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Utilities Commission

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October 17, 2019

Sent via email/eFile

CREATIVE ENERGY BEATTY/EXPO PLANTS CPCN AND REORGANIZATION EXHIBIT A2-1
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Re: Creative Energy Vancouver Platforms Inc. – Application for Certificate of Public Convenience and Necessity for Beatty-Expo Plants and Reorganization – Project No. 1598962 – Farris LLP Requests for Relief

British Columbia Utilities Commission (BCUC) staff submit the following letter for the record in this proceeding:

Farris LLP, counsel for Cadillac Fairview Corporation
Limited and Pacific Centre Limited
Requests for Relief
Letter dated October 15, 2019

Sincerely,

Original signed by:

Patrick Wruck
Commission Secretary

/aci
Enclosure

Reply Attention of: Ludmila B. Herbst, Q.C.
Direct Dial Number: (604) 661 1722
Email Address: lherbst@farris.com

FARRIS

File No: 19078-18

October 15, 2019

BY EMAIL – commission.secretary@bcuc.com

British Columbia Utilities Commission

410 – 900 Howe Street

Vancouver, BC

V6Z 2N3

**Attention: Patrick Wruck
Commission Secretary and Manager, Regulatory Support**

Dear Sirs/Mesdames:

Re: Creative Energy Vancouver Platforms Inc. (“CEV”) Application for Certificate of Public Convenience and Necessity for Beatty-Expo Plants and Approval of Corporate Reorganization – Project No. 1598962 (“CPCN Application”) – and – CEV Filing posted May 14, 2019 (together, the “BCUC Proceedings”)

Overview of Requests for Relief

As we have previously indicated, we are counsel for Cadillac Fairview Corporation Limited (“**Cadillac Fairview**”) and Pacific Centre Limited (“**PCL**”).

We have provided updates, including by letters dated July 12, August 15 and September 26, 2019, regarding the status of PCL’s B.C. Supreme Court proceeding (S-197775, Vancouver Registry) against CEV, Westbank Projects Corp. (“**Westbank**”), Emanate Energy Solutions Inc. (“**Emanate**”) and John Doe Partnership (the “**Partnership**”) (the “**Court Proceeding**”). In the Court Proceeding, PCL seeks to enforce the right of first purchase that CEV granted to it in or about 1969-1970 (the “**ROFP**”) in relation to the land at 720 Beatty Street, Vancouver (the “**Beatty Property**”), on which CEV’s present boiler plant is located, and CEV’s undertaking more broadly. Pursuant to the ROFP, if CEV “shall decide to sell the whole of its property, assets, business and undertaking including the plant, lands, system, Licence Agreement and customer contracts (hereinafter referred to collectively as ‘the undertaking’), or any part thereof required to generate and distribute steam to serve [a two-block portion of the Pacific Centre complex in downtown Vancouver], [PCL] shall have the first right to purchase the undertaking or any such part thereof to be offered for sale by [CEV]”.

Given the positions that CEV, Westbank and the Partnership (which are jointly represented in the Court Proceeding and are referred to in this correspondence as the “**CEV Defendants**”) have as of Sunday, October 13, 2019 proposed to assert in the Court Proceeding, we write, on PCL’s behalf, to request that the BCUC:

- suspend the BCUC Proceedings pending the later of:

FARRIS LLP

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- the determination of the B.C. Supreme Court in the Court Proceeding on the matters that are to be the subject of the summary trial/judgment applications described below; and
- the outcome of the request for reconsideration that PCL seeks permission to make herein; and
- grant permission for PCL to apply for reconsideration of the BCUC's determination of February 19, 2019 in the CPCN Application (the "**February BCUC Decision**") if, as the CEV Defendants now seek to assert in the Court Proceeding, it is a final decision from which factual findings may be extracted to prejudice the rights of PCL as a chargeholder in the Court Proceeding.

Background

PCL filed its claim against the CEV Defendants as well as Emanate on July 12, 2019, after we advised the BCUC on July 8, 2019 that the Court Proceeding would be commenced.

By letter dated July 8, 2019 (Exhibit B-26), counsel for CEV advised the BCUC:

Creative Energy further confirms that once it has had an opportunity to review Cadillac Fairview's court filing, Creative Energy will submit a timely report to the BCUC on whether such ***filing has any relevance to any matter arising from the Application, which at this time seems inconceivable.*** [emphasis added]

The CEV Defendants filed their Response to Civil Claim on August 9, 2019. Their pleading made limited reference to the BCUC Proceedings and did not seek to rely on any orders, decisions, or factual findings of the BCUC, either in the BCUC Proceedings or historically, in support of the CEV Defendants' position in the Court Proceeding.

On August 15, 2019, after we provided an update to the BCUC regarding the status of the Court Proceeding, counsel for CEV wrote to the BCUC as well, enclosing the CEV Defendants' Response to Civil Claim and "to confirm that the civil claim is not relevant to any matter arising from the Application."

As PCL advised the BCUC on September 26, 2019, PCL provided its then-unfiled summary trial application materials (the "**PCL Application**") to the CEV Defendants on September 25, 2019. The hearing of the PCL Application is presently scheduled for the October 29-November 1, 2019 time period.

On October 9, 2019, the CEV Defendants provided a response to the PCL Application (the "**CEV Response**"), as well as their own application for summary trial and/or summary judgment (the "**CEV Application**") and an Amended Response to Civil Claim. The CEV Application is also to be heard in the October 29-November 1, 2019 time period. We discuss later in this correspondence certain of the contents of the CEV Defendants' supporting affidavit material.

On Sunday, October 13, 2019, the CEV Defendants delivered a proposed Counterclaim and proposed Further Amended Response to Civil Claim, which given their timing and the court rules, would both require consent of PCL or a court order to file. Unlike the CEV Defendants' prior Responses to Civil Claim in the Court Proceeding, including the Amended Response to Civil Claim filed on October 9, both

the proposed Counterclaim and proposed Further Amended Response to Civil Claim rely heavily on the February BCUC Decision. Substantial portions of the proposed Counterclaim and proposed Further Amended Response to Civil Claim set out what the CEV Defendants describe as the “findings of fact” and “Factual Determinations” made in the “2019 Decision and Order”. Among other things, the CEV Defendants assert in their proposed Further Amended Response to Civil Claim that:

32 ... the BCUC has determined in fact that the property proposed to be transferred to the developer pursuant to the proposed Reorganization, including the Trust and Development Agreement and Transfer Agreement, are not required to generate and distribute steam to serve CEV’s customers, which determination is binding and conclusive on PCL and this Honourable Court.

33 Accordingly, the assets proposed to be transferred to the developer pursuant to the proposed Reorganization, including the Trust and Development Agreement and Transfer Agreement, are not in fact required to generate and distribute steam to the Pacific Centre Complex.

We do not see anything to this effect in the February BCUC Decision. The decision simply refers to the fact that pursuant to the Trust and Development Agreement CEV is to “transfer to the Developer the land and airspace that Creative Energy owns and which Creative Energy *states* are surplus to its needs in its operation as a utility” (pages 12, 45; emphasis added). However, the CEV Defendants now seek to plead in the Court Proceeding that the BCUC made substantive factual determinations including as noted in the indented passage quoted above in its favour.

Further, in the proposed Counterclaim provided to us on October 13, 2019, the CEV Defendants seek that the B.C. Supreme Court modify the ROFP under section 35 of the *Property Law Act* to provide that:

The parties hereto further covenant and agree that this right of first purchase shall not apply to a transaction or a series of transactions which is expressly subject to approval of the British Columbia Utilities Commission.

This language is not found in the ROFP now. The fact that the CEV Defendants seek the addition of this language to the ROFP:

- suggests that even they would agree it should not presently be read into it as an implied term; and
- confirms that no past or current order of the BCUC or predecessor achieves the result that the CEV Defendants seek be imposed by court order via modified contractual terms.

With respect to orders of the BCUC and its predecessor, we note that the proposed Counterclaim and proposed Further Amended Response to Civil Claim also refer to the Public Utilities Commission’s February 13, 1970 order approving CEV’s encumbrance of the Beatty Property with the ROFP (the “**1970 PUC Order**”). A copy of that order was found enclosed with the August 15, 2019 letter of counsel for CEV to the BCUC confirming that PCL’s “civil claim is not relevant to any matter arising from the Application.” The 1970 PUC Order provides that it shall not restrict the power of the Public Utilities

Commission to act “in accordance with statutory requirements”, and of course there is no requirement on any regulator either to grant an application made to it or to adjudicate on matters outside its statutory purview. The 1970 PUC Order further provides that nothing in the order “shall be construed as approval by the Commission of any act or thing done by the parties” thereafter pursuant to the agreement’s terms, which reinforces that the 1970 PUC Order cannot be construed as blessing CEV’s later acts.

However, the upshot of the CEV Defendants’ proposed pleadings appears to be that they would like the Court to order that in relation to its contractual rights, PCL should be bound by what the BCUC said in the February BCUC Decision even though not contemplated in the ROFP at the time of that decision. Of course, as well, CEV did not even bring the ROFP to the BCUC’s attention at the time of the February BCUC Decision.

Whether the proposed Counterclaim would be heard as part of the October 29-November 1 hearing is to this point uncertain, though PCL is proposing to the CEV Defendants a means by which that could occur. We enclose as **Schedule “A”** our letter dated October 15, 2019 to counsel for the CEV Defendants in this regard.

Issues Raised By CEV Defendants’ New Positions in the Court Proceeding

The positions now taken by the CEV Defendants in the Court Proceeding raise several issues.

Procedural Fairness Considerations

We understand that CEV provided no indication to the BCUC that PCL had significant charges on the Beatty Property when the BCUC set notice requirements or otherwise proceeded with the BCUC Proceedings. The only mention we can find of the ROFP on the record of the BCUC Proceedings is a passing mention in the report of the BCUC’s appraiser (Ex. A-15 at p. 8 of the report). We do not understand the text of the ROFP to have been before the BCUC in the BCUC Proceedings at any point before the February BCUC Decision or that the BCUC would be inclined to engage in consideration of such contractual rights in any event. Regardless, however, contractual or other rights may not be affected without proper and specific notice to persons who may potentially be impacted.

The lack of notice to the BCUC regarding PCL’s charges on the Beatty Street property is particularly troubling in light of evidence that has recently emerged in the Court Proceeding. On October 9, 2019, the CEV Defendants provided a to-be-sworn affidavit which attached, as part of Exhibit “F”, a memorandum from solicitors for CEV sent to CEV, Westbank and an entity related to Emanate regarding the structuring of the transactions that are now before the BCUC in the BCUC Proceedings. The memorandum, a copy of which is enclosed as part of **Schedule “B”**, is dated November 9, 2017 and on number-stamped p. 79B includes the following content:

Upon being declared, by the BCUC, as assets which are surplus to the operation of the utility, the beneficial interest in the real property will be transferred to the Development Entity. ***(Once the BCUC considers the real property assets to be surplus, then Cadillac should have difficulty in arguing that its ROFR applies to those assets.)***
[emphasis added]

This memorandum was circulated by CEV's solicitors to counterparties to a potential transaction involving the Beatty Property within days of PCL (a) having declined a request by CEV to release the ROFP and (b) having asked that future correspondence on the matter be directed to Cadillac Fairview's Executive Vice President, Operations. Neither that individual nor others at Cadillac Fairview or PCL heard anything from the CEV Defendants in this regard: Affidavit #1 of Tom Knoepfel in the Court Proceeding ("**Knoepfel Affidavit**", the text of which is enclosed as **Schedule "C"**) at paras. 72, 78-83. The memorandum did not go to PCL or Cadillac Fairview.

