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October 11, 2016

Ms. Laurel Ross  
Acting Commission Secretary  
British Columbia Utilities Commission  
Sixth Floor – 900 Howe Street  
Vancouver, BC V6Z 2N3

Dear Ms. Ross:

**RE: Project No. 3698781  
British Columbia Utilities Commission (BCUC or Commission)  
British Columbia Hydro and Power Authority (BC Hydro)  
2015 Rate Design Application (2015 RDA)  
BC Hydro Final Argument**

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BC Hydro writes in compliance with Exhibit A-39 providing its submission on BCOAPO's Final Argument filed on September 26, 2016.

Yours sincerely,



Tom Loski  
Chief Regulatory Officer

jc/af

Enclosure

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**British Columbia Utilities Commission**

**BC Hydro 2015 Rate Design Application**

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**BC Hydro Response  
to BCOAPO's Low-Income Rate Proposals**

**October 11, 2016**

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Attachment 1 – Extracts from *The Law of Evidence in Canada*

Attachment 2 – Extracts from *Practice and Procedure Before Administrative Tribunals*

## INTRODUCTION

1. These are BC Hydro's submissions in response to the low-income rate<sup>1</sup> and related proposals recommended by Mr. Colton on behalf of the BCOAPO in its September 26, 2016 argument (**BCOAPO Argument**).<sup>2</sup>
2. BC Hydro has enjoyed and significantly benefited from the collaborative relationship with the BCOAPO that has developed through consultation in regard to the RDA that began 2 ½ years ago. That relationship has resulted in a number of customer-facing service improvements that benefit customers, including low-income customers, within the confines of the UCA as summarized in BC Hydro's Final Argument. BC Hydro was hopeful at the outset of the 2015 RDA process that perhaps it wouldn't be at odds with the BCOAPO on any major issue<sup>3</sup> when it came to the argument phase of this proceeding, with a view to minimizing risks to a relationship that can arise in a context that is inherently adversarial. However, it is apparent that BC Hydro and the BCOAPO remain at odds over a number of important issues that have significant customer, socio-economic and legal implications. In consequence this argument is adversarial, insofar as BC Hydro is obliged to explain in clear and unambiguous legal argument why it believes the Commission should not approve the remaining<sup>4</sup> BCOAPO proposals. Nevertheless, and despite the nature of this argument, BC

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<sup>1</sup> Consistent with its September 26, 2016 Final Argument and the UCA, BC Hydro uses the word "rates" to refer to rates, terms and conditions, except where context requires otherwise.

<sup>2</sup> BC Hydro uses and adopts all of the defined terms and acronyms used in its Application and Final Argument in this argument.

<sup>3</sup> With the exception of the Commission's jurisdiction to approve low-income rates.

<sup>4</sup> BC Hydro and the BCOAPO have worked on a number of important issues and BC Hydro has made the following changes and/or proposed changes to its terms and conditions that benefit or will benefit if approved, low-income customers. These measures include: extending repayment timelines for instalment plans provided bills are paid prior to the next winter heating season; extending payment deferrals and instalment plans for customers receiving MSDSI direct employment assistance; working with MSDSI to avoid security deposits and postpone disconnections for customers awaiting MSDSI decisions on applications for income support; proposing changes to standard charges (i.e. reduction in minimum reconnection charge and returned payment charge) and amendments to the amount of the security deposit assessed; opening in-person customer service desks; delaying disconnections for demonstrated medical reasons; posting business practices online regarding payment options; and establishing a low-income advisory group, see Application, Exhibit B-1, pp 8-30 to 8-34/pdf 440-444 and Mr. Anderson's Opening Statement, Exhibit B-38, pp 4 and 5/pdf 8-9.

Hydro looks forward to a continued respectful and mutually productive relationship with the BCOAPO through Module 2 and beyond.

3. In Part 1 of this argument BC Hydro makes a number of overarching arguments regarding Mr. Colton's recommendations. In Part 2, BC Hydro addresses Mr. Colton's specific recommendations, proposal by proposal.
4. The BCOAPO Argument includes submissions on the Basic LI Jurisdiction issue addressed in BC Hydro's September 26 Final Argument. BC Hydro will reply to those submissions, and to those of other interveners, in its October 24 Reply, consistent with the order of argument approved by the Commission.<sup>5</sup>
5. The BCOAPO Argument also includes a number of recommendations the BCOAPO would have the Commission make to the Minister in regard to the Minister's RIB Review.<sup>6</sup> While the 2015 RDA has been used to gather information for the purpose of the Commission's response to the Minister, it is a separate proceeding and has at all times had its own process, including opportunities for submissions. If the BCOAPO wishes to make submissions in regard to that proceeding, BC Hydro submits it should do so within the process that has been established by the Commission for that purpose.<sup>7</sup> Accordingly, BC Hydro provides no response to the BCOAPO's submissions regarding the Minister's RIB Review in this argument.

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<sup>5</sup> Commission letter dated August 29, 2016, Exhibit A-39.

<sup>6</sup> BCOAPO Argument, pp 100-102/pdf 104-106.

<sup>7</sup> See letter dated October 7, 2016 from the Commission (Exhibit A-20) setting out a public comment process with respect to the RIB Review.

## PART 1: OVER-ARCHING ISSUES

### Burden of Proof

6. The term “burden of proof” refers to the obligation imposed on a party to prove or disprove a fact or issue.<sup>8</sup> The broad principle is that the burden of proof is on the party that asserts a proposition. A failure of the party to convince the trier of fact means the party will lose on that issue.<sup>9</sup>
7. As agreed to by all counsel and as set out in BC Hydro counsel’s letter of August 29, 2016,<sup>10</sup> the BCOAPO bears the burden of proof with regard to Mr. Colton’s recommendations. To discharge that burden it must satisfy the Commission, on a balance of probabilities,<sup>11</sup> that those recommendations are lawful and appropriate.
8. The BCOAPO does not address the burden of proof in its argument.

### Mr. Colton’s “Three-Legged Stool”

9. Mr. Colton’s recommended low-income rates<sup>12</sup> are justified on three grounds:
  - (a) on the basis of ameliorating the effects of low-income and/or poverty (referred to by Mr. Colton as “affordability”);
  - (b) on the basis that low-income customers currently cost BC Hydro less to serve than non-low-income residential customers (referred to by Mr. Colton as “cost reflectivity”); and
  - (c) on the basis of efficiency (referred to by Mr. Colton as “cost-effectiveness”).

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<sup>8</sup> Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 4<sup>th</sup> ed (Markham, Ont: LexisNexis, 2014), p 87, extracts at Attachment 1 to this argument (**Sopinka**).

<sup>9</sup> *Sopinka*, section 3.7; p 90, extracts at Attachment 1 to this argument.

<sup>10</sup> Exhibit B-59.

<sup>11</sup> Macaulay and Sprague, *Practice and Procedure Before Administrative Tribunals* (Toronto: Carswell), section 17.2, extracts at Attachment 2 to this argument.

<sup>12</sup> “Low-income rates” refers to Mr. Colton’s rate recommendations that in whole or part are meant to address affordability and/or poverty issues. They don’t include the rate recommendations that would be applicable to all residential customers (Part 2B of this argument) or the non-rate recommendations such as an ECAP target (Part 2C of this argument).

10. Mr. Colton's evidence is that his low-income rate recommendations are dependent on all three justifications and that in the absence of any one of those justifications his recommendations would look quite different:<sup>13</sup>

*MS. WORTH: Q: Did you consider making the ESUB reduction in rates of 4 cents per kilowatt hour for the first 400 -- or 4 cents per 400 kilowatt hours available to everyone?*

*MR. COLTON: A: I considered it and rejected that.*

*MS. WORTH: Q: Why did you reject that?*

*MR. COLTON: A: I rejected it for a couple of reasons. Number one is that the ESUB, the essential services usage block, the foundation for it – I'm going to mix my metaphors here – is a three-legged stool. One is the cost reflectivity. ESUB clearly increases cost reflectivity. Number 2 -- and so that would apply whether you're low income or non-low income. The second part of the stool is that the ESUB improves the efficiency of the company in being able to collect its bill revenue. Those four metrics that I talk about. The complete payment, timely payment, regular payment, unsolicited payment. When you move away from low income, you lose that part of the foundation for the ESUB, and the third was simply a cost consideration that if we make ESUB available to everyone, we would not be talking about a 26.9 million dollar program decreased by 50 percent. But we would be talking about much, much larger costs.*

*When we limit it to low income, low usage, we keep the various foundations, which aren't applicable to the total population, plus we keep the costs reasonable. And all of those were objectives.*

*MS. WORTH: Q: You'll agree with me that your evidence thus far has been, though, that the low usage group in BC Hydro's ratepayers is not exclusively low income. Correct?*

*MR. COLTON: A: Yes. The evidence is that low income customers are disproportionately low-use, and cost -- the three stools are cost reflectivity, the increased efficiency and affordability. And if we only use the cost reflectivity aspect as a justification, then we could talk about extending ESUB to everyone. But when you extend the justification also to*

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<sup>13</sup> Transcript, v 7 p 1290 line 19 to p 1292 line 13.

increasing the efficiency of utility operations and improving affordability, you -- it doesn't -- it no longer works to extend ESUB to everyone. You lose two-thirds of the justification for doing it in the first instance. So we didn't. And in addition, it costs more to boot. [emphasis added]

11. Mr. Colton reiterated the premise of the “three-legged stool” analogy later in his testimony:<sup>14</sup>

*MR. COLTON: A: If your only -- if your only point is to deliver dollars of bill reduction to low income customers, then eliminating the fixed basic customer charge would serve that objective. If your point is not simply to deliver dollars of bill reduction to low income customers, but to deliver dollars of bill reduction in a way that you can justify on traditional regulatory grounds, such as improving cost reflectivity, then no, it's not a step in the right direction. Because I can't think of a reason why low income customers would have a zero dollar basic monthly customer charge. So you know, it really boils down again to, what are you trying to accomplish? If all you're trying to do is to give low income customers a break, then you eliminate the fixed monthly customer charge. And yes, the bills will be lower. But that's not what my proposal is. My proposal is to serve -- to improve cost reflectivity, help improve the efficiency of bill collections, and to address affordability. And you either believe that or you don't. If you look at -- and say, "Yes, we want to do each of those three," then you need to do it through a mechanism such as ESUB. If all you want to do is to create a social service program, then eliminate the customer charge. That's not what we're doing.*

12. And a third time:<sup>15</sup>

*MR. COLTON: A: I would agree with that. Which is one of the reasons that the ESUB is based not solely as an affordability program as a social service program, such as a food subsidy that you're talking about, but it has the three legs of the justification. The improving cost reflectivity and improving the efficiency of the utility operation in collecting its money, and affordability is only one of the three links.*

<sup>14</sup> Transcript, v 7 p 1295 line 5 to p 1296 line 4.

<sup>15</sup> Transcript, v 7 p 1370 lines 14-22.

13. The underlined text shows that the consequence of Mr. Colton's recommendations being supported on a three-legged stool is that without any one leg of Mr. Colton's justifications, his proposals can no longer stand.<sup>16</sup> That is, Mr. Colton's low-income rate recommendations cannot be approved by the Commission unless – on his own evidence - the Commission is satisfied that each of affordability, cost reflectivity and efficiency are demonstrated on a balance of probabilities. BC Hydro will address each in turn below.

