuine representation of the claims of the members of the class to be represented or that the representative plaintiff must be capable of asserting a claim on behalf of all of the class members as against the defendant.[104]

[138] Provided that the representative plaintiff has his or her own cause of action, the representative plaintiff can assert a cause of action against a defendant on behalf of other class members that he or she does not assert personally, provided that the causes of action all share a common issue of law or of fact.[105]

[139] Whether the representative plaintiff can provide adequate representation depends on such

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[102] S.O. 1998, c. 15, Sched. B, s.1(1) para. 1.

[103] 2001 SCC 68 at para. 39.

[104] *Drady v. Canada (Minister of Health)*, [2007] O.J. No. 2812 at paras. 36-45 (S.C.J.); *Attis v. Canada (Minister of Health)*, [2003] O.J. No. 344 at para. 40 (S.C.J.), aff'd [2003] O.J. No. 4708 (C.A.).

[105] *Boulanger v. Johnson & Johnson Corp.*, [2002] O.J. No. 1075 at para. 2 (S.C.J.), leave to appeal granted, [2002] O.J. No. 2135 (S.C.J.), varied (2003), 64 O.R. (3d) 208 (Div. Ct.), varied [2003] O.J. No. 2218 (C.A.); *Matoni v. C.B.S. Interactive Multimedia Inc.*, [2008] O.J. No. 197 at paras. 71-77(S.C.J.); *Voutour v. Pfizer Canada Inc.*, [2008] O.J. No. 3070 (S.C.J.); *LeFrancois v. Guidant Corp.*, [2008] O.J. No. 1397 at para. 55 (S.C.J.).

factors as: his or her motivation to prosecute the claim; his or her ability to bear the costs of the litigation; and the competence of his or her counsel to prosecute the claim.[106]

[140] While a litigation plan is a work in progress, it must correspond to the complexity of the particular case and provide enough detail to allow the court to assess whether a class action is: (a) the preferable procedure; and (b) manageable including the resolution of the common issues and any individual issues that remain after the common issues trial.[107] The litigation plan will not be workable if it fails to address how the individual issues that remain after the determination of the common issues are to be addressed.[108]

(b) **Analysis: Representative Plaintiff**

[141] Hydro One Networks argues that his claim is not a genuine representation of the claims of the members of the class and he does not share the proposed common issues with other class members, as the proposed common issues are not a substantial ingredient of, and would not advance, his claims.

[142] I disagree. Assuming that all the other certification criteria were satisfied, then Mr. Bennett satisfies the requirements to be representative plaintiff.

D. Conclusion

[143] For the above reasons, Mr. Bennett's motion for certification is dismissed.

[144] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with the Defendants' submissions within 20 days from the release of these Reasons for Decision followed by Mr. Bennett's submissions within a further 20 days.

Perell, J.

Released: November 28, 2017

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[106] *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 41.
[107] *Carom v. Bre-X Minerals Ltd.* (1999), 44 O.R. (3d) 173 (Div. Ct.), rev'd on other grounds (2000), 51 O.R. (3d) 236 (C.A.); *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 at para. 95 (C.A.); *Caputo v. Imperial Tobacco Ltd.*, [2004] O.J. No. 299 at para. 76 (S.C.J.); *Griffin v. Dell Canada Inc.*, [2009] O.J. No. 418 at para. 100 (S.C.J.).
[108] *Caputo v. Imperial Tobacco Ltd.*, [2004] O.J. No. 299 at paras. 62-67 (S.C.J.); *Griffin v. Dell Canada Inc.*, [2009] O.J. No. 418 (S.C.J.).

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DATE: 20171128

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

BILL BENNETT

Plaintiff

– and –

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

Defendants

REASONS FOR DECISION

PERELL J.

Released: November 28, 2017