Correspondence from representatives of the CEV Defendants to Cadillac Fairview at around this time referred to having a "fix" or "work around" to PCL's charges, with no indication to PCL or Cadillac Fairview that it might involve attempting to use a BCUC proceeding as a barrier to a contractual claim.

In light of the strategic, ancillary benefits the CEV Defendants have apparently attempted to gain through the BCUC Proceedings in respect of PCL's registered charges, there are substantial procedural fairness issues arising from the lack of notice of this issue both to the BCUC and, as detailed further below, to PCL itself.

Drivers for Content of CPCN Application and Reorganization

The CEV Defendants have suggested in the Court Proceeding that their desire to avoid triggering the ROFP (presumably, one might surmise, as CEV did not want to have to sell other than to Westbank) was a major driving force in structuring what it put forward to the BCUC.

CEV's Vice President, Projects & Engineering, has attested in an affidavit provided to us on October 9: "In fact, it was always, and remains, CEV's ***intention to plan*** the Proposed Reorganization and the Proposed Project in such a manner as not to trigger the ROFP" (emphasis added) (para. 112 of his affidavit sworn on October 8, 2019; also paragraph 63 of the CEV Application).

We do not see any reference in the record of the BCUC Proceedings to this intention having been communicated to the BCUC. Further, it seems to be at odds with the other, utility-focused, considerations that we understand to have been put forward as project drivers. The February BCUC Decision refers at page 33 to the fact that "Creative Energy has outlined the following drivers for the Proposed Project; to maintain reliable service and improve safety, efficiency and emissions as well as workspaces and accessibility."

CEV noted in the CPCN Application that its requested form of reorganization "is required to facilitate the Proposed Project..." (Part III – 19). This takes on new meaning in the context of the November 9, 2017 memorandum described above.

We note as well that in the November 9, 2017 memorandum (on number-stamped p. 79A of Schedule "B"), the CEV Defendants' solicitors suggested that the structure put forward to the BCUC would "minimize" risk "of the potential for breach of the Cadillac Fairview ROFR" and that the structure "would achieve the same commercial effect" as the form of transaction that was seen as posing a greater risk. Of course, the adage that one cannot do indirectly what cannot be done directly is a component of PCL's position in the Court Proceeding.

Impact of ROFP on the Proposed Project

Relatedly, in the materials provided to us on October 9 in the Court Proceeding, the CEV Defendants seem to take the position that if PCL were to succeed in the relief sought in the Court Proceeding, the matters that the CEV Defendants have put before the BCUC for approval may not be able to proceed. The CEV Defendants' notice of application states that "[t]he Proposed Reorganization would be undermined by a triggering of the ROFP" (para. 48). CEV's Vice President, Projects & Engineering, states: "Since the outset of this project I have recognized that if the Proposed Reorganization or any element of it were to trigger the ROFP, the entire restructuring would be jeopardized" (para. 112 of his affidavit sworn on October 8, 2019; also para. 63 of the CEV Application).

Of course, the CEV Defendants deny in the Court Proceeding that the ROFP has been triggered; it is not surprising that they do so given the efforts they seem to have taken to avoid offering the Beatty Property or undertaking, or any part thereof, for sale to PCL. PCL does not agree that those efforts were successful or that, if they were, they would have complied with the duty of a grantor of a right of first purchase to deal with the grantee in good faith.

PCL has also adduced considerable evidence in the Court Proceeding that if CEV were required to comply with the ROFP and offer all or part of its undertaking to PCL, PCL would be in a position to evaluate the offer expeditiously and that it has within its corporate structure the financial resources and utility- and development-related expertise to take on a substantial project of this nature: Knoepfel Affidavit at paras. 19-28, 86-90. Though the triggering of the ROFP might, if PCL were to accept an offer that the Court orders to be made, prevent Westbank from pursuing the proposed project, that does not mean that another entity would not be able to do so.

Presumably taking into account the prospect that they may not succeed in convincing the Court that the ROFP has not been triggered, as of their Amended Response to Civil Claim of October 9 the CEV Defendants alternatively seek relief from forfeiture under s. 24 of the *Law and Equity Act*.

Post-Transaction Fee Simple Parameters at the Beatty Property

As reflected in the February BCUC Decision, CEV took the position in the BCUC Proceedings that "it retains fee simple ownership at Beatty" and "states that the airspace parcel [which is stated to be the parcel "containing the Beatty Plant" and "housing the utility"] provides fee simple title to the airspace for Creative Energy" (pages 12, 47).

However, the CEV Defendants have conceded in their October 9 materials in the Court Proceeding that as presently planned, the boiler flues, emergency generator and diesel tanks that would be used at the post-renovation Beatty plant would be located on land, including airspace, of which CEV would not have fee simple ownership (that is, to which legal and beneficial title would be transferred to the developer); the CEV Defendants are, as presently planned, only to have access by statutory right of way even at the Beatty site. For example, CEV's Vice President Projects & Engineering, attested on October 9: "...it is currently proposed that two items of equipment related to the Proposed Reconfigured Beatty Plant, namely the new Generator No. 1 and two diesel tanks, would be located on land not retained by CEV" (para. 115). The CEV Application refers to having "flues or distribution piping...protrude beyond the area currently contemplated for the proposed Air Space Parcel" that CEV would own (para. 66). PCL's

evidence in the Court Proceeding includes that boiler flues, the generator and tanks are necessary to the operation of a steam plant.

The CEV Defendants seek to suggest in the Court Proceeding that their planning is at such a preliminary and fluid stage that, for example, the positioning of the emergency generator and diesel tanks may change; and that the boundaries of the airspace parcel that CEV is to own may change so as to extend around the boiler flues. The CEV Defendants also, in their proposed Further Amended Response to Civil Claim, state that, “The lands that PCL alleges CEV intends to transfer have not been finally delineated and thus cannot constitute a ‘decision to sell’ under the ROFP as ***neither the Trust Agreement nor the contemplated transfer contain the essential terms of a contract, such that the offer which if accepted would be legally enforceable***” (para. 37; emphasis added). We note that the Trust Agreement has from the outset been described as “central” in the CPCN Application and that CEV urged on the BCUC an expedited resolution to allow for the relatively prompt commencement of building work (first at the Expo Plant, but then at the Beatty Property). While one might expect some flexibility in planning and drawings, that this would be the excuse for matters such as presumptive breach of the ROFP through presently contemplated placement of utility equipment outside CEV-owned areas at the Beatty Property is surprising at best.

Further reorganization-related issues

We also note that as of October 13, the CEV Defendants have refused to produce to PCL documents, notably partnership and shareholders agreements referenced in other documents, that PCL believes may show that Emanate could emerge with a greater than 50% interest in the utility. PCL’s theory in the Court Proceeding includes that the transaction with Emanate may include a multi-staged sale which has not been disclosed.

Request for Suspension or Stay of BCUC Proceedings

PCL requests that the BCUC Proceedings be suspended or stayed pending the later of:

- the determination of the B.C. Supreme Court in the Court Proceeding on the matters that are to be the subject of the summary trial/judgment applications described above; and
- the outcome of the request for reconsideration that PCL seeks permission to make herein.

In this case, the CEV Defendants are as of October 13, 2019 seeking to use as a tool in the Court Proceeding the making of BCUC decisions (notably to this point the February BCUC Decision, but presumably also a further decision if made).

Further, through their proposed Counterclaim the CEV Defendants are seeking to add a term to the ROFP that would exclude its application to transactions that require BCUC approval.

The contractual entitlements of PCL are a matter for court determination, as is the CEV Defendants’ claim in the Court Proceeding that the CEV Defendants would be proceeding contrary to s. 73 of the *Land Title Act* by purporting to transfer to the developer in the immediate term beneficial ownership of a portion of unsubdivided property. The CEV Defendants should not be permitted to proceed where

seeking to use the BCUC process as an instrument to prejudice PCL's rights. Further, the CEV Defendants are asking the B.C. Supreme Court to modify PCL's rights in a way that may shape PCL's interest, which may turn on that court determination, in future participation in any resumed BCUC Proceedings.

Unless or until the Court issues a decision regarding the contractual rights of PCL, carrying on any further with the BCUC Proceedings would risk prejudicing PCL given the positions that the CEV Defendants have now adopted. The CEV Defendants have an interest in giving decisions in the BCUC Proceedings an effect that at the time of making they were not intended to have and further opportunities to this end should not be provided.

Further or alternatively, as PCL has previously noted and as the positions enunciated by CEV in its filing in the Court Proceeding confirm, if PCL is successful in the Court Proceeding, and CEV is ordered to offer property for sale to PCL instead of Westbank, the present BCUC Proceedings may be moot.

Though also taking into account other considerations, the Panel noted in the February BCUC Decision that "[t]he immediate need for the Proposed Project may not have been established" (p. 23), and as noted above, the CEV Defendants contend in the Court Proceeding that their planning is preliminary. There is time to suspend the BCUC Proceedings.

By contrast, the summary trial/judgment applications are presently scheduled to proceed to hearing in the last week of October 2019, though that specific timing and whether the proposed Counterclaim is included in that adjudication may depend on whether the proposal set out in Schedule "A" is adopted.

Request for Reconsideration

Section 99 of the *Utilities Commission Act* provides that "[t]he commission, on application or on its own motion, may reconsider a decision, an order, a rule or a regulation of the commission and may confirm, vary or rescind the decision, order, rule or regulation."

The February BCUC Decision did not approve the CPCN Application; rather, the Panel stated that "the CPCN and related approvals have not been granted" (p. 57). Further, the Panel noted in the February BCUC Decision that it was not "consider[ing] the proposed Corporate Reorganization at this time" (p. 57) and deferred approving a related customer service agreement (p. 58).

However, as of October 13, 2019 the CEV Defendants in their proposed Further Amended Response to Civil Claim and proposed Counterclaim treat factual statements in the February BCUC Decision as having binding force on PCL for the purpose of the Court Proceeding. In their proposed Further Amended Response to Civil Claim provided on October 13, the CEV Defendants purport to rely on ss. 79 and 105(2) of the *Utilities Commission Act*. The CEV Defendants' proposed Counterclaim and proposed Further Amended Response to Civil Claim seem to seek to create an impression of finality, rather than characterizing the February BCUC Decision as interim and preliminary.

Given that the CEV Defendants have sought to adopt this approach in the Court Proceeding with respect to the February BCUC Decision and with respect to its effect on PCL's contractual entitlements, PCL makes the present application out of an abundance of caution.