### **The Affordability Leg of Mr. Colton's Three-Legged Stool**

14. In its Final Argument, BC Hydro explained why the Commission does not have the jurisdiction to determine and set preferential rates or terms or conditions for BC Hydro's low-income residential customers in the absence of an independent cost-of-service basis. To justify a rate difference based on customer characteristics (such as income level), the authority must be found in the rate-setting provisions of the UCA.<sup>17</sup> As BC Hydro outlined in its Final Argument, nothing in the UCA gives the Commission this power and further, the evidence demonstrates that the legislature has not intended for the Commission to have that power.<sup>18</sup> Simply put, rates based on ability to pay (rather than the nature and quality of service) would not meet the "fair, just and not unduly discriminatory" standard and would contravene the UCA. This is referred to as BC Hydro's Basic LI Jurisdiction argument.
15. Because Mr. Colton's recommended low-income rates are not intended to independently address each of the justification-legs of his three-legged stool,<sup>19</sup> it

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<sup>16</sup> While the testimony quoted above is in regard to the ESUB, all of Mr. Colton's low-income rate recommendations are premised on the same three-legged stool. That is, Mr. Colton justifies all of his low-income rate recommendations on the basis of cost-effectiveness but they are only available to low-income customers, who Mr. Colton claims, have a lower cost to serve ("cost-reflectivity"). Finally, the stated purpose of all of Mr. Colton's low-income rate recommendations is to address affordability issues and assist low-income ratepayers. See for example pp 2 and 4/pdf 6 and 8 of the BCOAPO Argument which refers to its package of proposals put forward as "a strategy to assist low income ratepayers" and "a strategy aimed at assisting qualified low income residential ratepayers..."

<sup>17</sup> UCA sections 58-61.

<sup>18</sup> See Part IV of BC Hydro's Final Argument.

<sup>19</sup> Mr. Colton would have recommended something else if affordability was the only objective and by implication, he would have recommended something else again if affordability was not an objective.

is apparent that if the Commission accepts BC Hydro's Basic LI Jurisdiction argument then it cannot approve Mr. Colton's low-income rate recommendations regardless of any other justification.

16. A further flaw in the "affordability" leg of Mr. Colton's three-legged stool is that he didn't offer – indeed, wasn't qualified to offer - any opinion evidence on how his recommendations would affect the incidence or scope of poverty in British Columbia, the circumstances of individual low-income customers of BC Hydro, or more generally "affordability".
17. Similarly, Mr. Klein did not opine on how Mr. Colton's recommendations, if effected, would serve to mitigate the scope and extent of poverty in British Columbia. Indeed, there is no reference to Mr. Colton's recommendations anywhere in Mr. Klein's testimony, and he confirmed that he prepared his evidence without the benefit of having seen Mr. Colton's recommendations.<sup>20</sup>
18. The BCOAPO tendered lay evidence from a number of community activists and individual customers of BC Hydro.<sup>21</sup> None of those witnesses offered any evidence suggesting that Mr. Colton's recommendations would be meaningful or helpful, or that they were even aware of Mr. Colton's recommendations.<sup>22</sup>
19. In short, the BCOAPO have offered evidence of a problem (the nature and extent of poverty in British Columbia as described by Mr. Klein and the BCOAPO's lay witnesses) and opinion evidence of a solution (Mr. Colton's recommendations), but no evidence that the solution will address the problem. Without such evidence the Commission has no basis to accept on a balance of probabilities, or otherwise, that the affordability element of Mr. Colton's recommendations can be satisfied. It follows that the affordability leg of Mr. Colton's three-legged stool cannot stand.

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<sup>20</sup> Transcript, v 5 p 796 lines 2-18.

<sup>21</sup> BCOAPO Evidence, May 9, 2016, Exhibit C2-12, pdf 301-341.

<sup>22</sup> In fact, lay witnesses commented on the challenges that arise from Equal Payment Plan (**EPP**) true-ups, and the negligible benefit and/or difficulties of low-income DSM, both of which are advocated for by Mr. Colton.

## The Cost Reflectivity Leg of Mr. Colton's Three-Legged Stool

20. The second leg of Mr. Colton's three-legged stool that supports and shapes his low-income rate recommendations is the idea that low-consumption customers have a lower cost-of-service than high-consumption customers; that low-income customers are predominantly low-consumption customers; that in consequence low-income customers have a lower cost-of-service; and that the lower cost-of-service associated with low-income justifies the recommended low-income rates. This is referred to by Mr. Colton as the "cost reflectivity" leg of the three-legged stool. Again, if the Commission does not accept that there is a current cost-of-service or "cost reflectively" basis for the recommended low-income rates then Mr. Colton's three-legged stool cannot stand and the Commission should not approve his recommendations.
21. BC Hydro submits there are a number of problems with the "cost reflectivity" leg of Mr. Colton's three-legged stool.
22. The first problem arises from the fact that while a number of low-income customers are low-consumption customers<sup>23</sup>, the reverse is not true, and by a large majority low-consumption customers are not low-income customers.<sup>24</sup> Because the number of low-consumption customers is so much greater than the number of low-income customers, preferential rates for only low-income customers and not the majority of the low-consumption customers are plainly discriminatory and unfair to the low-consumption customers whose consumption characteristics allegedly justify the rate preferences.
23. This basic fairness problem is amplified by the fact that a significant number of low-income customers are not low-consumption customers,<sup>25</sup> but would get the

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<sup>23</sup> Of the approximately 170,000 low-income customers, about 70,000-75,000 consume less than 4800 kWh: see Transcript, v 7 p 1404 lines 15-25.

<sup>24</sup> There are approximately 170,000 low-income customers and about 433,000 additional low-consumption customers: see Transcript, v 7 p 1404 lines 15-25.

<sup>25</sup> See BC Hydro's response to BCOAPO IR 1.58.3 which shows the percentiles of consumption, Exhibit B-5, pdf 809.

benefit of the recommended low-income rates despite not having a consumption profile that allegedly justifies those preferences.<sup>26</sup>

24. In any event, the evidence does not support the assertion that low-income customers, or low-consumption customers, have a lower cost-of-service than other residential customers.
25. First, BC Hydro's evidence demonstrates that the annual load profiles of all its low-income and non-low-income residential customer segments are substantially the same shape, indicating that low-income and non-low-income residential customers impose the same load-serving obligations and therefore the same costs on BC Hydro, regardless of dwelling type, heating type or consumption level.<sup>27</sup>
26. Second, and critically, BC Hydro testified that because the RIB energy charge has to collect not only BC Hydro's variable cost of energy but also the majority of its fixed (demand and customer-related) costs, it is to be expected that the lower a customer's consumption, the less likely it is to be paying its fully allocated cost-of-service. BC Hydro was able to quantify this relationship, and testified that small consumption customers currently pay about 71 or 72 percent of their demand and customer-related costs, and that with the ESUB they would pay only about 43 to 46 per cent of their demand and customer-related costs.<sup>28</sup> Mr. Colton's assertion that low-consumption customers have a lower cost-of-service warranting preferential rates cannot stand in the face of this uncontradicted evidence.
27. Mr. Colton bases his cost-reflectivity argument on two premises, namely that BC Hydro's low-consumption customers have higher load factors than higher-

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<sup>26</sup> And despite circumstances that might not justify a rate preference on an "affordability" basis: see for example Transcript, v 7 p 1334 line 13 to p 1336 line 8.

<sup>27</sup> BC Hydro Rebuttal Evidence, Exhibit B-31, Q/A3 p 4/pdf 8; see Attachment 1 where the load profiles show the maximum hourly consumption in kwh each day of a year. The load profiles in BC Hydro's Rebuttal Evidence were developed using F2015 billing data and the results of the 2014 Residential End-Use Survey.

<sup>28</sup> Transcript, v 7 p 1388 line 16 to p 1390 line 2.

consumption customers, and that higher load-factors necessarily imply a lower cost-of-service. Neither premise is supported by the evidence.

28. Regarding the premise that there is an inverse relationship between the consumption level of BC Hydro's residential customers and their load factors, BC Hydro expressly refuted the idea in testimony,<sup>29</sup> and confirmed that the load factors of its residential customers are very close regardless of consumption and other customer characteristics (consistent with the load profiles provided with BC Hydro's Rebuttal Evidence).<sup>30</sup>
29. Regarding the premised inverse relationship between load factor and cost-of-service, BC Hydro's evidence was similarly clear that no such relationship invariably exists, except and unless all other variables - particularly consumption - are held constant.<sup>31</sup>
30. The BCOAPO Argument says at pages 54-55 that "BC Hydro explicitly and unequivocally states: "low load factors are indicative of customers that are relatively more costly to serve",<sup>32</sup> citing to the Application but ignoring IR responses, testimony and the impracticality of qualifying every phrase in a rate application with the words "all else being equal".
31. Mr. Colton's cost reflectivity argument relies in part on BC Hydro's response to BCOAPO IR 1.49.1,<sup>33</sup> which in turn depends on the so-called "4CP" and "NCP" load factors that BC Hydro was asked to and did calculate. It is reasonably clear

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<sup>29</sup> Transcript, v 7 p 1401 line 4 to p 1402 line 25.

<sup>30</sup> Transcript, v 7 p 1403 lines 7-25.

<sup>31</sup> See BC Hydro responses to BCUC IRs 1.82.1, 1.82.2 and 1.83.3, Exhibit B-5, pdf 325-328. Indeed, it is apparent upon first principles that load factor can only inversely correlate to cost-of-service when all other factors are held constant because the definition of load factor demands it (see BC Hydro response to BCUC IR 1.82.2, Exhibit B-5, pdf 326). Consider two customers A and B who take service with the same energy consumption and therefore the same average demand over a period of time, at the same voltage and from the same distribution feeder - but A has a peak demand higher than that of B. In this case it is clear that the only cost-of-service difference between the two is that more infrastructure had to be built to serve A than to serve B. If any of the other variables change - service voltage, location on distribution system, or consumption - there is no basis to conclude that A necessarily costs more to serve than B.

<sup>32</sup> Pdf 58-59, emphasis in original.

<sup>33</sup> Exhibit B-5, pdf 788-790.

from the evidence that BC Hydro does not calculate load factor on either a 4CP or NCP basis, and that these are at best unorthodox methods of calculating load factors.<sup>34</sup> It is clear that there is no evidence on the record of this proceeding from anyone qualified to opine on Mr. Colton's use of 4CP and NCP load factors and their relationship to cost-causality. It is noteworthy that Mr. Colton readily admitted that he is not qualified to provide cost-of-service opinion evidence.<sup>35</sup> It is also noteworthy that the conclusions drawn on pages 56 and 57 of the BCOAPO Argument<sup>36</sup> on this topic are not supported by the testimony of any witness, let alone a cost-of-service witness.

32. On page 58 of the BCOAPO Argument<sup>37</sup> is a table showing average electricity prices of residential customers at various consumption levels. "Average electricity price" refers to the total bill (energy charge and basic charge) divided by kWh usage during the billing period. The average electricity prices shown reflect the fact that the RIB has a basic charge which does not vary with consumption, resulting in higher average electricity prices for very low-consuming customers. The table says nothing about the extent to which those prices allow BC Hydro to recover its costs. If the concern is the fact that very low-consuming customers have higher average electricity prices then one would think that the cause of the concern – the basic charge – should be eliminated.<sup>38</sup> However, Mr. Colton expressly and clearly rejected that proposal under cross-examination.<sup>39</sup>

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<sup>34</sup> BCUC IR 1.82.2 asked BC Hydro how it calculates load factor. BC Hydro's response says nothing about the 4CP and NCP load factor calculations BC Hydro was asked to perform in response to BCOAPO IR 1.49.1, Exhibit B-5, pdf 788-790. In the latter IR response, BC Hydro said that "Customer load factor is typically calculated as energy use divided by peak use over a specific period of time" [emphasis added]. Finally, Mr. Colton accepted that BC Hydro's method of calculating load factor does not differ from industry norms in response to BC Hydro IR 4.2, Exhibit C2-17, p 4.

<sup>35</sup> Transcript, v 7 p 1246 lines 13 to 19.

<sup>36</sup> Pdf 60-61.

<sup>37</sup> Pdf 62.

<sup>38</sup> Which BC Hydro is not proposing.

<sup>39</sup> Transcript, v 7 p 1294 line 11 to p 1296 line 4.

## The Cost-Effectiveness Leg of Mr. Colton's Three-Legged Stool

33. The third leg of Mr. Colton's three-legged stool that supports and shapes his low-income rate recommendations is the idea that they are "cost-effective" and thus will increase the efficiency of BC Hydro's operations. Again, if the Commission does not accept that Mr. Colton's cost-effectiveness test provides an appropriate and independent basis for his low-income rate recommendations then his low-income rate recommendations should be rejected.
34. BC Hydro submits that Mr. Colton's use of the "cost-effectiveness" test would not be cost-based or otherwise meet the legal standard of "fair, just and not unduly discriminatory". Understanding why requires a close look at what Mr. Colton means by "cost-effectiveness", and how he applies it. The clearest description is set out in his opening statement:<sup>40</sup>

*I used a cost-effectiveness analysis. There are two sides to a cost-effectiveness analysis.*

*On the one hand, cost-effectiveness is used to identify the alternative that for a given output level minimizes the cost of achieving that output. On the other hand, cost-effectiveness is used to identify the alternative that, for a given cost, maximizes the level of output. So we either do more with less or we do the same and spend less in reaching the same output.*

35. These words mean that new low-income rates that cost BC Hydro nothing but increase desired "outputs" would be cost-effective; similarly new low-income rates that do not change desired "outputs" but reduce BC Hydro's costs would also be cost-effective.
36. BC Hydro agrees that new low-income rates that were "cost-effective" in either way would be lawful and appropriate provided that:
- (a) "costs" means all incremental expenditures and revenues that arise from the new low-income rates;

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<sup>40</sup> Transcript, v 7 p 1239 lines 8-21.

- (b) the desired “outputs” of the low-income rates properly take into consideration the broader objective of maximizing recovery from all customers for their collective benefit; and
- (c) the assessment of incremental expenditures and revenues arising from the new low-income rates is not based on unfounded assumptions.

37. However, Mr. Colton’s use of “cost-effectiveness” fails on each of these three issues and the difficulty associated with his use of “cost-effectiveness” is illustrated by the following:<sup>41</sup>

*One thing I have not said is that the terms and conditions or the ESUB will reduce credit and collection costs, which may seem surprising to some folks. But what experience shows is that the utilities that I work with spend a certain amount of money on credit and collection and if they do not seek to collect money from customers A, B and C, they won't reduce their credit and collection costs, they'll simply redirect or redeploy those expenditures to customers X, Y and Z. And so the collections costs will -- the level of collections costs won't go down, and the level of collection costs will remain the same.*

*What the experience shows with those 77 evaluations that I attach to my testimony shows is that when you redeploy collections away from low income, unable to pay customers toward higher income, able to pay customers, you're going to have a greater impact. You're going to collect more money, you're going to collect it more quickly, you're going to collect it more regularly. So the costs won't go down, but the level of collections per dollar of expenditure is going to increase. The cost effectiveness will increase because the efficiency of your collection processes will have improved.*

38. The key points from Mr. Colton’s evidence outlined below further highlight how Mr. Colton’s use of “cost-effectiveness” fails on each of the above issues:

- (a) Mr. Colton’s use of cost-effectiveness ignores some of the most significant incremental expenditures and revenue losses that would arise from his

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<sup>41</sup> Transcript, v 7 p 1301 line 16 to p 1302 line 14.

low-income rates and instead focusses on the (assumed) fact that the current allocation of resources given over to credit and collections (in this example) would not change. Some of the more significant changes to expenditures and revenues that Mr. Colton ignores include the loss of revenue associated with the ESUB, the costs of implementing and administering the low-income “flag” in the billing system, and the lost revenue associated with the low-income exemptions from the minimum reconnection charge.<sup>42</sup> While it may be true that the return on a fixed allocation of credit and collection resources would be greater if low-income customers are ignored, and thus the efficiency of those particular resources increased,<sup>43</sup> it is quite inappropriate to ignore all the other consequential changes in expenditures and revenues. A drive to increased efficiency in areas of operation that ignores consequential changes elsewhere would not be prudent and is not a legitimate rate-design objective.

- (b) Mr. Colton’s use of cost-effectiveness focusses solely on the “outputs” of complete, regular, timely and unsolicited bill payments from non-low-income customers. That is, he ignores in his cost-effectiveness analysis the degree to which his proposed low-income rates would result in less complete, regular, timely and unsolicited bill payments from low-income customers.<sup>44</sup> At a higher-level, it is apparent that his “outputs” are better described as metrics that could inform but not replace the more

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<sup>42</sup> Other changes to expenditures and revenues include: the creation of and sustaining costs associated with a web portal for third party agencies; the development of customer service processes within the call centre and a web and interactive voice response system to enable proper treatment of eligible customers; costs associated with the call centre, billing and credits and collections operations such as process design and documentation, training development and delivery, agent training time, and the increase of permanent work scope, all as more fully described in BC Hydro’s Rebuttal Evidence, Exhibit B-31, Q/A 4, 5, 10 and 11.

<sup>43</sup> Consistent with BC Hydro’s agreement that “conceptually it makes sense that credit and collection responses that further increase a customer’s bill may not be productive” quoted a number of times in the BCOAPO Argument (emphasis added). This statement was accepted by BC Hydro as the basis for agreeing to do the low-income analysis ultimately reflected in Revision 2 of Attachment 1 to BC Hydro’s Response to BCOAPO 1.192.1, Exhibit B-26-1 (**Attachment 1, IR 1.192.1**). That analysis did not result in any empirical evidence that the concept was any more than conceptually correct.

<sup>44</sup> As discussed in paragraphs 41 and 57 below, this appears to be a growing issue in Ontario.

appropriate objective of maximizing the net recoveries from all customers for their collective benefit, where “net” means that all incremental expenditures and revenues are accounted for. In other words, the “outputs” Mr. Colton says BC Hydro would achieve through his proposed low-income rates are, like his cost analysis, too narrow and are artificially disconnected from the objectives BC Hydro is properly pursuing.<sup>45</sup>

- (c) Mr. Colton says that his proposed low-income rates would result in BC Hydro’s credit and collections costs remaining the same in total, but being re-deployed from low-income customers to non-low-income customers. There is no evidence of that being true in BC Hydro’s case and it is not relevant what other utilities have done in the absence of evidence showing that they are comparable circumstances as BC Hydro.<sup>46</sup> BC Hydro submits that in the absence of a conclusion by the Commission that BC Hydro would in response to the proposed low-income rates hold, for example, credit and collection dollars constant and re-deploy them to non-low-income customers, that Mr. Colton’s proposed low-income rates cannot meet the cost-effectiveness test as he defines it and would apply it.

39. It is also apparent that Mr. Colton's measure of cost-effectiveness is premised on BC Hydro being able to identify its low-income customers. As noted by Mr. Sanders in response to questions from Commissioner Keilty, BC Hydro does not have that information.<sup>47</sup> It follows that any analysis of cost-effectiveness could only be demonstrated after-the-fact and in the meantime amounts to speculation at best.

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<sup>45</sup> An alternative “output” referenced by Mr. Colton is the “public policy decision that ... the utility service should be preserved where feasible”, Direct Testimony of Roger Colton, Exhibit C2-12, p 66/pdf 71. There is no evidence supporting such a public policy decision: see Transcript, v 7 p 1206 lines 5-18.

<sup>46</sup> See for example: Transcript, v 7 p 1390 lines 3-13 regarding the relevance of the 77 reports made available to BC Hydro by Mr. Colton.

<sup>47</sup> Transcript, v 7 p 1213 lines 3-12.

40. BC Hydro notes that its current collections practices have been improving and are becoming materially more cost-effective (as Mr. Colton uses the expression).<sup>48</sup> For example:
- average arrears by ageing bucket has been decreasing since May 2015;<sup>49</sup>
  - ratios of older residential arrears to arrears greater than 60 days have been decreasing (number of accounts and dollars) since January 2013;<sup>50</sup>
  - dunning communications have shown a downward trend in terms of bills rendered and accounts paid since 2013;<sup>51</sup> and
  - the number and value of accounts paid per dunning communication has shown an increasing trend since 2013.<sup>52</sup>
41. The relevance of the foregoing is that BC Hydro has made significant gains in recent years in its collections practices. BC Hydro currently collects 99.83% of its accounts, on a dollar basis, corresponding to bad debt of 0.17%, a fraction of the rate in Ontario and lower than it has been for at least 10 years.<sup>53</sup> Further efficiencies in collections efforts will be difficult to achieve in any event but to the extent they can be achieved it ought to be through technology and business process improvements, as has been the case the last several years.
42. The BCOAPO Argument at page 59 cites BC Hydro evidence<sup>54</sup> for the proposition that “reducing bills will, indeed, result in improved efficiencies and reduced costs”. However, the cited evidence says nothing about “reducing bills” but instead speaks about managing account receivables. Moreover, the evidence suggests that there is in fact no simplistic relationship between the size

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<sup>48</sup> See BC Hydro Rebuttal Evidence, Exhibit B-31, pp 14-18/pdf 18-22 and Attachment 2 to same.

<sup>49</sup> BC Hydro Rebuttal Evidence, Exhibit B-31, Attachment 2, p 2 of 20/pdf 47.

<sup>50</sup> BC Hydro Rebuttal Evidence, Exhibit B-31, Attachment 2, p 3 of 20/pdf 48.

<sup>51</sup> BC Hydro Rebuttal Evidence, Exhibit B-31, Attachment 2, pp 6 and 9 of 20/pdf 51 and 54.

<sup>52</sup> BC Hydro Rebuttal Evidence, Exhibit B-31, Attachment 2, p 12 of 20/pdf 57.

<sup>53</sup> Attachment 1, IR 1.192.1, Figure 1, Exhibit B-26-1, pdf 41, and Transcript v 7, p 1208, lines 5-26, corrected in Exhibit B-58-1.

<sup>54</sup> Attachment 1, IR 1.192.1, Exhibit B-26-1, pdf 42, referred to at Transcript v 6, p 1044, lines 10-19.

of a customer's bill and account receivables, bad debt or efficiency of collection practices. For example, Attachment 1, IR 1.192.1 shows clearly that both bad debt (in dollars) and active residential accounts receivable greater than 60 days (also in dollars) were the same in Fiscal 2016 as they were in Fiscal 2011 despite annual average rate increases in each year and despite an increase in the number of customer accounts over that period.<sup>55</sup>

43. At page 60 of its argument the BCOAPO provides a table that it says BC Hydro "agreed to" in support of the proposition that lower bills result in lower arrears.<sup>56</sup> In a number of instances in the oral hearing BC Hydro witnesses agreed to the arithmetic shown in witness aids-to-cross, but either did not accept, or were not given the opportunity to comment on, the inference the BCOAPO would have the Commission draw from the numbers. The table shown on page 60 of the BCOAPO Argument is an example of the latter, as a review of the cited transcript references make clear. Moreover, witness qualifications to the data (not weather-normalized) are ignored, as are the qualifying words in the IR response from which the data was extracted for the purpose of the aid-to-cross: "Account level arrears information is required to disaggregate residential customers by heating types. BC Hydro does not preserve historical account-level arrears data and so cannot provide this information from January 2012 as requested. The information below was analyzed based on a point-in-time data extraction on December 2, 2015."<sup>57</sup> In other words, to produce the table the BCOAPO has compared an annual average bill against a snapshot of arrears in December. In light of this and the fact that the data is not weather-normalized, no inference can be drawn from the data, let alone the one the BCOAPO would have the Commission draw.
44. In its Rebuttal Evidence BC Hydro stated that it had not seen evidence that its costs would be materially reduced by the ESUB (or more generally by low-

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<sup>55</sup> Attachment 1, IR 1.192.1, Exhibit B-26-1, pdf 41-42.

<sup>56</sup> Pdf 64.