Rule 26.01 of the BCUC Rules of Practice and Procedure provides that “[a] person, other than the applicant or an intervener in the original proceeding that gave rise to the decision, may not file an application for reconsideration without obtaining prior permission of the BCUC. In applying to the BCUC for permission to file an application for reconsideration, the person seeking permission must explain: a) why the person did not participate in the original proceeding; and b) how the person is directly or sufficiently affected by the decision or how the person has experience, information, or expertise relevant to a matter arising from the decision.”

With respect to subparagraph a), PCL did not participate in the BCUC Proceedings because:

- it did not receive actual notice of them: paragraphs 78-83 of the Knoepfel Affidavit. It appears that notice went to the agent that it had authorized to act for it for “billing” purposes, who did not forward it;
- no one at PCL or Cadillac Fairview itself, including the individual that CEV had specifically been advised it should direct ROFP-related communications to, was alerted by CEV to the BCUC Proceedings: Knoepfel Affidavit at paras. 72, 78-83. This is so despite the fact that further to the November 9, 2017 memorandum, from well before the filing of the CPCN Application CEV appears to have intended to use it against PCL;
- PCL learned of the CPCN Application only well after the February BCUC Decision: Knoepfel Affidavit at paras. 80-81;
- further and in any event, as late as August 15, 2019, CEV expressly took the position that the Court Proceeding was irrelevant to the BCUC Proceedings; and
- the CEV Defendants filed both a Response to Civil Claim and an Amended Response to Civil Claim (on August 9 and October 9, 2019) that did not claim that the February BCUC Decision was in some way determinative.

However, having been notified late on the afternoon of October 13, 2019 of the position that the CEV Defendants now seek to take in the Court Proceeding in respect of the February BCUC Decision, PCL has expeditiously brought this matter to the BCUC’s attention.

Further, with respect to subparagraph b) of Rule 26.01, PCL notes the approach adopted by the CEV Defendants in their proposed Further Amended Response to Civil Claim and Counterclaim. The CEV Defendants themselves contend that PCL is directly affected by the February BCUC Decision as the CEV Defendants seek to rely on certain “factual determinations” made in this decision as having binding force on PCL in the Court Proceeding.

Rule 26.02 provides that “unless prior permission of the BCUC is obtained, an application for reconsideration must be filed with the BCUC within 60 days of the issuance of the order or the reasons for decision, whichever is later.” We note both:

- the timing of the events outlined above (including the position taken by the CEV Defendants on October 13, 2019); and
- the fact that PCL's request is out of an abundance of caution in response to the CEV Defendants' October 13 position in the Court Proceeding. In and of itself, it is at best not clear that the February BCUC Decision would be one that is ordinarily subject to reconsideration. In this regard, a reconsideration or appeal would ordinarily be from the outcome of a process. Not only is the February BCUC Decision not a final decision, but in its substance the February BCUC Decision does not approve the CPCN Application. Non-approval is a result that PCL does not oppose. What has changed is that as of October 13 (and to some extent in affidavits of October 9), the CEV Defendants are relying in the Court Proceeding on certain "factual determinations" within the body of the February BCUC Decision, prompting PCL to make this request.

Rule 26.05 provides:

An application for reconsideration of a decision must contain a concise statement of the grounds for reconsideration, which must include one or more of the following:

- a) the BCUC has made an error of fact, law, or jurisdiction which has a material bearing on the decision;
- b) facts material to the decision that existed prior to the issuance of the decision were not placed in evidence in the original proceeding and could not have been discovered by reasonable diligence at the time of the original proceeding;
- c) new fact(s) have arisen since the issuance of the decision which have material bearing on the decision;
- d) a change in circumstances material to the decision has occurred since the issuance of the decision; or
- e) where there is otherwise just cause.

In this case, and without seeking to argue the request for reconsideration in full before permission to pursue it is granted, PCL notes again the new matters that have arisen or come to light since the February BCUC Decision, including the positions taken by the CEV Defendants in the Court Proceeding in October 2019, the strategic and ancillary benefits that the CEV Defendants have attempted to gain through the BCUC Proceedings, the apparent fluidity of the plans for the Proposed Project, and the other issues of concern outlined earlier in this letter.

Pursuant to Rule 26.07, the BCUC "may, in its discretion or on application, stay the operation of the decision in the original proceeding, or part thereof, pending the outcome of the reconsideration on terms the BCUC considers appropriate." In any event of the other relief sought in this correspondence, PCL

October 15, 2019

- 11 -

FARRIS

seeks that a stay of the February BCUC Decision be granted on this basis.

Yours truly,

FARRIS LLP

Per: 

Ludmila B. Herbst, Q.C.

LBH/trw

Enclosures: Schedule "A" (Letter dated October 15, 2019 to Daniel Parlow and Devin Lucas); Schedule "B" (Exhibit "F" to Affidavit #1 of Trent Berry [including November 9, 2017 memorandum]); Schedule "C" (Affidavit #1 of Tom Knoepfel [text only])

c.c.: Paul Miller
Ian Webb, Daniel Parlow and Devin Lucas
Registered Interveners in the BCUC Proceedings
Emily Kirkpatrick
Client

SCHEDULE A

Reply Attention of: Ludmila B. Herbst, Q.C.
Direct Dial Number: 604 661 1722
Email Address: lherbst@farris.com

File No: 19078-18

October 15, 2019

BY EMAIL

Kornfeld LLP
1100 – 505 Burrard Street
Vancouver, BC V7X 1M5

Attention: Dan Parlow / Devin Lucas

Dear Sirs/Mesdames:

Re: Pacific Centre Limited (“PCL”) v. Creative Energy Vancouver Platforms Inc., Westbank Projects Corp., Emanate Energy Solutions Inc. (“Emanate”) and John Doe Partnership, Supreme Court of British Columbia, Vancouver Registry, VLC-S-S-197775 (the “Action”)

We write further to your letter of October 13, 2019 and address the matters set out therein.

Proposed Further Amended Response and Counterclaim

Impact on the British Columbia Utilities Commission (the “BCUC”)

The matters set out in your clients' proposed Further Amended Response and Counterclaim include the suggestion that the BCUC made factual determinations in its decision of February 19, 2019 that are contrary to the claim that we filed on July 12, 2019. The proposed Counterclaim also seeks modification of the right of first purchase to exclude from its scope transactions that require the approval of the BCUC.

In the circumstances, we are alerting the BCUC to the position that your clients are now taking and we are requesting *inter alia* that the BCUC suspend its proceedings, given the import that your clients ask be given to them.

Time Frame of Adjudication

We indicated in our letter of October 11 that while we had the concerns set out therein, we were open to considering having a potential challenge by your clients under section 35 of the *Property Law Act* heard during the four-day period reserved for this matter commencing October 29. Though in our view the timing of the arguments that we now see are being advanced is extraordinary, given their nature it is in our view important for all involved that the matter be addressed expeditiously. As such we are, subject to the matters outlined in the next paragraph, prepared to:

- consent to the filing of the Further Amended Response and Counterclaim; and

- have the subject matter of the Counterclaim addressed in the October 29-November 1 period.

Our agreement to the above is subject to the following:

- As the subject matter of the Counterclaim is not addressed in the notice of application filed October 9, 2019, we will need to see the content of the notice of application (or of the amended version of the already filed application) before confirming our consent to having it proceed at the same time as the other matters before the Court. (We do not anticipate an issue if it simply tracks the Counterclaim provided.)
- Your letter notes that “We do expect to rely primarily or entirely upon the record as it now stands, save for any further evidentiary record which may arise from cross-examinations or in reply affidavits.” If any affidavit material is to be filed in support of your clients’ application (or amended application) for relief, apart from materials arising out of cross-examinations or as proper reply, we will need to see its content before confirming our consent.
- We have the ability to cross-examine Messrs. McConnell, Iyer and Berry, further to my October 11 request, by no later than October 23. We would now in any event also have been seeking, even apart from the existing applications as they stood on October 11, to cross-examine these witnesses on matters arising out of their affidavits relevant to the Counterclaim. We return to this under the heading “Cross-examination”, below.
- We obtain copies by October 17, 2019 of:
 - the partnership and shareholder agreements referred to again in our letter of October 11, 2019, pursuant to the arrangement described under the heading “Document Production”, below; and
 - any current or prior deals, listings, market activity, terms of lease or leases (including any draft floor plates) with respect to the leasing of space in the proposed development at 720 Beatty Street.

The bases for the confirmed and further document requests noted in the fourth bullet point above are addressed under the heading “Document Production”.

We confirm that, having reviewed the proposed Counterclaim, we will not take the position that it need instead be brought by petition.

Cross-examination

As noted in our respective correspondence of October 11 and 13, we seek the cross-examination of Messrs. McConnell, Iyer and Berry for the limited durations set out in our October 11 letter (3 hours, 2 hours and 2 hours respectively).

Rule 9-7(12) provides: “On or before the hearing of a summary trial application, the court may order that ... (b) the person who swore or affirmed an affidavit, or an expert whose report is relied on, attend for

cross-examination, either before the court or before another person as the court directs.” This is also a facet of process, of course, for affidavits filed in other chambers proceedings.

The scope of the cross examination is defined by the summary trial application. In the normal course, cross-examination will be ordered where the witness’s affidavit contains facts that are in issue: *Anderson Creek Site Developing Ltd. v. Brovender*, 2011 BCSC 474. Cross-examination would be relevant to issues that may affect the outcome of the substantive application and serve a useful purpose in terms of eliciting evidence that would assist in determining the issue. This is so whether or not there is a conflict in the affidavit evidence. See, for example, the summary in *B & L Holdings Inc. v. SNFW Fitness BC Ltd.*, 2018 BCSC 1374 at paras. 25-27.

Your clients seek to rely on the evidence of Messrs. McConnell, Iyer and Berry on the summary trial applications and it appears on the Counterclaim. They have attested to certain matters that are outside the direct knowledge of our client, but appear to us to be contradictory to aspects of the record that is otherwise in evidence, including from proceedings at the BCUC. Without limiting the scope of the questions to be posed on the cross-examination (which is defined in the manner outlined in the prior paragraph), their evidence relates *inter alia* to your clients’ motivations and beliefs, your clients’ objectives, and the nature and timing of their planning and contractual arrangements, including with reference to documents not disclosed until their affidavits were provided. The frequency with which those positions are repeated in the materials filed or proposed to be filed indicates that your clients will be relying heavily on those assertions. As noted above, we are also proceeding on the assumption that their evidence underpins the relief that your clients seek on the proposed Counterclaim.

It is appropriate that we have the opportunity to test those assertions and without that opportunity, in our view, the affidavits would not properly be relied upon or given any significant weight.

Please advise by no later than October 16, 2019 whether your clients will consent to the cross-examination proposed, whether as part of the arrangement we have proposed for an orderly hearing of the proposed Counterclaim or otherwise. If they do not, we anticipate bringing an application on short leave to obtain cross-examination.

Document Production

Shareholder and Partnership Agreements

We have for a substantial period of time sought production of the category of documents that on October 13 you have refused to produce.