<sup>57</sup> BC Hydro's Response to BCOAPO IR 1.191.1, Exhibit B-5, pdf 1201.

income rates).<sup>58</sup> The BCOAPO at pages 59-60 of its argument responds by arguing that BC Hydro had "six months" to review "77 reports" that Mr. Colton "offered to make available" (which presumably would in Mr. Colton's view have provided that evidence). With respect, this submission cannot be accepted:

- First, the "six months" assertion is incorrect, as the BC Hydro Rebuttal Evidence was filed about nine weeks after Mr. Colton's direct testimony was filed.<sup>59</sup>
- Second, Mr. Colton's direct testimony did not offer any reason upon which BC Hydro could infer that the 77 reports were applicable to the circumstances of BC Hydro at the present time.
- Third, many of the reports were clearly identified as being those of other persons and not Mr. Colton. That is, they were offered as the evidence of other entities who the BCOAPO was not willing or able to put forth as witnesses and whose qualifications and opinions would not be subject to cross-examination.<sup>60</sup>
- Fourth, it is the BCOAPO's responsibility to put forward evidence on the record that supports the relief it seeks from the Commission. Conversely, it is not the responsibility of BC Hydro to accept offers from hearing participants to review reports (much less 77 reports) that are thought to support the participant's case. In essence, this is why the BCOAPO properly bears the burden of proof in this proceeding with regard to Mr. Colton's recommendations.

45. BC Hydro submits that the 77 reports are still not properly on the record of this proceeding; there is no evidence that the reports address circumstances that are analogous to BC Hydro's; and there is no evidence that they support Mr. Colton's

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<sup>58</sup> BC Hydro Rebuttal Evidence, Exhibit B-31, p 4/pdf 10.

<sup>59</sup> Mr. Colton's direct testimony was filed on May 9, 2016, as part of Exhibit C2-12, and BC Hydro's Rebuttal Evidence, Exhibit B-31, was filed on July 6, 2016.

<sup>60</sup> The 77 reports are, in law, hearsay evidence.

hypothesis that low-income rates will be cost-effective (let alone result in a net reduction in BC Hydro costs).<sup>61</sup> As such, BC Hydro submits that there are no quantifiable net benefits to any of Mr. Colton's low-income rate proposals, all as more fully outlined in its Rebuttal Evidence.

46. BC Hydro can for its part offer the following information. BC Hydro's total collection costs are about \$16 million;<sup>62</sup> about 10% of BC Hydro customers are low-income; and BC Hydro's low-income customers do not generally seem more or less able or inclined to pay their bills than non-low-income customers.<sup>63</sup> It follows that even if all low-income collection costs of about \$1.6 million were eliminated (\$16 million x 10%) through Mr. Colton's recommendations (an assertion he doesn't make but which is offered for illustrative purposes), BC Hydro would cover just a fraction of the revenue loss arising from the ESUB,<sup>64</sup> let alone the other incremental costs BC Hydro would incur through adoption of Mr. Colton's recommendations.

### **The Proposals Assume Government Support**

47. Mr. Colton's three-legged stool rests on a foundation that is assumed but not proven in evidence, namely that it will be voluntarily supported by the necessary third parties and the Province.
48. In its Basic LI Jurisdiction argument, BC Hydro identified Ontario as the sole Canadian jurisdiction in which utilities provide meaningfully preferential rates to low-income customers.<sup>65</sup> It is significant that the Ontario government has for

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<sup>61</sup> Other than Mr. Colton simply stating that they do.

<sup>62</sup> Attachment 1, IR 1.192.1, Exhibit B-26-1, pdf 35.

<sup>63</sup> Attachment 1, IR 1.192.1, Exhibit B-26-1, pdf 36-37.

<sup>64</sup> At 100 % take-up rate, the estimated revenue loss amounts to \$26.9 million per year; at Mr. Colton's assumed 50% take-up rate, the ESUB revenue loss amounts to \$13.5 million, see BC Hydro Rebuttal Evidence, Exhibit B-31, pp 5-6/pdf 9-10 and BCOAPO Argument p 52/pdf 56.

<sup>65</sup> While the Manitoba regulator has asserted its jurisdiction to establish low-income rates, to date it has only directed Manitoba Hydro to "initiate a collaborative process to develop a bill affordability program ..." and notes that "[f]rom a policy perspective there may well be better solutions that have not been proposed to date" to address affordability, other than "special lower income rates": *Manitoba Hydro*, pp 27-28, extracts at Tab 24 of BC Hydro's Book of Authorities to its Final Argument. The argument made at page 9 of the BCOAPO Argument that "every other jurisdiction that has higher rates than BC Hydro has bill assistance programs in place..." is, in a Canadian context, simply incorrect.

years supported and indeed promoted the development of various low-income rate preferences in Ontario. That support and promotion is apparent most recently through the Ontario government's request to the OEB to recommend expansions to the low-income program, and its amendment of the legislation necessary to allow the OEB's recommendations to be effected.<sup>66</sup>

49. There is no evidence of a similar government intention in this case. Indeed, the evidence is reasonably clear the Province does not support a low-income rate program of the type recommended by Mr. Colton, or at all<sup>67</sup> and has instead indicated a preference for low-income conservation programs.<sup>68</sup>
50. The lack of government support in British Columbia for preferential low-income rates is a threshold issue for the BCOAPO. That's because a central element of Mr. Colton's recommendations is that MSDSI's<sup>69</sup> roster of low-income British Columbia residents be used as an eligibility screen for access to those preferential rates.<sup>70</sup> However, it is quite certain that MSDSI is not subject to the authority of either BC Hydro or the Commission but instead only to the authority of the Province. In the absence of evidence regarding government support for Mr. Colton's recommendations, MSDSI's involvement in any low-income rate program is speculative at best.<sup>71</sup>
51. Here is Mr. Colton's evidence on the point:<sup>72</sup>

*MR. CHRISTIAN: Q: And what happens, sir, if MSDSI declines the Commission's designation as the intake agency for BC Hydro's low-income program we'll assume has been otherwise approved by the Commission? What if MSDSI declines to be that intake agency?*

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<sup>66</sup> Application, Exhibit B-1, p 5-59/pdf 255.

<sup>67</sup> On the basis of the repeated rejections of proposed amendments to the UCA that would empower it to set low-income rates, as described in BC Hydro's September 26 Final Argument, at paragraphs 190-204.

<sup>68</sup> <https://www.leg.bc.ca/content/Hansard/40th5th/20160411pm-Hansard-v36n9.htm>

<sup>69</sup> Ministry of Social Development and Social Innovation.

<sup>70</sup> Direct Testimony of Roger Colton, Exhibit C2-12, pp 28-31/pdf 33-36.

<sup>71</sup> Current arrangements between BC Hydro and MSDSI would not support the proposed intake role of MSDSI: see BC Hydro Rebuttal Evidence, Exhibit B-31, p 7 and pp 10-11/pdf 11 and 14-15.

<sup>72</sup> Transcript, v 7 p 1364 line 20 to p 1365 line 9.

*MR. COLTON: A: If MSDSI said, "We are not interested in providing income verification," then that would be a problem.*

*MR. CHRISTIAN: Q: Yes, and indeed, I suggest to you, sir, that any low-income program proposal [that] turns on the willingness of a third party to provide the low income qualification, requires their agreement insofar as those third parties are not subject to the Commission's jurisdiction directly.*

*MR. COLTON: A: I absolutely agree with that.*

52. The BCOAPO Argument says nothing about this critical role of MSDSI. That's because there is no evidence that MSDSI is willing to be the intake agency for a low-income rate program. It follows that there is not a solid foundation upon which Mr. Colton's three-legged stool stands.

#### **Expertise and Qualifications of Mr. Klein and Mr. Colton**

53. BC Hydro did not object to Mr. Klein being qualified "as an expert on the extent and profile of poverty in B.C. and the difficulties that low-income people in B.C. have paying for the basic necessities of life, including residential electricity."<sup>73</sup> However, it is apparent that Mr. Klein's expertise in the field he was qualified in is not extensive.<sup>74</sup> His "peer-reviewed" papers have all been published – with one exception – by the organization he directs.<sup>75</sup> Moreover, it is clear that the organization Mr. Klein leads is an advocacy organization, in part,<sup>76</sup> and that his expertise in regard to poverty in British Columbia is informed by that advocacy work.<sup>77</sup> In consequence, BC Hydro submits that to the extent Mr. Klein's opinion evidence is relevant (see paragraphs 17 to 19 above), it ought to be given little weight.
54. Similarly, BC Hydro did not object to Mr. Colton being qualified as an expert in "low income utility rate and customer service issues, including low income usage,

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<sup>73</sup> Transcript, v 5 p 782 lines 4-16.

<sup>74</sup> Transcript, v 5 p 777 line 17 to p 778 line 17.

<sup>75</sup> Transcript, v 5 p 776 line 21 to p 777 line 16.

<sup>76</sup> Transcript, v 5 p 778 line 17 to p 781 line 16.

<sup>77</sup> Transcript, v 5 p 776 line 21 to p 777 line 16.

payment patterns, affordability programs, and low income DSM" (with the proviso that "low-income" modifies each element of his expertise).<sup>78</sup> Mr. Colton was not qualified to opine on electricity rate design generally or electricity cost-of-service, and in BC Hydro's submission his evidence on those areas should properly be given little or no weight.<sup>79</sup>

55. With respect, Mr. Colton's opinion evidence also suffers from the fact that he is an advocate for low-income rates, as much as an expert in, low-income rates. In this regard BC Hydro notes that Mr. Colton did not advise the BCOAPO as an unbiased consultant but instead worked with the organization in the decision-making process to develop proposals that would suit the BCOAPO.<sup>80</sup> Further, and in response to questions about the basis of his experience, he said:

*MR. COLTON: A: It is a combination of things. First, this is what I do for a living and I've been doing it for 30-some years now and I've worked in 35 states to help design and implement and evaluate programs. So it's based on my personal experience. First it's based on my personal experience with the implementation of programs.*<sup>81</sup>

56. Mr. Colton's opinion evidence also regularly displays a degree of partisanship to the cause of low-income rates that undermines its weight. In particular, his use of literature reviews and extra-provincial experiences is qualitative, anecdotal, and one-sided insofar as it doesn't admit to any interpretation except those which support his recommendations. This partisanship is evident most recently in his commentary on the recent report of the Ontario Energy Board regarding residential arrears (**OEB Arrears Report**).<sup>82</sup>

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<sup>78</sup> Transcript, v 7 p 1226 line 12 to p 1227 line 6.

<sup>79</sup> As noted previously, Mr. Colton conceded that he is not a cost-of-service expert at Transcript, v 7 p 1246 lines 13-19, an important admission in light of his "cost reflectivity" arguments in support of low-income rates.

<sup>80</sup> Transcript, v 7 p 1286 lines 8-16.

<sup>81</sup> Transcript, v 7 p 1285 lines 11-17.

<sup>82</sup> BCOAPO Submitting Undertaking No. 1, September 9, 2016, Exhibit C2-48.

57. The OEB Arrears Report was referred to in the cross-examination of Mr. Colton. It was put on the record in response to an undertaking request from BC Hydro, which request was made with an open-ended invitation for Mr. Colton to comment on it as he saw fit.<sup>83</sup> Mr. Colton provided about 7 ½ pages of such commentary.<sup>84</sup> In doing so he confirmed that the report is in regard to residential arrears of all licensed electricity distributors in Ontario in the 2013 to 2015 period. He also confirmed that the 2013-2015 period is bracketed by milestones in the evolution of Ontario's low-income rate programs, including the establishment of the Ontario Electricity Support Program in late 2015. However, nowhere in the 7 ½ pages of commentary does Mr. Colton say anything about the following facts gleaned from the report:

- residential arrears in Ontario have increased from \$108 million in 2013 to \$173 million in 2015;<sup>85</sup>
- low-income residential arrears have increased from \$5 million to \$13 million over the same period;<sup>86</sup>
- residential bad debt ("writeoffs") has increased from \$31 million in 2013 to \$35 million in 2015;<sup>87</sup> and
- low-income residential bad debt has increased from \$1.1 million to \$3.6 million over the same period.<sup>88</sup>

58. From these facts one might reasonably infer that Ontario's low-income programs are costing Ontario electricity customers a significant and increasing amount of money. Indeed, BC Hydro submits that these are correct and proper inferences to be drawn from the OEB Arrears Report.