As noted in Ms. Miller’s letter of September 23, which among other things addressed those documents, we continued to endeavour to provide our client’s summary trial application materials to you that week (which in fact we did) despite what we considered to be deficient production; however, we reserved the right to supplement those materials, if needed, based on any additional production provided by your clients.

We do not see how our request for the documents in question could be seen as “fishing” given the nature of the matters live in this litigation. The relevance of those documents has again been evidenced by the

content of Exhibit "F" to Mr. Berry's affidavit and the fact that your clients rely more generally on a constellation of arrangements of which these form an integral part.

At best your position presumes success on your clients' application for summary judgment, which has not been adjudicated and the bringing of which does not operate as a stay of other measures in the court process.

Further, as to the confidentiality or privacy concerns raised in your letter:

- the parties were able to address these in relation to the schedules to the Unit and Share Purchase Agreement and the same process could be adopted here. We would be prepared to apply in this case the same arrangement as agreed to in Mr. Hooge's email of September 27, 2019 regarding the un-redacted Unit Purchase Agreement, namely receipt of the documents on the basis that we will not communicate them to our client without first having your consent or a court order, and reserving the right to seek such a court order, once we have had an opportunity to review the un-redacted documents, should we consider it appropriate to do so.
- your letter suggests that the confidentiality and privacy-related matters "would have to be considered prior to any potential production". That consideration was, we understood, already being undertaken given among other things your email of September 25, 2019 referring to the fact colleagues, clients and counsel for Emanate were being conferred with.

Lease-related Documents

With respect to our request (set out under the heading "Proposed Further Amended Response and Counterclaim") for any current or prior deals, listings, market activity, terms of lease or leases (including any draft floor plates) with respect to the leasing of space in the proposed development at 720 Beatty Street, we note that CEV's affiants have suggested that the planning for the proposed development is at a preliminary and fluid stage. For example, Mr. McConnell states that the plans and specifications in the Trust and Development Agreement "were conceptual in nature", that the "size, layout and organization of the Proposed Reconfigured Beatty Plant are being developed by the project architects and have been evolving for many months" and that "the precise location of the equipment must be worked out in further detail before the Proposed Project can proceed" (at paragraphs 72, 75 and 76).

The requested leasing documents are important facets in assessing the certainty of design of the proposed development and the nature and enforceability of contractual and property interests to which they could give rise.

Process

The above-noted documents are relevant and material to this litigation and should be produced.

Further, as noted above, we also specifically seek production of these documents as an element of the arrangement outlined above for proceeding with the filing and early adjudication of matters arising from the proposed Further Amended Response to Civil Claim and proposed Counterclaim. The agreement sought would facilitate the parties' ability to proceed in an orderly manner, to adjudicate on their

October 15, 2019

- 5 -

substance the matters raised and avoid impediments such as the need to apply to court for filing or production.

Please advise by no later than October 16 whether will you provide the requested documents (by no later than October 17) on the basis outlined above, whether as part of the arrangement we have proposed for an orderly hearing of matters arising out of the proposed Further Amended Response to Civil Claim and proposed Counterclaim or otherwise. If you do not, we anticipate bringing an application on short leave for that and potentially other document production.

Materials to be Relied on at the October 29-November 1 Hearing

We agree that the parties may refer to the materials that the others have filed without having listed them in their own notice of application or their own application response.

We also have no objection to the materials that you filed on October 9 being referred to, subject in the case of the affidavits of Messrs. McConnell, Iyer and Berry to our ability to cross-examine them.

The further point we wished to make in relation to service being effective October 10 was that if you had intended to argue your application before our application, you would have been out of time to do so (as 12 business days from October 10 is October 30, not 29). However, that seems to be moot given the remainder of your correspondence.

Order of Submissions at the October 29-November 1 Hearing

We agree that if the proposed Counterclaim is pursued during the October 29-November 1 time period (in that regard, we refer to the points outlined above), the order of submissions should be as follows:

- PCL's submissions on its summary trial application (the "**PCL Application**");
- your clients' submissions in response to the PCL Application and on their summary judgment/trial application(s), including in relation to the Counterclaim (the "**CEV Application**");
- PCL's submissions in response to the CEV Application and in reply on the PCL Application; and
- your clients' submissions in reply on the CEV Application.

Yours truly,

FARRIS LLP

Per: 

Ludmila B. Herbst, Q.C.

LBH/Itt

c.c.: Client
Kristin Apan
Emily Kirkpatrick
Nicholas Hooge and Erica Miller

SCHEDULE B

Kristin Apan

From: Carol Alter Kerfoot
Sent: November 9, 2017 3:14 PM
To: pjawanda@mccarthy.ca; Kosoric, Bosa (BKOSORIC@mccarthy.ca); alex.jerome@instaragf.com; ching-yen.chen@instaragf.com; Gillis, Maureen (mgillis@mccarthy.ca)
Cc: tberry@reshapestrategies.com; Diane Rapatz (diane@westbankcorp.com); Jordan E. Langlois; Neil Kornfeld
Subject: CRE005INS171-- Creative/ Instar Group 2 Purchase - Alternative Structure
Attachments: STAGE 2 - Alternative Structure Diagram 2(Nov. 9, 2017).pdf; Alternative Structure for the Group 2 Business 4.docx

All,
 Attached is a memo and diagram that outlines a potential Stage 2 structure which does not require Cadillac participation.

As it is preliminary and is still being further reviewed by Westbank’s external accountants, it’s also subject to further comment from our clients. In particular, the way in which the development activity will be structured has not been determined.

With regards,

Carol

Carol Alter Kerfoot
 Law Corporation
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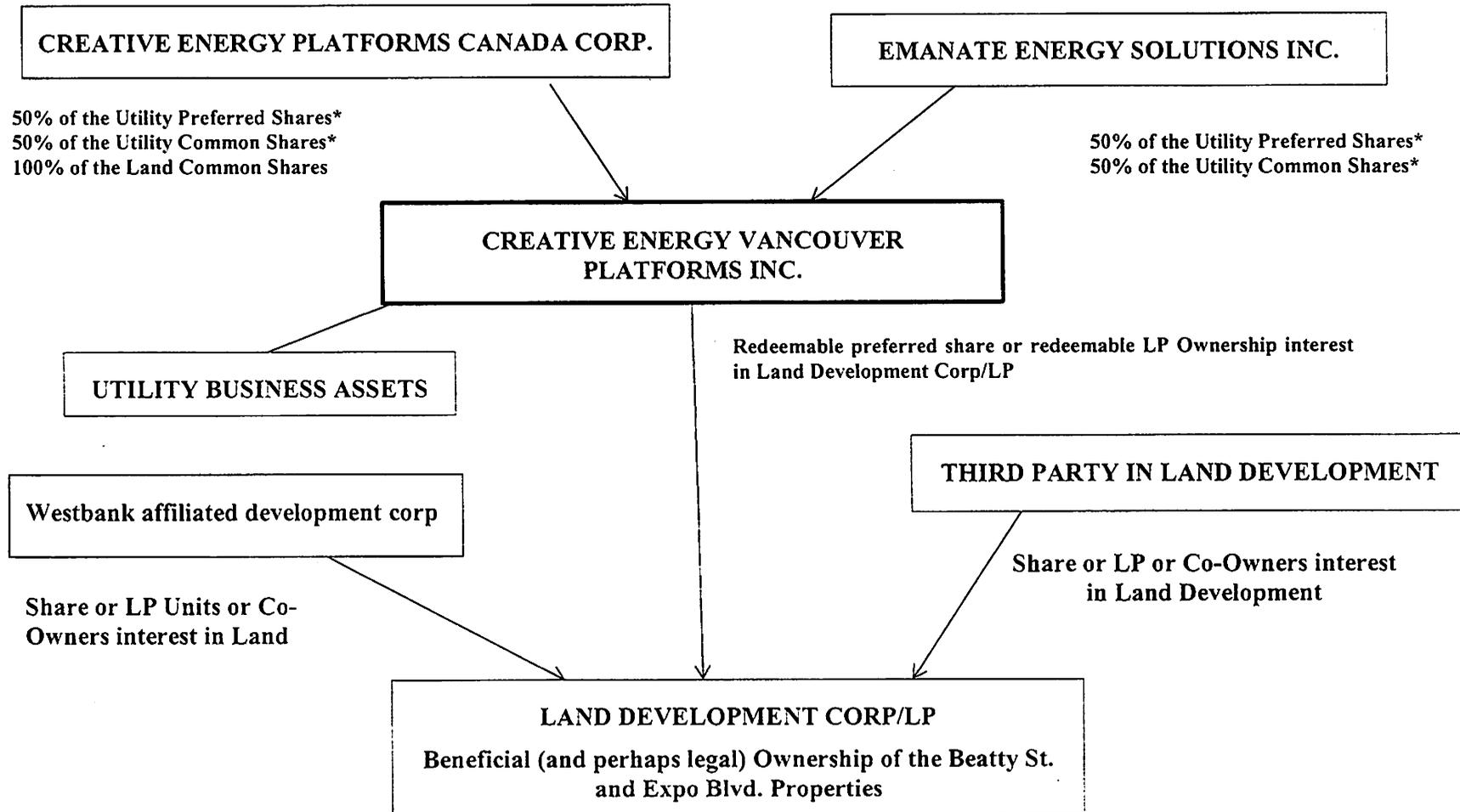
KORNFELD LLP
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 1100 One Bentall Centre
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 604.331.8300

This message is intended only for the addressee and may contain information which is privileged, confidential and exempt from disclosure under applicable law. Unauthorized dissemination, distribution or duplication of this transmission is strictly prohibited.

*This is Exhibit " " referred to in the
 affidavit of
 sworn before me at
 in the Province of British Columbia
 this day of A.D. 20*

.....
 A Commissioner for taking Affidavits
 within British Columbia

STAGE 2 – ALTERNATE STRUCTURE MEMO



*The Utility Preferred shares will be sold by CE Canada to Emanate for consideration equal to the Stage 2 purchase price and with the Utility Common shares will provide to the holder 50% of the net returns from the Utility Business Assets (ie: a return equal to the return which Creative Canada receives from the Utility Business Assets).

November 9, 2017

DRAFT FOR DISCUSSION

Possible Alternative Structure for the Group 2 Assets

1. Creative Energy Vancouver Platforms Inc. (CE Vancouver) is a wholly owned subsidiary of Creative Energy Canada Platforms Corp (CE Canada) and CE Canada. is a wholly owned subsidiary of Creative Canada Holdings Ltd. (CE Holdings);
2. CE Canada intends to complete the transfer of the Group 1 Business to Creative Developments Limited Partnership, the transfer of 50% of the units of that partnership to Emanate Energy Solutions Inc., and to cause CE Vancouver to enter into a Unit and Share Purchase Agreement for the Group 2 Business, completion for which is subject to, inter alia, approval of the BC Utilities Commission;
3. The Beatty Plant, which is the single most significant asset of the Group 2 Business is subject to the Cadillac Fairview ROFR;
4. To date, Cadillac Fairview the owner of Pacific Centre Limited, has declined to discharge the Cadillac Fairview ROFR or to waive its rights to allow for the transfer of the Group 2 Business to Creative Vancouver LP;
5. To minimize risk of the potential for a breach of the Cadillac Fairview ROFR, the parties to the Unit and Share Purchase Agreement for the Group 2 Business wish to consider an alternative structure which would achieve the same commercial effect as the transactions between Emanate Energy Solutions Inc, (Instar AGF), CE Vancouver and CE Holdings contemplated by the Group 2 Unit and Share Purchase Agreement of even date, the agreed form of Limited Partnership Agreement for Creative Vancouver LP and the agreed form of Shareholder Agreement for Creative Vancouver GP.