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<sup>83</sup> Transcript, v 7 p 1361 line 23 to p 1362 line 3.

<sup>84</sup> "...Mr. Colton provides the following comments..." Exhibit C2-48, p1/pdf 1.

<sup>85</sup> Exhibit C2-48, pdf 11.

<sup>86</sup> Exhibit C2-48, pdf 23.

<sup>87</sup> Exhibit C2-48, pdf 20.

<sup>88</sup> Exhibit C2-48, pdf 32.

59. Mr. Colton does not note these facts and address them directly, rather, he only implicitly acknowledges them with the caution that “it is not possible to draw comparisons from year-to-year based on the OEB data” because, for example, “not all years in the data tables are comparable”.<sup>89</sup>
60. Mr. Colton's cautions could have been the end of his commentary but instead, and despite his cautions, he did exactly what he argues should not be done: he draws a number of conclusions from the OEB Arrears Report, supported in a number of cases - as if it was argument - by his own testimony. Notably, each and every one of the conclusions he draws from the OEB Arrears Report supports one or more of his recommendations, and most of his recommendations are, in his view and despite the reports alleged shortcomings, supported by the report.<sup>90</sup>
61. BC Hydro suggests that the explanation for Mr. Colton's assessment of the OEB Arrears Report is because he acted as an advocate rather than an unbiased expert assisting the Commission. Essentially, Mr. Colton took on the role of counsel by pointing out facts and drawing on inferences that best supported his recommendations and proposals of the BCOAPO and it is notable that he did not point out any facts or inferences that do not support those recommendations.<sup>91</sup> In BC Hydro's submission Mr. Colton seems not to have felt constrained by the Commission's caution to Mr. Klein:

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<sup>89</sup> Exhibit C2-48, pdf 1. In contrast see Mr. Klein's direct testimony where he allows, fairly and properly, that “the overall poverty rate in BC (for all persons) in 2013 using the LICO-AT was 9.9%, a low not seen since 1980”: Exhibit C2-12, pdf 266.

<sup>90</sup> Mr. Colton argues that the OEB Arrears Report supports his recommendations that BC Hydro collect better/more collections data; that one qualifying process be used for both preferential low-income rates as well as terms and conditions; that participation in a low-income rate program would be less than 100%; that a low-income rate program will entail a ramp-up period during which “under-spent benefits” could pay for implementation costs; that the term of low-income payment plans be extended; for a crisis intervention fund disconnection delays; and for a late payment charge date of 60 days after the due date on a bill (i.e. about 81 days after the bill is issued).

<sup>91</sup> See also the repeated references in the BCOAPO Argument to BC Hydro as “the Company”, a word choice used extensively by Mr. Colton in his direct testimony but in no other BCOAPO submission in this proceeding, indicating his authorship of significant parts of the BCOAPO Argument and thus a continued advocacy role.

*“... the role of an expert witness when it appears before the Utilities Commission is not to act as an advocate, but the role is to assist the Commission Panel...”<sup>92</sup>*

62. In summary, the Commission should give little weight to the opinions expressed by Mr. Colton, and should give no weight to those opinions where they are put forward without any supporting factual evidence properly on the record.

### **Setting Social Welfare Policy is the Role of the Province**

63. In this section of the argument BC Hydro argues that the Commission should not establish a low-income rate program of the type argued for by Mr. Colton even if it concludes it has the jurisdiction to do so.<sup>93</sup>
64. As articulated by both BC Hydro<sup>94</sup> and the BCOAPO<sup>95</sup> the Commission has within its lawful rate-setting confines a broad discretion to act and, by implication, to not act.
65. If the Commission concludes it has the jurisdiction to establish a low-income rate program, which BC Hydro submits it does not, it should not enter that realm because, with respect, it is not institutionally capable of assessing the competing societal interests and values that must come into play when considering the circumstances of low-income British Columbians and how electricity affordability fits into those circumstances. Nor is it institutionally capable of assessing the myriad alternatives to addressing the circumstances of low-income British Columbians and energy affordability. Conversely, the Legislature itself and a number of other bodies established by it for those purposes - MSDSI is the best example on the record of this proceeding - function squarely within the realm of social welfare policy. In particular, those bodies have both the perspective and the tools to properly address social welfare issues.

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<sup>92</sup> Transcript, v 5 p 782 line 26 to p 783 line 3.

<sup>93</sup> Which BC Hydro submits it does not, as more fully outlined in Part IV of BC Hydro's Final Argument.

<sup>94</sup> Application, Exhibit B-1, pp 2-3 to 2-4/pdf 56-57.

<sup>95</sup> Transcript, v 3 p 386 lines 8-20.

66. The BCOAPO Argument underscores this point in its submissions at pages 22-24 where it describes the role of MSDSI and other agencies in assisting BC Hydro customers who have trouble paying their bills.<sup>96</sup> The existence of these agencies demonstrates that there is a social policy need that has been recognized and is being addressed in B.C.; the advancement of low-income rate proposals in this proceeding simply demonstrates that in the BCOAPO's view they are inadequate. It follows that accepting the BCOAPO's invitation to establish low-income rates when it is not required to do so by law<sup>97</sup> would amount to second-guessing the Legislature and the agencies set up by the Province to address low-income and energy affordability issues. The Commission should respectfully decline the BCOAPO's invitation regardless of whether it may in law accept it.

## **PART 2: MR. COLTON'S RECOMMENDATIONS**

67. Mr. Colton's recommendations fall into three categories:

- Rate proposals meant to address, in part, affordability issues and the incidence of poverty in British Columbia (including the Essential Services Usage Block or ESUB rate, and the Crisis Intervention Fund). These are referred to below as "low-income rates", consistent with BC Hydro's September 26, 2016 Final Argument.
- Rate proposals that are not justified on the basis of affordability or the relief of poverty.
- Non-rate proposals (including Mr. Colton's DSM recommendations).

68. The BC Hydro submissions that follow are organized on the basis of these categories.

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<sup>96</sup> Pdf 26-28.

<sup>97</sup> No suggestion has been made by the BCOAPO or others that the Commission is obliged, as a matter of law, to establish low-income rates.

## **A. Low-Income Rates**

69. BC Hydro opposes all of Mr. Colton's low-income rate proposals for the reasons set out in Part 1 of this argument. That is, each of the affordability, cost-reflectivity and cost-effectiveness legs that justify Mr. Colton's three-legged low-income rate program has one or more significant defects; the entire program rests on an assumed but unproven foundation of government support; there is no qualified unbiased advice before the Commission upon which it can feel confident that it is not merely speculating on what the consequences of the program would be; and, fundamentally, the Commission is not the appropriate agency to develop and implement social welfare policy.
70. In the submissions that follow BC Hydro identifies additional issues associated with each of Mr. Colton's specific low-income rate recommendations.

### ***Essential Services Usage Block (ESUB)***

71. The BCOAPO argues at page 51 that there are empirical bases for both the ESUB block size (400 kwh) and price discount (\$0.04).<sup>98</sup> A standard dictionary definition of empirical is "*based on, concerned with or verifiable by observation or experience rather than theory or pure logic*". With respect, the arguments advanced by the BCOAPO in support of the ESUB block size and discount are not empirical arguments. In this regard, it is important to recall that the ESUB is justified on the three legs of affordability, cost-reflectivity and cost-effectiveness. Empirical support for the ESUB block size and discount would be observations or experience that demonstrated that those objectives could all be met by a 400 kwh block size and \$0.04 discount. There is no such evidence on the record of this proceeding, and indeed no evidence of any utility offering a 400 kwh block / \$0.04 discount to low-income customers.<sup>99</sup> Instead, Mr. Colton refers to a BC Hydro price elasticity analysis of customers whose consumption is only in Step 1, without offering an explanation of the relationship between that study and the

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<sup>98</sup> Pdf 55.

<sup>99</sup> BC Hydro assumes that if one of the 77 reports offered to BC Hydro by Mr. Colton spoke of such a rate, it would have been put on the record.

proposed block size; and, in a completely circular manner, refers to his own unsupported assertion in his direct testimony that a \$0.04 discount would be meaningful.

72. The ESUB would, if accepted by the Commission as recommended by Mr. Colton, result in an incremental rate impact to residential customers of 1.5%, on the assumptions of 100% take-up<sup>100</sup> and that incremental implementation and on-going administration costs<sup>101</sup> would be fully offset by assumed but undemonstrated cost savings.<sup>102</sup> BC Hydro suggests that an incremental<sup>103</sup> 1.5% rate increase for residential customers is simply not appropriate.
73. At page 55 of the BCOAPO Argument it is argued that the costs of the proposed ESUB would be small compared to the Thermo-Mechanical Pulp Program (**TMP Program**). The comparison is meaningless because the TMP Program is a reflection of government policy and intent, and a Commission-ordered low-income rate program would not be. A meaningful comparison would be to a Commission-ordered program to provide relief to a segment of customers on account of their economic circumstances. However, there is no such program.
74. The BCOAPO argues for alternative relief in regard to the ESUB at page 4 of its argument. It submits that if the Commission requires further information from BC Hydro regarding the ESUB, that it should direct BC Hydro to file a proposed rate discount for low-income customers within six months of a Commission order arising from this proceeding. BC Hydro's response is that if the Commission

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<sup>100</sup> This assumption increases the estimated bill impact, but is consistent with the take-up rate in California of low-income programs: Transcript, v 7 p 1384 lines 1-6 and p 1386, lines 10-15.

<sup>101</sup> This assumption decreases bill impacts. Note that Ontario Electricity Support Program one-time implementation costs were determined to be \$13.2 million, and on-going annual administration costs were budgeted at \$9 million. Moreover, a number of challenging implementation and on-going administration issues have arisen in Ontario: BC Hydro Rebuttal Evidence, Exhibit B-31, pp 12-13/pdf 16-17. Mr. Colton's evidence that during a ramp-up period incremental revenue associated with program funding would "pay" for implementation costs assumes that the Commission would in a revenue requirements proceeding allow BC Hydro to recover program costs associated with 100% implementation during years prior to 100% implementation. This is a false assumption, and in any event simply means that the incremental 1.5% rate impact would occur during the ramp-up period.

<sup>102</sup> See BC Hydro Rebuttal Evidence, Exhibit B-31, pp 4-6/pdf 8-10.

<sup>103</sup> That is, in excess of RRA increases of 4, 3.5 and 3 per cent for each of F2017, F2018 and F2019 respectively.

needs more information from BC Hydro then the proper course of action is to make such enquires of BC Hydro that allow it to provide the necessary information. Conversely, it would not be appropriate for the Commission to decline to approve the requested ESUB on the basis of insufficient information and then direct BC Hydro to make a substantially similar proposal. The alternative ESUB relief should be denied.

### ***Crisis Intervention Fund (CIF)***

75. Mr. Colton's CIF recommendation has the same problems that each of his other low-income rate proposals have, assuming it is accepted as a "rate". However, the only basis for treating it as a rate proposal is the proposed \$0.25 per-month, per-customer charge. BC Hydro submits that it is a red-herring, and that the substance of the proposal is an annual BC Hydro grant to a third-party relief agency. This is something the Commission has no jurisdiction to require BC Hydro to do, regardless of how the grant funds would be collected. For example, the Commission would have no jurisdiction in a revenue requirement proceeding to order BC Hydro to increase its costs to fund a relief agency and thus increase its revenue requirement and average rates.
76. Assuming one accepts the CIF as a rate proposal, it is plainly discriminatory as it is only available to and at best benefits a small segment of low-income residential customers, but would be paid for by all customer classes. Under cross-examination, Mr. Colton justified this aspect of his CIF recommendation on the assertion that all customers would see a cost-effectiveness benefit from the CIF.<sup>104</sup> As discussed above at paragraph 38, the cost-effectiveness test Mr. Colton would employ is inappropriately narrow insofar as it doesn't consider the entirety of incremental costs and revenues arising from the proposal. The balance of Mr. Colton's testimony on the all-customer benefits of the CIF are unsupported assertions that should be given no weight in light of the advocacy role that Mr. Colton took in this proceeding.