If the transfer of the Beatty Plant to Creative Vancouver LP and the subsequent transfer of units of Creative Vancouver LP to Creative Developments LP cannot be completed without, in the opinion of CE Vancouver, a material risk of breach of the Cadillac Fairview ROFR, the parties will direct their advisors to consider the feasibility of a plan structured as set out below.

Capitalized terms which are not defined have the meanings given to them in the Unit and Share Purchase Agreement for the Group 2 Business.

CE Vancouver will separate its assets and activities into two divisions, the Utility Division and the Property Division.

The assets of the Utility Division will consist of all assets which were to have been transferred to Creative Vancouver LP.

The assets of the Property Division will consist of all assets which were to have been retained by CE Vancouver.

CE Vancouver will do a “freeze” and convert its existing common shares into two classes of preferred shares, one (the Utility Preferred Shares) to which will be attributed the current value of the CE Vancouver energy business and the other (the Property Preferred Shares), to which will be attributed the existing value of the real property. Two new classes of common shares will be created which will initially have nominal value. One (the Utility Common shares) will be entitled only to the assets of and growth in the CE Vancouver energy business, (with the Utility Preferred Shares having priority) and another (the Property Common shares) which will be entitled to the remaining assets including the real property, (with the Property Preferred Shares having priority).

CE Canada as the owner of the Utility Preferred Shares will sell to Instar AGF one half of the Utility Preferred Shares. CE Vancouver will issue to Instar AGF for nominal consideration one half of the Utility Common shares.

The sale price for the Utility Preferred shares will be calculated in the same manner as the price for the Purchased Newco Units is to be calculated under the Group 2 Unit and Share Purchase Agreement.

In its application to the BC Utilities Commission for approval of the transactions, CE Vancouver will seek approval for the transfer of the assets of the Real Property Division (save for a 99 year lease of the plant site) to a newly created corporation or real estate development limited partnership [the Development Entity] in which CE Vancouver is the holder of preferred redeemable shares or a limited partner holding redeemable units. (Another Westbank affiliate, not in the Creative chain, would be the holder of common shares or participating units and be the general partner.)

Upon being declared, by the BCUC, as assets which are surplus to the operation of the utility, the beneficial interest in the real property will be transferred to the Development Entity. (Once the BCUC considers the real property assets to be surplus, then Cadillac should have difficulty in arguing that its ROFR applies to those assets.)

If there is a third party shareholder, codeveloper or partner in the Development Entity and the third party requires that legal title be registered to a nominee, then the PPT cost of transferring title may have to be incurred.

CE Vancouver will enter into a management agreement with Creative Developments LP, pursuant to which it will agree to cause the Energy Division of CE Vancouver, (but not matters related to its interest in the real estate) to be controlled by Creative Developments LP, in the same manner and to the same extent as if the Energy Division of CE Vancouver were a subsidiary of Creative Developments LP.

The Utility Preferred Shares and Utility Common shares held by Instar will have the same value at time of issue, will have the same increase or decrease in value, and will provide the same return, on an after tax basis, as would have been attributed to the Purchased Newco Units under the Group 2 Unit and Share Purchase Agreement.

If legal title to the real property is not transferred to a nominee to be held for the Development Entity, Instar should be indemnified to the extent that liabilities of the Development Entity impair the value of Instar's interests.

SCHEDULE C



This is the 1st affidavit of T. Knoepfel in this case and was made on 25/Sept/2019.

No. S197775
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

PACIFIC CENTRE LIMITED

PLAINTIFF

AND:

**CREATIVE ENERGY VANCOUVER PLATFORMS INC.,
WESTBANK PROJECTS CORP., EMANATE ENERGY SOLUTIONS INC.
and JOHN DOE PARTNERSHIP**

DEFENDANTS

AFFIDAVIT

I, **TOM KNOEPFEL**, Senior Vice President and Portfolio Manager, Western Canada Portfolio, care of 2500 – 700 West Georgia Street, Vancouver, British Columbia, MAKE OATH AND SAY AS FOLLOWS:

1. I am an Officer (Vice President) of the plaintiff, Pacific Centre Limited (“PCL”). I am also the Senior Vice President and Portfolio Manager, Western Canada Portfolio, for The Cadillac Fairview Corporation Limited (“**Cadillac Fairview**”), which is a 50% owner of the plaintiff, PCL. As such, I have personal knowledge of the facts and matters hereinafter deposed to, except where my knowledge is stated to be based on information and belief, in which case I believe the facts to be true.

A. INTRODUCTION

2. As is set out in more detail below, PCL is a registered owner of the “**Pacific Centre Complex**”, an office and retail complex that occupies three full city blocks in downtown Vancouver between Granville Street and Howe Street, running from West Pender Street to Robson Street. The Pacific Centre Complex includes:

(a) the buildings and properties located on:

- (i) lands located between West Georgia Street and Robson Street, and legally described as PID 005-003-580, Block 52 (Explanatory Plan 9962), DL 541, Plan 210 ("**Block 52**");
 - (ii) lands located between Dunsmuir Street and West Georgia Street and legally described as PID 010-240-004, Block 42 (Reference Plan 10328), DL 541, Plan 210 ("**Block 42**"); and
 - (iii) lands located between West Pender Street and Dunsmuir Street and legally described as PID 007-857-969, Lot C, Block 32, District Lot 541, Plan 21253 ("**Lot C**") and PID 024-384-844, Parcel E, Block 32, District Lot 541, Group 1, New Westminster District, Plan LMP40957 ("**Parcel E**", and together with Lot C, "**Block 32**"); and
 - (b) numerous undersurface leases with the City of Vancouver below portions of Block 52, Block 42 and Block 32; and
 - (c) one above-ground lease with the City of Vancouver, between Block 42 and Block 32.
3. As is set out in more detail below, the Pacific Centre Complex receives steam heating from the defendant, Creative Energy Vancouver Platforms Inc. ("**CEV**"), which was formerly known as Central Heat Distribution Limited ("**Central Heat**"). CEV has served the Pacific Centre Complex since the first portions of the complex opened in or about 1971. The steam heating provided to one portion of the complex, specifically Block 52 and Block 42 (together, "**Pacific Centre South**") is secured by certain charges in favour of PCL, and registered against a property owned by CEV at 720 Beatty Street, Vancouver, British Columbia (the "**Beatty Property**").

B. MY BACKGROUND AT PCL AND CADILLAC FAIRVIEW

4. I started working for Cadillac Fairview in April 2001, as a Director of Office Leasing. In this role, I oversaw Cadillac Fairview's office leasing efforts with respect to its "Waterfront Properties" (as this term is defined below), an office and retail development located in downtown Vancouver, British Columbia.
5. In or about April 2002, my responsibilities expanded beyond overseeing the "Waterfront Properties" to include all of Cadillac Fairview's office leasing efforts throughout Vancouver, British Columbia. It was at this time I first became involved with PCL and the Pacific Centre Complex.
6. My portfolio again expanded, in terms of both geographic area and tenant type, in or about November 2006. At this time, I became the Vice President and Assistant Portfolio Manager, responsible for overseeing Cadillac Fairview's western Canada portfolio, which consists of Cadillac Fairview's office and retail leasing efforts throughout British Columbia, Alberta and Manitoba. In this role, I was second-in-command with respect to these assets, and I reported directly to the Senior Vice-President, Portfolio Manager, Western Canada Portfolio.

7. Also in or about 2006, I became a Vice President of PCL. I continue to hold this role to date.
8. In or about January 2010, I commenced my current role of Senior Vice President and Portfolio Manager, Western Canada Portfolio.
9. In my current role, I am responsible for overseeing the management of operations, as well as the retail and office leasing efforts, of Cadillac Fairview's western portfolio, including the Pacific Centre Complex. This involves managing the relevant real estate assets, ensuring that the assets are being operated efficiently and effectively, setting leasing strategies, overseeing annual leasing and operating budget preparation and implementation and ensuring that appropriate leasing transactions are undertaken from a merchandising perspective, understanding and applying the market conditions and other external factors that may impact the operations and leasing of the properties, as well as ensuring adherence of the relevant properties to Cadillac Fairview's corporate policies and governmental regulations.

C. PACIFIC CENTRE LIMITED

10. PCL is a company incorporated in British Columbia. Attached hereto and marked as **Exhibit "1"** to my affidavit are copies of current and historical BC Company Summaries for PCL.
11. PCL is the tenant under ground leases of the Pacific Centre Complex. Attached hereto and marked as **Exhibit "2"** to my affidavit is a copy of the ground leases, registered in the Land Title Office under document numbers 484272-M and 503338-M.
12. PCL is also the registered owner of Block 42.

D. PCL'S CORPORATE STRUCTURE

13. Since in or about January 2017, PCL has been owned 50% by Cadillac Fairview and 50% by VanPC LP.
14. As is set out in more detail below, Cadillac Fairview is indirectly owned by the Ontario Teachers' Pension Plan Board (the "**OTPPB**"), and VanPC LP is indirectly owned by the Workplace Safety and Insurance Board Ontario (the "**WSIB**") and the Ontario Pension Board (the "**OPB**").

i. The Cadillac Fairview Corporation Limited

15. Cadillac Fairview is a Canadian company that was formed in or about 1974 through the merger of various Canadian companies, including Cadillac Development Corporation Limited and The Fairview Corporation Limited. Attached hereto and marked as **Exhibit "3"** to my affidavit is a copy of an Extraprovincial Company Summary for Cadillac Fairview. It has approximately 1,500 employees.