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<sup>104</sup> Transcript, v 7 p 1250 line 24 to p 1251 line 20, and, p 1252 lines 7 to 20.

77. The BCOAPO argues for alternative relief in regard to the CIF at page 5 of its argument. It submits that if the Commission requires further information from BC Hydro regarding the CIF that it should direct BC Hydro to file a proposed crisis assistance program for low-income customers within six months of a Commission order arising from this proceeding. BC Hydro's response is that if the Commission needs more information from BC Hydro then the proper course of action is to make such enquires of BC Hydro that allow it to provide the necessary information. Conversely, it would not be appropriate for the Commission to decline to approve the requested CIF on the basis of insufficient information and then direct BC Hydro to make a substantively similar proposal. The alternative CIF relief should be denied.

***LI Deferred Payment Arrangements (DPAs)***

78. Mr. Colton's recommended low-income DPA provisions are:

- (a) set the down-payment at 10% of arrears;
- (b) limit the term of the DPA to not less than 12 months; and
- (c) in the alternative to (b), limit the installment amount to not more than the average bill.<sup>105</sup>

79. Mr. Colton argues in support of his low-income DPA recommendation on the basis, in part, that current DPAs are not working, by which he means that not enough customers entering into DPAs are ultimately retiring their arrears.<sup>106</sup> However, BC Hydro's evidence is that Mr. Colton's measure of success is inappropriate (ie it is too narrow) and that a more appropriate objective is to balance BC Hydro's desire for all customers to have timely re-payment periods with the recognition that too short a period can be counter-productive for revenue

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<sup>105</sup> BCOAPO Argument, p 77/pdf 81.

<sup>106</sup> BCOAPO Argument, p 75/pdf 79.

collection.<sup>107</sup> The BCOAPO does not respond in argument or otherwise to this assertion.

80. It is this BC Hydro objective that particularly informs BC Hydro's opposition to the recommendation that for low-income customers the DPA re-payment period should not be less than 12 months.<sup>108</sup> Given the well-documented fact that electricity bills are higher in the winter, DPAs that extend past the winter months will only serve to exacerbate the challenges that customers have paying their bills, and make it less likely they will ever be collected.<sup>109</sup>
81. BCOAPO<sup>110</sup> also argues that BC Hydro is working harder and spending more to generate DPAs. As stated at paragraphs 40-41 above, the evidence clearly demonstrates that BC Hydro's current collections practices have been improving since 2013 and in fact, despite Mr. Colton's suggestions otherwise, those practices are also more efficient. As clearly illustrated in BC Hydro's response to BCOAPO IR 1.192.1, since 2013, additional expenditures made by BC Hydro with respect to its collection efforts have actually achieved incremental benefits.<sup>111</sup>
82. Finally, Mr. Colton offers "empirical" evidence from Ontario and Pennsylvania<sup>112</sup> that his proposed low-income DPA provisions are cost-effective. However, the

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<sup>107</sup> BC Hydro Rebuttal Evidence, Exhibit B-31, pp 25-26/pdf 29-30.

<sup>108</sup> Note that BC Hydro has, upon consideration of Mr. Colton's evidence, changed its business practices to allow for longer payment periods up to but not extending into the winter season: BC Hydro Rebuttal Evidence, Exhibit B-31, p 26/pdf 30 and Transcript, v 3 p 420 lines 16-20.

<sup>109</sup> BC Hydro Rebuttal Evidence, Exhibit B-31, p 24/pdf 28 and Transcript, v 3 p 481 lines 9-21, and, v 6 p 1002 line 15 to p 1003 line 20.

<sup>110</sup> BCOAPO Argument, p 75/pdf 79.

<sup>111</sup> Using the data from Table 2 of BC Hydro's response to BCOAPO IR 1.192.1, Exhibit B-26-1, pp 15-16 of 65/pdf 34-35, it shows that when comparing F2013 to F2016, additional expenditures of \$1,427k achieved incremental benefits of \$2,057K. Further, when comparing F2015 to F2016, additional expenditures of \$96k achieved incremental benefits of \$3,935k. In both cases, the incremental benefits are in spite of rate increases over the period as well as a 41% increase in the cost of mailing notifications (see BC Hydro's response to BCOAPO IR 1.183.1, Revised Attachment 4, Tab B, Exhibit B-5-2). Expenditures were calculated using the data from the credit and call centre, late payment communications, operations and maintenance, credit checks for new customers, interest paid on security deposits and disconnections/reconnections rows of Table 2. Incremental benefits were calculated using the data from the bad debt expense, collection agency commissions and interest on borrowings for delayed revenue rows of Table 2.

<sup>112</sup> BCOAPO Argument, pp 77-79/pdf 81-83.

evidence that would make the experiences in those jurisdictions relevant and applicable to BC Hydro are absent from the record. For example, there is no evidence that shows what the DPA arrangements were in those jurisdictions prior to the adoption of low-income DPA arrangements or, what specific low-income DPA arrangements have been made.<sup>113</sup> Further, there is no evidence that demonstrates what efforts have been made to control for other variables including, notably, average electricity rates.

### ***LI Late Payment Charge (LPC) Exemption***

83. Mr. Colton's recommendation to exempt low-income customers from LPCs is based in part on the same arguments he makes in regard to the low-income DPA arrangements,<sup>114</sup> and BC Hydro refers to paragraphs 79-82 above in response. Mr. Colton also asserts that there is no cost-of-service basis for the LPC. BC Hydro responds to that point in its discussion of BCOAPO's proposal to extend the LPC due date by 60 days at paragraphs 93-95 below.

### ***LI Charge Exemptions***

84. BCOAPO and Mr. Colton argue that low-income customers should be exempt from BC Hydro's reconnection and account charges on the basis that they are not related to the cost-causer and are therefore unjustified.<sup>115</sup> BC Hydro's evidence clearly demonstrates that both charges have a cost basis, are well established and are justified on that basis.<sup>116</sup> In fact, throughout the customer engagement process BCOAPO supported the reconnection charge being set at \$30 and confirmed its support in its opening statement at the start of the oral hearing.<sup>117</sup>

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<sup>113</sup> Mr. Colton's specific low-income DPA recommendations for BC Hydro are mentioned only once, in passing, in the BCOAPO Argument.

<sup>114</sup> For example, the LPC does not provide an incentive to pay and it is "not working," according to Mr. Colton.

<sup>115</sup> BCOAPO Argument, pp 90 and 91/pdf 94 and 95.

<sup>116</sup> Application, Exhibit B-1, Appendix G1-B, pp 7 and 8 of 10/pdf 4833-4834; BC Hydro Rebuttal Evidence, Exhibit B-31, pp 29-31/pdf 33-35; Transcript v 7, p 1209 line 1 to p 1210 line 26 and Transcript v 7, p 1354 lines 15-26.

<sup>117</sup> Transcript, v 3 p 379 lines 10-17.

85. Mr. Colton also attempts to draw a link between an inability to pay the reconnection charge and it becoming a barrier to actual reconnection. However, this is based on anecdotal evidence, whereas BC Hydro has shown that in regard to both the reconnection charge and the account charge, "96.6 per cent of customers disconnected for non-payment are reconnected within 60 days."<sup>118</sup> Moreover, the reconnection charge is not imposed until after a customer has paid his or her arrears and been reconnected, and in F2016 the revenue loss during the period of disconnection was only \$0.4 million.<sup>119</sup> It is therefore apparent that neither the minimum reconnection charge (nor the account charge) are meaningful barriers to collection of arrears and reconnection of service.

### ***LI Security Deposit Exemption***

86. BCOAPO argues that all low-income customers should be exempt from security deposits based primarily on affordability reasons, that is, security deposits impose an additional hardship on low-income customers and as such they should be exempt from payment.
87. BC Hydro currently assesses security deposits for new applicants that have not established satisfactory credit or for existing customers who have not maintained a satisfactory credit history.<sup>120</sup> Security deposits provide BC Hydro with protection against bad debt and BC Hydro applies this practice equally to all customers, i.e. any customer who poses a credit risk may be assessed a security deposit.<sup>121</sup>
88. The arguments at pages 87 and 88 of the BCOAPO Argument seem to be suggesting that BC Hydro's practices with respect to its assessment of security deposits could be improved which is something BC Hydro has already acknowledged in this proceeding and is one of the reasons why BC Hydro is proposing changes to its terms and conditions that will give it greater flexibility in

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<sup>118</sup> BC Hydro Rebuttal Evidence, Exhibit B-31, p 28/pdf 32.

<sup>119</sup> BC Hydro Rebuttal Evidence, Exhibit B-31, p 29/pdf 33.

<sup>120</sup> Application, Exhibit B-1, pp 8-19 to 8-20/pdf 429-430.

<sup>121</sup> Application, Exhibit B-1, p 8-20/pdf 430.

the assessment of security deposits.<sup>122</sup> However, in making their argument, BCOAPO and Mr. Colton do not provide any evidence that waiving security deposits for low-income customers will improve the cost-effective collection of the bills that BC Hydro renders to its low-income customers.<sup>123</sup> To repeat the submissions made above, to waive the security deposit for low-income customers would be plainly discriminatory because while it may benefit BC Hydro's low-income customers it would ultimately be paid for by all customers.

89. BCOAPO acknowledges the gains BC Hydro and MSDSI have made with respect to the business practices around the assessment of security deposits and postponement of disconnections for customers awaiting decisions by MSDSI with respect to assistance.<sup>124</sup> These practices and the increased flexibility BC Hydro seeks in its terms and conditions proposal with respect to security deposits is the more appropriate way to address the concerns BCOAPO has regarding BC Hydro's low-income customers.

## **B. All-Customer Rates**

### ***LPC at Weighted Average Cost of Debt***

90. Mr. Colton argues for a LPC at the short-term cost of debt on the basis that the current percentage rate is not cost-reflective. However, BC Hydro's evidence is clear that it is:

*BC Hydro's weighted average cost of debt was 4.28 per cent in F2015, which equates to 0.35 per cent compounded monthly. The remaining 1.15 per cent per month, that is, 1.5 per cent less the 0.35 per cent associated with carrying costs, is for the recovery of collections costs that without the Late Payment Charge would otherwise be absorbed within general rates.*<sup>125</sup>

91. Section 9 of BC Hydro's Rebuttal Evidence explains how customers who pay late cause BC Hydro to incur costs in excess of carrying costs that are about equal to

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<sup>122</sup> Application, Exhibit B-1, pp 8-20 to 8-22/pdf 430-432.

<sup>123</sup> BCOAPO Argument, p 86/pdf 90.

<sup>124</sup> BCOAPO Argument, p 85/pdf 89.

<sup>125</sup> BC Hydro Rebuttal Evidence, Exhibit B-31, p 31/pdf 35.

the revenue generated from the portion of the LPC (ie 1.15 percent) that is in excess of BC Hydro's weighted average cost of debt.<sup>126</sup> If only the cost of debt was recovered, then, as its Rebuttal Evidence shows, BC Hydro would under-collect for costs incurred with respect to its dunning communications and other operational costs.<sup>127</sup>

### ***LPC Extended to 60 Days After the Due Date***

92. Mr. Colton recommends that the LPC not be applied until 60 days past the due date shown on a bill (81 days after the bill is issued) on the basis that the LPC is not cost-justified because it imposes a charge on customers before the costs to be recovered by that charge are incurred.<sup>128</sup> In fact, Mr. Colton goes so far as to say that the activities which incur the LPC costs “have simply not begun” on Day 30, when BC Hydro currently applies the LPC.<sup>129</sup>
93. With respect, BC Hydro has provided ample evidence on this point to the contrary<sup>130</sup> which clearly shows that BC Hydro incurs carrying costs from the day the service is provided and specifically sustains communications and collections costs for customers with bad creditworthiness when a bill is seven days late and again at day 21.<sup>131</sup> This evidence is unacknowledged by BCOAPO.
94. Mr. Colton also justifies its proposed extension on the basis that the imposition of an LPC does not prompt bill payment that would not otherwise have been made.<sup>132</sup> Mr. Colton and BCOAPO seem to suggest that there is no correlation between a bill’s due date, bill payment and the consequence for not paying on time (ie the LPC). However, the data suggests otherwise which, as cited by BCOAPO, shows a higher percentage of customers making payment on the due

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<sup>126</sup> BC Hydro Rebuttal Evidence, Exhibit B-31, pp 31-35/pdf 35-39.

<sup>127</sup> BC Hydro Rebuttal Evidence, Exhibit B-31, Q/A 41 and 45, pp 32 and 34/pdf 36 and 38.

<sup>128</sup> BCOAPO Argument, p 82/pdf 86.

<sup>129</sup> BCOAPO Argument, p 84/pdf 88.

<sup>130</sup> See for example erratum to the Application filed July 13, 2016, Exhibit B-1-2 which updated Table 8-5 and provides the costs for BC Hydro’s Late Payment Charge; see also BC Hydro Rebuttal Evidence, Exhibit B-31, section 9.

<sup>131</sup> BC Hydro Rebuttal Evidence, Exhibit B-31, Q42, p 33/pdf 37 and Q44 and 45, p 34/pdf 38.

<sup>132</sup> BCOAPO Argument, p 83/pdf 87.

date or directly after (day 21 and 22). One can reasonably infer, at minimum, that this is causally connected to a desire to avoid the imposition of the LPC. Mr. Colton's own testimony on the point further acknowledged this correlation:

*MR. CHRISTIAN: Q: ...But what I'm trying to get at is the due date shown on the bill either has some significance with respect to customers paying their bill or it does not. Is it your evidence that it has no effect on when a customer pays a bill?*

*MR. COLTON: A: No, we know that that's not the case. Because we saw yesterday that on the due date and on the day after the due date there was an uptick in payments. We saw those numbers and so the due date does have significance.*

95. If the LPC is extended until 60 days after the due date, many of BC Hydro's costs would not be recovered<sup>133</sup> and BC Hydro would be out of pocket for carrying costs for 60 days before a bill is even issued. As such, this proposal would result in increased borrowing from delayed revenues which cost would be borne by all customers.

### ***Winter Shutoff Restrictions***

96. Mr. Colton's recommended winter shutoff restrictions<sup>134</sup> have substantially been agreed to by BC Hydro on a pilot basis, as described by Mr. Anderson and Mr. Sanders.<sup>135</sup>

### ***Disconnection Delays***

97. BC Hydro opposes the scope of Mr. Colton's recommended Disconnection Delays.<sup>136</sup>

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<sup>133</sup> BC Hydro Rebuttal Evidence, Exhibit B-31, Q45, p 34/pdf 38 such as costs related to its dunning activities – BC Hydro incurs communications costs at day seven, 21, 35 and 49 days overdue, none of which would be recovered if the LPC was not applied until bills were 60 days overdue.

<sup>134</sup> BCOAPO Argument, pp 105-106/pdf 109-110.

<sup>135</sup> Transcript, v 3 p 421 line 8 to p 422 line 3 and Transcript, v 6 p 1011 lines 2 to 25.

<sup>136</sup> BCOAPO Argument, pp 106-109/pdf 110-113.

98. As described by Mr. Anderson<sup>137</sup> BC Hydro will be implementing business practices to delay disconnections where customers demonstrate a medical reason for requiring power. BC Hydro has proposed allowing an additional 20 business day period where customers can enter into an installment payment plan.<sup>138</sup> This is more manageable than Mr. Colton's proposal which is admittedly incomplete, and which would require BC Hydro to maintain sensitive personal information for some indefinite period in regard to any resident in a customer premise, regardless of the source of the information.<sup>139</sup> This is self-evidently an impractical idea.

### ***Bar Use of External Credit Scores***

99. BC Hydro opposes Mr. Colton's recommendation that BC Hydro be prohibited from relying on what he describes as "external credit scores" that aren't solely based on utility payment history (where "utility" is understood to include cablevision, telephone and internet services).<sup>140</sup>

100. Mr. Colton supports this recommendation with the assertion that non-utility credit scores are not relevant to a person's electricity-service credit-worthiness.<sup>141</sup> The assertion is not supported by any evidence other than Mr. Colton's bare opinion. The assertion is at best counter-intuitive, since it begs the question why a customer's payment history to cablevision service providers (for example) is any more indicative of their ability or willingness to pay a BC Hydro bill than their rent payment history or gasoline credit card payment history.

101. BC Hydro also refers to its Rebuttal Evidence, where it points out that utilities in Canada do not generally provide payment history to third-party credit agencies.<sup>142</sup> Therefore the inevitable consequence of accepting Mr. Colton's recommendation would be that one of three identified options to demonstrate

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<sup>137</sup> Transcript, v 3 p 420 lines 20-22 and v 3 p 482 line 21 to 483 line 7.

<sup>138</sup> Transcript, v 3 p 482 line 21 to 483 line 7.

<sup>139</sup> Transcript, v 7 p 1343 line 12 to p 1345 line 20.

<sup>140</sup> BCOAPO Argument, pp 92-95/pdf 96-99.

<sup>141</sup> BCOAPO Argument, p 95/pdf 99; see also Direct Testimony of Roger Colton, Exhibit C2-12, p 112/pdf117.

<sup>142</sup> BC Hydro Rebuttal Evidence, Exhibit B-31, p 20/pdf 24.

good credit history is removed;<sup>143</sup> that in consequence fewer people could establish a good credit history; and that in the result either more customers would be asked to post security deposits or BC Hydro's bad debt risk would increase. These are unnecessary and therefore inappropriate outcomes, and this recommendation should be rejected.

### ***Non-Cash Security Deposits***

102. Mr. Colton recommends that the Commission require BC Hydro to allow customers to:

- (a) provide sureties in lieu of a security deposit;<sup>144</sup> and
- (b) enter into an EPP in lieu of a security deposit.<sup>145</sup>

103. In regard to accepting sureties in lieu of security deposits, BC Hydro confirms that in this context a surety is a legally-binding commitment of a third-party to pay a customer's bill when the customer defaults.<sup>146</sup> The consequence of the proposal is that insofar as the third-party doesn't honour its contractual commitment, BC Hydro would be obliged to sue on the surety.<sup>147</sup> BC Hydro suggests that this would be expensive and impractical, and notes that the BCOAPO have adduced no evidence to say that such a scheme would be cost-effective.

104. However, BC Hydro has committed to proposing tariff amendments, as necessary, to allow a third-party customer to take responsibility for a customer's bill,<sup>148</sup> and will be considering how such an arrangement could work with

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<sup>143</sup> As outlined in BC Hydro's Rebuttal Evidence, Exhibit B-31, p 20/pdf 24, the current three options are: through a third-party credit agency; through a utility reference letter evidencing good standing; or, evidence of final utility bill payment.

<sup>144</sup> BCOAPO Argument, p 89/pdf 93; see also see also Direct Testimony of Roger Colton, Exhibit C2-12, pp 115-116/pdf 120-121.

<sup>145</sup> BCOAPO Argument, p 6/pdf 10; see also Direct Testimony of Roger Colton, Exhibit C2-12, p 117/pdf 122.

<sup>146</sup> Transcript v 7, p 1355 line 16 to p 1356 line 5.

<sup>147</sup> That is, to bring a lawsuit in a court of competent jurisdiction: Transcript, v 7 lines 6-16.

<sup>148</sup> Transcript, v 3 p 421 lines 1-3.

community groups or with broader public organizations as suggested by Commissioner Cote.<sup>149</sup>

105. In regard to customers entering into EPPs as an alternative to security deposits, BC Hydro submits that there is no evidence from which one could reasonably infer that participation in an EPP reduces the risk of final unpaid bills.<sup>150</sup> Because the BCOAPO bears the burden of proof, this proposal must fail.

### **C. Non-Rate Recommendations**

#### ***Low-Income ECAP Target***

106. BC Hydro's submissions with respect to the recommendations the BCOAPO would have the Commission make in regard to the Minister's RIB Review are addressed at paragraph 5 above. The submissions that follow are premised on the understanding that the BCOAPO seeks an order from the Commission in this proceeding that BC Hydro incur sufficient low-income DSM expenditures as necessary to achieve Mr. Colton's recommended penetration target for ECAP.<sup>151</sup> BC Hydro opposes any such order in this proceeding.
107. BC Hydro has been willing to and indeed has provided significant amounts of evidence regarding its DSM programs and expenditures in this proceeding despite not seeking any DSM-related relief. Nevertheless, BC Hydro does not think it appropriate for the Commission to issue any orders to BC Hydro in this proceeding regarding its DSM expenditures or programs.<sup>152</sup>
108. BC Hydro has recently filed a three-year DSM expenditure plan as part of the F2017-F2019 RRA. Among other things, the F2017-F2019 RRA explains BC Hydro's over-arching DSM strategy for the three years F2017-F2019; provides

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<sup>149</sup> Transcript, v 7 p 1216 line 14 to p 1218 line 2.

<sup>150</sup> BC Hydro Rebuttal Evidence, Exhibit B-31, p 21/pdf 25.

<sup>151</sup> BCOAPO Argument, p 102/pdf 106; see also Direct Testimony of Roger Colton, Exhibit C2-12, p 61/pdf 66.

<sup>152</sup> See letter dated August 9, 2016, Exhibit B-38; see also the remarks of the Chair where he reminded parties that "DSM is not explicitly within the scope of this hearing. It is more properly within the scope of the RRA, which has an application for approval of DSM expenditures." Transcript, v 4 p 583 line 23 to p 584 line 1.

the justifications for individual DSM programs (including the ECAP program); and seeks approvals of \$375 million in DSM expenditures over the three-year test period.<sup>153</sup> The regulatory review of that proceeding has just commenced, and, at the request of the BCOAPO,<sup>154</sup> BC Hydro has filed a number of IR responses related to DSM that were filed in this proceeding on the record of the F2017-F2019 RRA.<sup>155</sup> BC Hydro submits that the Commission cannot reasonably and fairly assess one program (ECAP) as recommended by Mr. Colton in the absence of evidence regarding the over-arching DSM strategy and individual program justifications that are just being reviewed and developed through IR responses in the separate RRA proceeding that is just getting underway.

109. BC Hydro notes in addition that an essential element of Mr. Colton's ECAP proposal is that BC Hydro be able to identify and proactively approach low-income customers.<sup>156</sup> By necessary inference, Mr. Colton's ECAP recommendation pre-supposes Commission approval of low-income rates<sup>157</sup> and the associated intake and ongoing administration process.<sup>158</sup> That in turn requires the support of MSDSI and/or the Province to provide that intake process (as explained in paragraphs 50-52 above). It follows that Mr. Colton's ECAP recommendation cannot stand in the absence of such approvals and evidence of government support.
110. A final reason for denying Mr. Colton's ECAP recommendation is that, with respect, the Commission has no lawful basis to require BC Hydro to incur DSM program expenditures. Section 44.2 of the UCA allows the Commission to accept or reject all or part of a proposed DSM expenditure schedule. Nothing in section 44.2 or otherwise in the UCA empowers the Commission to compel DSM

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<sup>153</sup> See Exhibit B-1-1 of the F2017-F2019 RRA, p 1-46, Table 1-9 "Fiscal 2017 to Fiscal 2019 Demand-Side Measures Expenditures Schedule," pdf 75.