16. Cadillac Fairview is indirectly owned by the Ontario Teachers' Pension Plan Board (as defined above, the "OTPPB").
17. Cadillac Fairview manages all of the real estate assets and real estate investments of the OTPBB, and with respect to certain of these properties, it holds (directly, or indirectly through subsidiaries) full or partial interests. It is responsible for 68 properties in Canada, encompassing over 37 million square feet of space, and with a total value of over \$31 billion. Its core markets are Vancouver, Calgary, Toronto and Montreal, and, amongst its assets are fourteen properties in British Columbia, seven properties in Alberta, thirty-six properties in Ontario and six properties in Quebec.
18. In Vancouver, in addition to the Pacific Centre Complex, Cadillac Fairview manages a large complex located in downtown Vancouver, consisting of buildings located at 601 West Cordova Street (the Station), 250 Howe Street (PwC Place), 200 Granville Street (Granville Square) and 200 Burrard Street (Waterfront Centre, and together, the "**Waterfront Properties**"), as well as the HSBC building at 885 West Georgia Street (the "**HSBC Building**").
19. Cadillac Fairview has developed over \$7 billion in retail, office and mixed-use properties over the past ten years. This has included ground up new office, residential and hotel buildings, as well as redevelopment of existing assets (for example, the Sears/Nordstrom redevelopment discussed in paragraph 20(a) below). Cadillac Fairview currently has \$3 billion of developments under construction across Canada, including office, residential and retail buildings.
20. Some examples of developments and redevelopments that Cadillac Fairview has undertaken in recent years include:
 - (a) the Sears/Nordstrom redevelopment at 725 Granville Street, in Vancouver, which occurred from 2012 to 2015, comprised over 600,000 square feet (with over 550,000 square feet in gross leasable area being redeveloped) and involved construction costs in excess of \$300 million;
 - (b) the CF Chinook Centre expansion at 6455 Macleod Trail, in Calgary, which was completed in the spring of 2010, and involved approximately 220,000 square feet at a cost of over \$275 million;
 - (c) the Calgary City Centre office development at 215 – 2nd Street SW in Calgary, which was completed in January 2016 and involved approximately 853,000 square feet at a cost of over \$450 million; and
 - (d) the office development at 160 Front St. W in Toronto, which is estimated to be completed in spring 2023, involves 1,260,000 square feet, and has an estimated cost of almost \$850 million.
21. Cadillac Fairview is also responsible for managing the OTPPB's international real estate assets and real estate investments. The OTPPB currently has real estate investments in

Brazil, Mexico, Colombia and the United States. Cadillac Fairview provides investments, development and property management services for the real estate portfolio.

ii. The Ontario Teachers' Pension Plan Board

22. The OTPPB has been involved in Cadillac Fairview's ownership since in or about 1997, initially as a shareholder, and from in or about March 2000, as its sole owner.
23. Since in or about March 2017, the OTPPB has indirectly owned Cadillac Fairview.
24. The OTPPB is Canada's largest single-profession pension plan. As was set out above, Cadillac Fairview manages properties with a total value of over \$31 billion for the OTPPB. The OTPPB's net investment in real estate (less third party debt) is approximately \$27.5 billion.
25. The OTPPB has numerous investments and in utility companies and infrastructure projects, including the following current or recent investments:
 - (a) Scotia Gas Networks – the UK's second largest gas distribution company;
 - (b) SAESA – Chile based electricity distributor and transmitter;
 - (c) Southwater – Chile based water utility;
 - (d) Cubico – global renewable power generator;
 - (e) BluEarth Renewables – Canadian renewable power generator;
 - (f) MapleCo – UK based smart meter supplier;
 - (g) Sydney Desalination Plant (SDP) – Australia based water desalination facility;
 - (h) Essbio, Esva and Nuevosur – water companies in Latin America;
 - (i) Anbaric Development Partners – a leader in the development of clean energy transmission and microgrid projects, headquartered in Massachusetts;
 - (j) Stem, Inc. – innovative technology services that transforms the way energy is distributed and consumed;
 - (k) Heritage Royalty – an oil and gas royalty company headquartered in Calgary; and
 - (l) GRP Energy – acquires and manages oil and gas mineral rights in Texas.

iii. VanPC LP and VanPC GP

26. In addition to Cadillac Fairview, PCL's other owner is VanPC LP (through its general partner, VanPC GP Ltd. ("**VanPC GP**")). Attached hereto and marked as **Exhibit "4"** to my affidavit is a copy of the Extraprovincial Company Summary for VanPC GP.

27. VanPC GP is indirectly owned 50% by the Workplace Safety and Insurance Board Ontario (as defined above, the “WSIB”) and 50% by the Ontario Pension Board (as defined above, the “OPB”).

iv. **The Workplace Safety and Insurance Board Ontario & the Ontario Pension Board**

28. The WSIB has net investments of approximately \$35 billion and the OPB has net investments of approximately \$26.5 billion. This includes numerous investments in utility projects. The WSIB and OPB are part of a consortium of investors that acquired a stake in a 413-megawatt Canadian hydroelectric portfolio, have investments in a UK-based firm that focuses on extracting energy from waste through an aggregated platform, and recently increased their stake in CLH Group, a Spanish oil logistics operator. Additionally, the WSIB holds an interest in a private regulated UK water and sewerage company that serves more than 2 million customers in England.

E. **THE PACIFIC CENTRE COMPLEX**

29. While it predates my employment with Cadillac Fairview and my involvement with PCL, it is my understanding and belief, both from my discussions with various other Cadillac Fairview employees over the years, and from my review of documents through the course of my employment and in preparing this affidavit, that development of the “Pacific Centre Complex” commenced in or about 1969. The development was undertaken in stages, as follows:
- (a) the first portion to be developed (in the late 1960s and early 1970s) was located on Block 52 and a copy of the title search for Block 52 is attached hereto and marked as **Exhibit “5”** to my affidavit;
 - (b) the second portion to be developed (in the early 1980s) was located on Block 42, and a copy of the title search for Block 42 is attached hereto and marked as **Exhibit “6”** to my affidavit; and
 - (c) finally, the third portion, located on Block 32, was developed and redeveloped (as certain portions of Block 32 were already developed when they were acquired) between the late 1980s and early 2000s, and copies of the title searches for Lot C and Parcel D of Block 32 are attached hereto and marked as **Exhibit “7”** and as **Exhibit “8”** to my affidavit, respectively.
30. Pacific Centre South (which, as defined above, includes Block 52 and Block 42, but not Block 32) includes the land and buildings at 609 Granville Street (the Cannacord Tower), 725 Granville Street, 701 West Georgia Street, the Four Seasons Hotel, 700 West Georgia Street (the TD Tower) and the majority of the CF Pacific Centre shopping centre (the “**Shopping Centre**”).
31. Block 32 includes the land and buildings at 777 Dunsmuir Street, 700 West Pender Street, 750 West Pender Street and the balance of the Shopping Centre (including Holt Renfrew).

32. As stated above, PCL is the registered owner of Block 42.
33. The registered owners of Block 52 are 527698 B.C. Ltd. and 527700 B.C. Ltd. (each of which own an undivided half interest in the property). Like PCL, 527698 B.C. Ltd. and 527700 B.C. Ltd. are each owned 50% by Cadillac Fairview and 50% by VanPC GP.
34. The registered owners of Block 32 are: (a) for Lot C, Cadillac Fairview (as to an undivided 20/60 interest), 622145 B.C. Ltd. (as to an undivided 20/60 interest), 527698 B.C. Ltd. (as to an undivided 10/60 interest) and 527700 B.C. Ltd. (as to an undivided 10/60 interest), and (b) for Parcel E, PCL Pender Place Inc. Cadillac Fairview owns 50% of each 527698 B.C. Ltd., 527700 B.C. Ltd. and PCL Pender Place Inc.
35. Cadillac Fairview and VanPC LP are the beneficial owners of the Pacific Centre Complex.
36. Cadillac Fairview is the property manager of the Pacific Centre Complex, and is a licenced brokerage pursuant to the *Real Estate Services Act*. In its capacity as property manager, Cadillac Fairview is the agent in certain respects for the beneficial owners of the Pacific Centre Complex (being Cadillac Fairview and VanPC LP).

F. PACIFIC CENTRE'S TENANTS

37. In my role as Senior Vice President and Portfolio Manager, Western Canada Portfolio, I am responsible for managing the operations of the Pacific Centre Complex, including oversight of the leasing efforts for the Pacific Centre Complex.
38. With respect to retail tenants, the Pacific Centre Complex includes CF Pacific Centre (as defined above, the "Shopping Centre"). It is one of the leading malls in Canada, receiving approximately 21 million visits per year. It is also the most productive shopping centre in British Columbia (and the second most productive shopping centre in Canada), measured in terms of sales per square foot.
39. The Shopping Centre is a major focal point in downtown Vancouver, and it is directly connected to major transit lines (the Canada Line and Expo Line, through the Vancouver City Centre skytrain station).
40. The Shopping Centre covers approximately 720,000 square feet and has approximately 85 tenants including anchor tenants Nordstrom and Holt Renfrew. Other major retailers located in the Shopping Centre including H&M, Harry Rosen and Sephora. Attached hereto and marked as **Exhibit "9"** to my affidavit is a copy of a list of the tenants of the Shopping Centre, printed from the Shopping Centre's website on August 2, 2019.
41. In addition to retail space, the Pacific Centre Complex has office buildings with approximately 1.8 million square feet, housing approximately 180 tenants with approximately 10,000 employees. The office space in Pacific Centre South is first class office space.

42. The tenants in the office space include national financial and accounting entities, the Federal Courts, the British Columbia Securities Commission, Health Canada, TD Canada Trust, radio stations (980 CKNW, Classic Rock 101, CFOX 99.3 and AM730), Sony Imageworks, Microsoft, various law firms, Canaccord, and numerous smaller tenants such as an optometrist.
43. The Pacific Centre Complex also includes a hotel, currently the Four Seasons Hotel Vancouver (the “Hotel”). The Hotel is approximately 360,000 square feet in size with 373 guest rooms. The Hotel also contains a restaurant, Yew Seafood + Bar.
44. Additionally, the Pacific Centre Complex generates funds for the City of Vancouver. Pacific Centre South generated approximately \$18.5 million in property taxes for Vancouver last year. The Pacific Centre Complex also contains a City-owned parkade, which generated approximately \$9 million in net revenues in 2018.

G. THE PACIFIC CENTRE’S STEAM HEAT SERVICE

i. The Importance of Steam Heating to the Pacific Centre Complex

45. The heating for Pacific Centre South is exclusively steam provided by CEV. Block 32 also utilizes steam heating from CEV, though its heat is supplemented by a geo-exchange heat storage system that was installed with the consent of CEV.
46. Heating is extremely important to the Pacific Centre Complex, particularly given its size, and the number of tenants, employees, customers and visitors that it houses. The tenants, customers and visitors to the Pacific Centre Complex rely on this supply of steam heat to ensure that their space remains habitable, and at a constant and comfortable temperature. It is essential that appropriate temperatures be maintained within the Pacific Centre Complex in order to comply with industry standards and expectations, and to remain competitive within current market conditions.
47. In particular, efforts are made to ensure compliance with the standards of the American Society of Heating Refrigeration and Air-Conditioning Engineers (“ASHRAE”). The applicable standard for indoor air testing is ASHRAE Standard 55-2017, Thermal Environmental Conditions for Human Occupancy, a copy of which is attached hereto to my affidavit and marked as **Exhibit “10”**. This ASHRAE Standard specifies the combinations of indoor thermal environmental factors and personal factors that produce thermal environmental conditions acceptable to a majority of occupants within the space.
48. In British Columbia, WorkSafeBC refers to the comfort ranges established by ASHRAE and states that, whenever practical, offices should be kept within this range. Attached hereto and marked as **Exhibit “11”** is a print off of the “Indoor Air Quality” webpage from the Managing Occupational Health & Safety section of www.gov.bc.ca.
49. If the steam service provided to the Pacific Centre Complex were to cease or be reduced, this would impact the maintenance of proper temperatures and compliance with the ASHRAE standards. While the severity of the impact would depend on factors such as

the weather and temperature outside, the amount of the reduction of service and the duration of the interruption, without heat:

- (a) customers or employees may not attend the Shopping Mall, potentially impacting retail sales of tenants (and for many retailers, the rent payable, as a portion of the rent payable by certain retailers is tied to their sales);
- (b) clients or employees may not attend offices, potentially impacting the financial performance of business operating in office spaces;
- (c) business may not be able to open, potentially causing a significant economic impact on both office and retail tenants;
- (d) hotel guests may refuse to stay at the Hotel, or the Hotel may be unable to remain open, causing a significant economic impact on the Hotel;
- (e) tenants may refuse to pay full rent, or claim other compensation, due to the impact on their businesses;
- (f) tenants may decide not to renew their leases going forward, and it may make it more challenging to lease vacant spaces;
- (g) risk of indoor air quality complaints from tenants or their employees; and
- (h) risk of severe reputational harm.

50. Further, if the steam service were to cease or be reduced, this could impact the physical state of the buildings within the Pacific Centre Complex. There is the potential for pipes and the sprinkler systems within the Pacific Centre Complex to freeze up, which could result in flooding and/or the loss of operation of the fire, life and safety systems. Additionally, if heating were impacted for a long time period, there is a risk of damage to the building envelope and/or mould.

51. Additionally, hot water at several of the buildings within the Pacific Centre Complex (specifically 700 West Georgia Street (the TD Tower), 701 West Georgia Street, 700 West Pender Street and 750 West Pender Street) relies on the steam heating and would be impacted if this service was not available.

ii. **Steam Usage**

52. For the period from January 1, 2015 to December 31, 2018, the Pacific Centre Complex (excluding the Hotel) had an average annual consumption of almost 57 million pounds of steam at an average annual cost of approximately \$1.015 million. Attached hereto and marked as **Exhibit "12"** to my affidavit is a copy of spreadsheets summarizing the monthly pounds of steam use, and the monthly steam cost, for the Pacific Centre Complex for the period of January 2015 through May 2019.

53. Attached hereto and marked as **Exhibit “13”** to my affidavit are copies of CEV’s invoices to Cadillac Fairview for steam heat service provided to the Pacific Centre Complex and the HSBC Building for the period of January 31, 2018 to May 31, 2019.
54. Additionally, CEV provides service to other properties managed by Cadillac Fairview in Vancouver, such as the Waterfront Complex and the HSBC Building. In 2018, these properties consumed approximately 76 million pounds of steam from CEV.
55. Cadillac Fairview engages a third party consultant, Energy Advantage Inc. (“**Energy Advantage**”), to provide services for all of its properties, including the properties that receive steam service from CEV. Energy Advantage provides services including invoice management, as well as providing an electronic interface with Cadillac Fairview’s accounting system and reporting of Cadillac Fairview’s cost and consumption information for energy and water.
56. Attached hereto and marked as **Exhibit “14”** to my affidavit is a copy of an agreement between Cadillac Fairview and Energy Advantage, dated November 1, 2017, with respect to the services provided by Energy Advantage.

H. THE CHARGES IN FAVOUR OF PCL

57. PCL entered into the following agreements with Central Heat, copies of which are attached to my affidavit and marked as the following exhibits:
- (a) **Exhibit “15”** – an Agreement between PCL and Central Heat, dated November 5, 1969 (the “**Agreement**”);
 - (b) **Exhibit “16”** – a Steam Service Contract between PCL and Central Heat, dated June 1, 1970 (the “**Steam Service Contract**”);
 - (c) **Exhibit “17”** – a First Right to Purchase agreement, dated June 1, 1970 (the “**ROFP Agreement**”) giving PCL a first right to purchase Central Heat’s undertaking, or any part thereof (the “**ROFP**”);
 - (d) **Exhibit “18”** – an Indenture, dated June 1, 1970 (the “**Indenture**”), granting PCL with a floating charge over Central Heat’s real and personal assets (the “**Floating Charge**”);
 - (e) **Exhibit “19”** – a Supplemental Steam Service Contract between PCL and Central heat, dated June 1, 1982 (the “**Supplemental Steam Service Contract**”);
 - (f) **Exhibit “20”** – a First Right to Purchase Modification Agreement, dated June 1, 1982 (the “**ROFP Modification Agreement**”); and
 - (g) **Exhibit “21”** – a Supplemental Debenture, dated June 1, 1982 (the “**Supplemental Debenture**”).

58. The ROFP Agreement, Indenture, ROFP Modification Agreement and Supplemental Debenture (together, the “**Charges**”) are registered in favour of PCL as charges against the Beatty Property, owned by CEV. Attached hereto and marked as **Exhibit “22”** to my affidavit is a copy of a title search for the Beatty Property, showing the Charges, and that the Beatty Property is owned by CEV.
59. Attached hereto and marked as **Exhibit “23”** to my affidavit is a copy of an Application for registration of charge 514787 with the Indenture attached, and attached hereto and marked as **Exhibit “24”** to my affidavit is a copy of an Application for registration of charge 514788 with the ROFR attached.
60. While it predates my employment with Cadillac Fairview and my involvement with PCL, the following is my understanding and belief, from my discussions with various other Cadillac Fairview employees over the years and my review of documents through the course of my employment and in preparing this affidavit:
- (a) At the time the Agreement was entered into between Central Heat and PCL, the first stages of development of the Pacific Centre Complex were being planned. The development was to start with the TD Tower located at 700 West Georgia Street (on Block 52), followed by the development of the balance of Block 52. At the time, the possibility of later developing Block 42 was also contemplated, as is set out in the recitals of the Agreement.
 - (b) The decision on heating services for the Pacific Centre Complex was an important decision in the overall design and construction of the project. This was because utilizing the steam heat provided by Central Heat would allow the Pacific Centre Complex to be designed and built without including onsite the infrastructure necessary to generate its own heating (such as boilers). This avoided the upfront costs and space associated with including this infrastructure, but was substituted with recurring steam charges over time.
 - (c) However, this decision also made the Pacific Centre Complex dependent on Central Heat for heating, as it would not have the ability to switch to generating its own heat. This dependence was increased by the fact that the Steam Service Contract contains an exclusivity clause, which provides that PCL “agrees that [Central Heat] shall have the exclusive right to serve [PCL] for the purpose of heating and ancillary uses in [PCL’s] business complex building ...”.
 - (d) At the time, Central Heat was a new utility. The Pacific Centre Complex was to be one of its first major customers.
 - (e) The relationship between PCL and Central Heat at this time was in some ways akin to a form of “partnership”. Both were in the process of developing new projects and Central Heat needed PCL, just as PCL needed Central Heat.
61. It is my understanding, based on the above, that the Charges were granted to PCL by Central Heat in order to ensure the continuous supply of steam heating to the Pacific Centre Complex. This is consistent with the recitals of the ROFP, which include:

AND WHEREAS [PCL] proposes to construct and operate a building upon lands situate downtown in the said City of Vancouver to be known as the Pacific Centre ...;

AND WHEREAS in consideration of [the Steam Service Contract] for the use of [Central Heat's] steam heat service to heat or otherwise serve the building and its fulfilment of a condition of the execution and delivery thereof by [PCL] [Central Heat] has agreed to enter into these presents in order to afford to [PCL] further and better assurance of continuity of steam heat service to [PCL] and its tenants and permitted assigns:

...

62. Ensuring this continuous supply remains just as important today, if not more important, as it would have been at the time the Charges were granted. As set out earlier in my affidavit, ensuring continuous and reliable heating is essential for the tenants of the Pacific Centre Complex.
63. Further, if service were to be interrupted or discontinued, there is not an alternative means of providing heating to the tenants of the Pacific Centre Complex. Boilers would need to be installed throughout the Pacific Centre Complex to provide alternative heating. In or about 2013, Cadillac Fairview investigated this process and determined that it would be an extensive and time consuming endeavour (expected to take approximately 12 months to source and install a replacement system). Further, PCL continues to be subject to an exclusivity provision in favour of CEV under the Steam Service Contract.
64. The Charges continue to have significant value to PCL.
65. With respect to Block 32, Central Heat did not enter into a written agreement with respect to steam heat service for this property when it first started providing service in or about 1987. Instead, service was paid for on the same terms as the Steam Service Contract and Supplemental Steam Service Contract, which covered Pacific Centre South (Block 52 and Block 42).
66. In or about 2014, Cadillac Fairview and Central Heat negotiated a Steam Service Contract with respect to Block 32, which was signed on or about March 7, 2014 (the "**Block 32 Contract**"). Attached hereto and marked as **Exhibit "25"** to my affidavit is a copy of the Block 32 Contract. At this time, Cadillac Fairview and Central Heat also signed a Steam Service Contract Amendment Agreement – Addendum B (the "**Block 32 Addendum**"). Attached hereto and marked as **Exhibit "26"** to my affidavit is a copy of the Block 32 Addendum.
67. The Block 32 Addendum provided that Cadillac Fairview wished to undertake efficiency upgrades with respect to the buildings on Block 32, and to investigate whether installing and operating a geo-exchange system for heating and cooling the buildings on Block 32 would be feasible. The Block 32 Addendum further provided that, if PCL were to install such a geo-exchange system, the exclusivity clause in favour of Central Heat would cease

to apply, insofar as it relates to the geo-exchange system. PCL implemented a geo-exchange heat storage system for Block 32 in or about 2014.

I. CEV REQUESTS DISCHARGE OF THE CHARGES

68. On October 2, 2017, I received an e-mail from John Sullivan, the chief executive officer of Cadillac Fairview, forwarding an e-mail that he received from Ian Gillespie, the president of Westbank Projects Corp. ("**Westbank Projects**") on October 2, 2017. A copy of Mr. Gillespie's e-mail to Mr. Sullivan is attached hereto and marked as **Exhibit "27"** to my affidavit.

69. The e-mail from Mr. Gillespie's to Mr. Sullivan states:

... I'm sending you this note as I need a small favour, which in order to fully understand unfortunately you need to read this short memo below.

As you may know, I own Creative Energy, the new name for Central Heat Distribution. Creative Energy supplies the steam to heat Pacific Centre in Vancouver. In 1969, when Central Heat was just starting up, it got the deal from Pacific Centre to supply the heat but Pacific Centre at that time was concerned that if Central Heat didn't survive, Pacific Centre could be in trouble without a heat supply. As part of the heating deal, Central Heat agreed to give Pacific Centre a floating charge on its assets and a Right of first Refusal on the sale of the steam producing assets so that if there was a problem, Pacific Centre could step in and ensure its steam supply. The floating charge debenture secures nothing other than control over the transfer of Central Heat's steam assets. Same is true for the RFR.

A lot has changed since then. In the last forty or so years, Central Heat (now Creative Energy) has grown from 3 customers, with Pacific Centre being one of them, to a major utility with well over 200 customers in downtown Vancouver. Similarly, with our consent a couple of years ago, and done in good faith, Pacific Centre took one of their downtown buildings off-line replacing the steam system with a geo-thermal system as the primary source of heat energy. The likelihood that your steam supply to Pacific Centre is not going to be there is zero. Creative Energy is strong and on top of that, the BC Utilities Commission would never let it happen and even on top of that you have a diminished reliance on the utility in any event.

The RFR and the Debenture still remain on title to the Creative Energy assets and is causing us unnecessary complications. We've been looking at restructuring the company by transferring the assets to a limited partnership that we control but I'm being advised that would trigger the RFR. This has been in the works for a while and in anticipation of it I asked one of my people, Damon Chan, to contact your local representative to ask that your company release its now unnecessary charges. I thought that would be a no-

brainer, but Damon had a meeting with your reps Lillian Tummonds and Jesse Gregson about a month ago and was told that Cadillac would look into it. When they had another meeting last week, the answer coming back was that CF would just like to keep things as they are.

I really wanted to avoid getting you involved, but that answer from your team really doesn't help us even though CF isn't being asked to give up anything of value. Moreover, when CF asked to be released from their obligation to take steam for one of the Pacific Centre buildings, I didn't hesitate in advising Creative Energy to give CF our approval even though that did have a hit to our bottom line. So my request is could you please instruct whoever is in control of this to accommodate Creative Energy's request so that we can do our restructuring, as I think they forgot the accommodation we made to them. Specifically, the favour I need is for you to authorize them to discharge the Debenture and RFR.

If there's anything that needs any further clarification, please call me. My guys tell me that we need to get our restructuring done in the short term and I hope you can get back to me this week.

Thanks you in advance for your help.

70. On October 3, 2017, Lillian Tummonds, the General Manager of the Pacific Centre Complex forwarded me an e-mail that she had received from Robert Hobbs, the Acting President and CEO of CEV at the time, on October 2, 2017, a copy of which is attached hereto and marked as **Exhibit "28"**. Mr. Hobb's e-mail to Ms. Tummonds contemplates setting a meeting in early November, and states "we look forward to your response regarding our request re the registered documents", which I understand to refer to the Charges.
71. On October 4, 2017, I e-mailed Ms. Tummonds (in response to her October 3, 2017) e-mail, stating "Don't book any further meetings. I'll update you on Friday". A copy of my e-mail to Ms. Tummonds is attached hereto and marked as **Exhibit "29"** to my affidavit.
72. On October 26, 2017, Craig Shirreff of McCarthy Tetrault LLP, corporate counsel for PCL, sent a letter to Westbank Projects and CEV. Attached hereto and marked as **Exhibit "30"** to my affidavit is a copy of Mr. Shirreff's letter dated October 26, 2017. This letter advised Westbank Projects and CEV that PCL was not prepared to discharge the Charges, on the basis that they have significant value to PCL and remain an important feature of the arrangement between PCL and CEV, to ensure the continuous supply of steam to the Pacific Centre Complex. PCL directed that future correspondence on the matter be addressed to Cadillac Fairview's Executive Vice President, Operations, Sal Iacono.
73. On October 31, 2017, I received an e-mail from Mr. Sullivan. The e-mail, which had the subject "Fwd: Pacific Centre Limited", forwarded an e-mail chain between Trent Berry, the Chair of CEV, Mr. Gillespie and Mr. Sullivan, dated from October 26, 2017 and

November 1, 2017. Attached hereto and marked as **Exhibit "31"** to my affidavit is a copy of this e-mail chain.

74. Mr. Berry's October 26, 2017 e-mail to Mr. Gillespie states:

Not sure you got this. It seems to me Creative did them a favour and they have not lived up to even that small commitment and now they are unwilling to discharge something that in fact is irrelevant to their service but remains a leverage point. Sad the company did not take the same line when they asked for the favour (and would be good to pursue the information they have failed to provide as a condition of that under the arrangement).

That said, I think we have a way forward with Instar.

75. Mr. Gillespie's October 31, 2017 e-mail to Mr. Sullivan states:

John, we got a letter last week from a lawyer at McCarthy saying they have no interest cooperating with us on the request I made on the email I sent you a few weeks back. I'm not sure if I should assume this was from someone from Cadillac before I sent you my note or if this is indeed coming from you hence my note. As discussed in the note attached, this has no impact on Cadillac and in our minds was part of the spirit in which we cooperated at Cadillac's request some time ago. So Cadillac's refusal makes no sense from a business perspective or fair play. The reality is if we can't gain this from Cadillac, we have a work-around that's just more time consuming and costly and not in the spirit in which we did Cadillac a favour when we released Cadillac from their steam contract which we were under no obligation to do.

Sorry to bother you on this – I know it's a pain but could you please look into at your earliest convenience? If you have already given advice to not cooperate than please send me a note back to that effect so we know how to move forward.

76. Mr. Sullivan's November 1, 2017 response to Mr. Gillespie's October 31, 2017 e-mail states as follows:

Hi Ian, thanks for your email. Let me respond to it as follows:

1) We feel our legal position including the RFR is strong and has significant value and we have no intention of giving up our rights.

2) Your point about providing a favour to CF by not attempting to stop us when we installed geothermal in the complex is not relevant - we asked for this as a courtesy as we aren't using a new source of energy but storing energy that we are obtaining through Creative.

3) We also weren't impressed when one of your representatives tried to slip through a consent from us by attempting to get one of our mid level employees to waive our rights and sign a release.

4) As to "fairness" it seems you have forgotten the experience we went through with you at Calgary City Centre. If you recall our LOI which set out how we were going to work together in the pre-development of the project (including you paying 50% of the pre-development expenses and designating each of us as Co-Developers) had expired in the middle of the Financial Crisis. Notwithstanding this we said we would honour the arrangement but you decided that you should be the Developer and we would have no development role. This was an obvious non-starter for us and when we advised you of this you walked away without paying your share of the expenses.

I trust you understand our position.

77. Mr. Gillespie responded to Mr. Sullivan on November 1, 2017, stating:

Gee somebody woke up on the wrong side of the bed. That's certainly not my recollection of how things went in Calgary and I think I was pretty close to it.

As for someone on my team trying to slip through I will inquire as to what that's about.

As to our request, don't worry about it. As I mentioned we have a fix and I appreciate you getting back to me.

78. To the best of my knowledge, CEV did not contact Mr. Iacono, or anyone else at Cadillac Fairview, with respect to the Charges, until May 2019.

J. THE UTILITIES COMMISSION PROCEEDING

79. In or about December 2018, I learned that a rezoning application had been filed with the City of Vancouver and that a development was planned for the Beatty Property. It is my recollection that I learned of the application through one of my media sources, though I cannot now recall which source (and I receive regular mediate updates on developments in Vancouver from various media sources). Attached hereto and marked as **Exhibit "32"** to my affidavit is a copy of the rezoning application. The rezoning application did not address how CEV would be impacted by the development on the Beatty Property, or how the Charges registered in favour of PCL would be affected.

80. In or about April 2019, I learned of CEV's Application for a Certificate of Public Convenience and Necessity (a "CPCN") and approval for reorganization (the "CPCN Application") to the British Columbia Utilities Commission (the "BCUC"), and the related decision of the BCUC, dated February 19, 2019 (the "**Initial BCUC Decision**"), after these documents were located by Ms. Tummonds on the BCUC's website.

81. To the best of my knowledge, when Ms. Tummonds located the Initial BCUC Decision in April 2019, this was the first time that PCL or Cadillac Fairview learned of CEV's proceeding before the BCUC. Given my role as Senior Vice President and Portfolio Manager, Western Canada Portfolio, I expect that the CPCN Application and/or the Initial BCUC Decision would have been reported to me if another employee of PCL or Cadillac Fairview had learned of it at an earlier time.
82. After I learned of the CPCN Application and the Initial BCUC Decision, I understand from Terry Connors, the Director of Operations, Western Canada, at Cadillac Fairview (who indirectly reports to me through the Vice President, Operations, Western Canada Portfolio) that he reached out to Energy Advantage in approximately May 2019. Energy Advantage searched its records and located an e-mail from Cindy Woo of Creative Energy, that was sent to Bobbie Assi of Energy Advantage on July 16, 2018, attaching a Public Notice of the CPCN Application. Attached hereto and marked as **Exhibit "33"** to my affidavit is a copy of Ms. Woo's July 16, 2018 e-mail and the Public Notice.
83. This Public Notice was not provided to Cadillac Fairview in July 2018 by Energy Advantage. Additionally, the Public Notice was not provided directly to PCL or to Cadillac Fairview.

K. CEV HAS NOT MADE AN OFFER OF SALE

84. To the best of my knowledge, at no time has CEV provided PCL with a copy of the Amended and Restated Trust and Development Agreement, setting out the details of the planned project with Westbank Projects. PCL only obtained a copy of this agreement from the filings posted on the BCUC's website.
85. To the best of my knowledge, at no time has CEV made an offer of sale to PCL or a related entity with respect to the Beatty Property or CEV's steam undertaking, under the ROFR or at all.
86. If PCL were to receive an offer under the ROFR, PCL would be in the position (with the assistance of Cadillac Fairview and the OTPPB) to evaluate the offer in a timely manner and, if it determined it to be warranted following this evaluation, accept the offer. Cadillac Fairview and the OTPPB collectively employ hundreds of investment professionals globally to source, assess and/or evaluate investment opportunities. This spans opportunities across a wide variety of disciplines, including real estate and infrastructure such as steam heating utilities.
87. Cadillac Fairview and the OTPPB have taken steps to pre-emptively prepare themselves to evaluate an offer from CEV under the ROFR, if PCL were to receive such an offer. For example, they have assembled a transaction team consisting of professionals in a variety of roles, to assist with the evaluation of an offer. This includes investment, development and legal professionals at Cadillac Fairview, as well as professionals that specialize in infrastructure and natural resources at the OTPPB.
88. If PCL receives an offer, it will conduct due diligence on the potential investment. Cadillac Fairview and the OTPPB have begun considering the information requests that it

would make to obtain pertinent information from CEV, in order to allow evaluation of the feasibility of an investment. The information requested from CEV would be supplemented by other information obtained by Cadillac Fairview and the OTPPB, such as information available in the public domain, as well as information from subscription based services, consultants, advisors or internal resources. Cadillac Fairview and the OTPPB would engage third party professionals to assist with the due diligence process (including external legal counsel, environmental and natural resource consultants, planning consultants, architects, construction experts and various cost consultants), as necessary.

- 89. Cadillac Fairview and the OTPPB would use the information gathered through the due diligence process to evaluate any offer received from CEV and to determine whether to proceed to accept the offer. If so, the necessary corporate approvals would be identified and sought.
- 90. PCL (supported by its owners) has the financial resources to complete a transaction of this magnitude.

SWORN BEFORE ME at Toronto,)
 Ontario, on 25/ Sept/2019)
 _____)
 A Commissioner for taking Affidavits)
 for Ontario.)
)



TOM KNOEPFEL