<sup>154</sup> And the Zone II Ratepayers Group.

<sup>155</sup> Exhibit B-5 of the F2017-F2019 RRA.

<sup>156</sup> BCOAPO Argument, pp 98-99/pdf 102-103.

<sup>157</sup> Transcript, v 3 p 380 line 23 to p 381 line 1.

<sup>158</sup> Because no other way of identifying BC Hydro's low-income customers has been recommended by Mr. Colton, or otherwise.

spending whether on a dollar basis or on a penetration rate basis as specifically recommended.

### ***Customer Segmentation Analysis***

111. The BCOAPO is not seeking an order from the Commission with regard to Mr. Colton's recommendation that BC Hydro engage in a study to characterize non-payment behaviour.<sup>159</sup> BC Hydro supports the BCOAPO's view that a Commission order is not warranted, but notes its willingness to engage on this topic with the to-be established Low-Income Advisory Group.

### ***Data Collection & Reporting***

112. The BCOAPO is not seeking an order from the Commission with regard to Mr. Colton's recommendation that BC Hydro engage in data collection and reporting.<sup>160</sup> BC Hydro supports the BCOAPO's view that a Commission order is not warranted, but notes its willingness to engage on this topic with the to-be established Low-Income Advisory Group.

### ***Low-Income Customer Assistance Unit (Low-Income CAU)***

113. The BCOAPO is not seeking an order from the Commission with regard to Mr. Colton's recommendation that BC Hydro engage in establishing a Low-Income CAU.<sup>161</sup> BC Hydro supports the BCOAPO's view that a Commission order is not warranted, but notes its willingness to engage on this topic with the to-be established Low-Income Advisory Group.

### ***Low-Income Advisory Group***

114. BC Hydro has agreed to establish a Low-Income Advisory Group as recommended by Mr. Colton and advocated for by the BCOAPO.<sup>162</sup> Terms of

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<sup>159</sup> BCOAPO Argument, section 6.5.1, pp 102-103/pdf 106-107.

<sup>160</sup> BCOAPO Argument, section 6.5.2, p 103/pdf 107.

<sup>161</sup> BCOAPO Argument, section 6.5.3, pp 103-104/pdf 107-108.

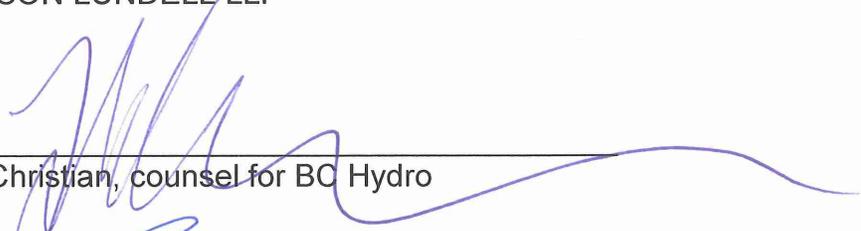
<sup>162</sup> BCOAPO Argument, section 6.6.1, p 105/pdf 109.

reference and membership are still to be determined,<sup>163</sup> but the structure of the group is expected to begin this fall.<sup>164</sup>

ALL OF WHICH IS RESPECTFULLY SUBMITTED

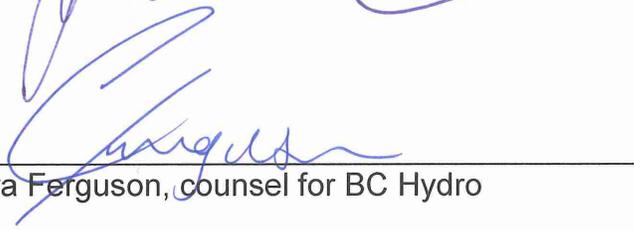
This 11th day of October, 2016

LAWSON LUNDELL LLP



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Jeff Christian, counsel for BC Hydro



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Clara Ferguson, counsel for BC Hydro

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<sup>163</sup> See discussion with Commissioner Cote at Transcript v 7, p 1214 line 2 to p 1216 line 13.

<sup>164</sup> Transcript, v 6 p 1000 lines 21-26.

# Attachment 1

# **THE LAW OF EVIDENCE IN CANADA**

**FOURTH EDITION**

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**Sopinka, Lederman & Bryant: The Law of Evidence in Canada, Fourth Edition**

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## I. INTRODUCTION

§3.1 The rules relating to the burdens of proof are largely governed by the substantive law. Nonetheless, these rules are commonly dealt with in textbooks on evidence because they are an integral part of the litigation process. Although degrees or standards of proof and presumptions are occasionally referred to in the present analysis, these matters are examined elsewhere in this text.<sup>1</sup>

## II. TERMINOLOGY

§3.2 The term “burden of proof” is occasionally used to describe two distinct concepts relating to the obligation of a party in a proceeding in connection with proof. In its first sense, the term refers to the obligation imposed on a party to prove or disprove a fact or issue to either a balance of probabilities or beyond a reasonable doubt. In the second sense, it refers to a party’s obligation to adduce or point to evidence on the record to raise an issue to the satisfaction of the trial judge.<sup>2</sup> For example, the evidence may be found in the plaintiff’s or the prosecution’s case.<sup>3</sup>

§3.3 Various labels have been used to describe the burden of proof in its first sense, including the legal burden,<sup>4</sup> ultimate<sup>5</sup> or fixed<sup>6</sup> burden, the persuasive burden<sup>7</sup> (or the risk of non-persuasion),<sup>8</sup> and the burden on the pleadings.<sup>9</sup> None of these is completely satisfactory. Although each is descriptive of some aspect of the total concept, some of the labels are misleading. It is often preferable simply to describe the effect of the operation of the particular species of burden with which one is dealing, rather than to employ a label. In previous editions of this text we selected the term legal burden on the basis it was the term most

<sup>1</sup> See Chapter 5, Standards of Proof, and Chapter 4, Presumptions.

<sup>2</sup> J.B. Thayer, *A Preliminary Treatise on Evidence at Common Law*, reprint of 1898 ed. (New York: Augustus M. Kelley, 1969), at 353-55; 9 Wigmore, *Evidence* (Chadbourne rev. 1981), §§ 2485, 2490, at 283, 302. *R. v. Stone*, [1999] 2 S.C.R. 290, [1999] S.C.J. No. 27, at para. 67 (S.C.C.).

<sup>3</sup> *L. v. D.P.P.*, [2003] Q.B. 137, at 23.

<sup>4</sup> A. Keane & P. McKeown, *The Modern Law of Evidence*, 9th ed. (Oxford: Oxford University Press, 2012), at 80.

<sup>5</sup> Lord Denning in *Bratty v. Attorney General for Northern Ireland*, [1963] A.C. 386, at 413, [1961] 3 All E.R. 523 (C.A.).

<sup>6</sup> N. Bridge, “Presumptions and Burdens” (1949) 12 Mod. L. Rev. 273, at 277.

<sup>7</sup> G. Williams, *Textbook of Criminal Law*, 2d ed. (London: Stevens & Sons, 1983), at 48; and Dickson C.J.C. in *R. v. Schwartz*, [1988] 2 S.C.R. 443 at 466, [1988] S.C.J. No. 84 (S.C.C.) and adopted by McLachlin C.J.C. in *R. v. Cinous*, [2002] 2 S.C.R. 3, [2002] S.C.J. No. 28, at paras. 52 and 70 (S.C.C.). But see *Pecore v. Pecore*, [2007] 1 S.C.R. 795, [2007] S.C.J. No. 17 (S.C.C.), where the Court refers to the legal burden, at paras. 24, 25, 44.

<sup>8</sup> 9 Wigmore, *Evidence* (Chadbourne rev. 1981), § 2485, at 283.

<sup>9</sup> M.N. Howard *et al.*, *Phipson on Evidence*, 16th ed. (London: Sweet & Maxwell, 2005), at 125-26.

frequently used.<sup>10</sup> Recent Supreme Court of Canada decisions show a preference for the term persuasive burden.<sup>11</sup> We will use the term “persuasive (legal) burden” or simply “persuasive burden” to describe the onus of proof in relation to the balance of probabilities or beyond a reasonable doubt standards.

§3.4 To differentiate between the two senses in which the term “burden of proof” is used, the other burden may be called the “evidential burden”.<sup>12</sup> Although the evidential burden is sometimes called the “minor” or “secondary burden”,<sup>13</sup> these terms neither describe the nature of this burden, nor provide a meaningful way of distinguishing between the persuasive (legal) and the evidential burdens. Where there are multiple issues in a case, for example, negligence, causation, and damages, using the term “minor” or “secondary” burden to describe the effect of the evidence in relation to these issues is not helpful and perhaps confusing. The terms “tactical burden”<sup>14</sup> and “provisional burden”<sup>15</sup> are also used to describe the evidential burden. These terms are uninformative and misleading because “evidential burdens are imposed by law, not mere matters of tactics”.<sup>16</sup>

§3.5 The terms “burden of adducing evidence”<sup>17</sup> and the “duty of passing the judge”<sup>18</sup> accurately describe the duty of the party that bears an evidential burden

<sup>10</sup> R. Cross & C. Tapper, *Cross and Tapper on Evidence*, 7th ed. (London: Butterworths, 1990), at 119.

<sup>11</sup> *R. v. Levigne*, [2010] 2 S.C.R. 3, [2010] S.C.J. No. 25, at para. 32 (S.C.C.); Fish J. in *R. v. Fontaine*, [2004] 1 S.C.R. 702, [2004] S.C.J. No. 23, at paras. 10 and 78 (S.C.C.) for a unanimous Supreme Court and McLachlin C.J.C. for a majority of the Court in *R. v. Cinous*, [2002] 2 S.C.R. 3, [2002] S.C.J. No. 28, at paras. 52, 70 (S.C.C.); C. Tapper, *Cross and Tapper on Evidence*, 12th ed. (Oxford: Oxford University Press, 2010), at 121, employs the term “persuasive” in the most recent edition of that evidence treatise.

<sup>12</sup> G. Williams, *Textbook of Criminal Law*, 2d ed. (London: Stevens & Sons, 1983), at 49: “... the name ‘evidential burden’ now has wide acceptance”. The first judicial acceptance of the term appears to have been in *R. v. Gill*, [1963] 1 W.L.R. 841, at 846 (C.A.) (G. Williams, *id.*, at 49, note 17).

<sup>13</sup> These terms are sometimes used by courts to distinguish the evidential burden from the burden of proof, which is sometimes called the primary burden. See, e.g., *Circle Film Enterprises Inc. v. Canadian Broadcasting Corp.*, [1959] S.C.R. 602, at 607, [1959] S.C.J. No. 40 (S.C.C.). See also *R. v. Schwartz*, [1988] 2 S.C.R. 443, [1988] S.C.J. No. 84 (S.C.C.).

<sup>14</sup> R. Cross, *Cross on Evidence*, 4th ed. (London: Butterworths, 1974) speaks of the “tactical shifting” of the evidential burden, at 79. But see the recent edition of *Cross and Tapper on Evidence*, 12th ed. (Oxford: Oxford University Press, 2010), at 126. The term “tactical burden” was rejected by the Supreme Court of Canada: “In my opinion, this is not a true burden of proof, and use of an additional label to describe what is an ordinary step in the fact-finding process is unwarranted”, per Sopinka J., *Snell v. Farrell*, [1990] 2 S.C.R. 311, at 330, [1990] S.C.J. No. 73 (S.C.C.).

<sup>15</sup> Lord Denning, “Presumptions and Burdens” (1945) 61 Law Q. Rev. 379.

<sup>16</sup> G. Williams, *Textbook of Criminal Law*, 2d ed. (London: Stevens & Sons, 1983). For a criticism of this term, see *R. v. Schwartz*, [1988] 2 S.C.R. 443, [1988] S.C.J. No. 84 (S.C.C.), at 467.

<sup>17</sup> *Phipson on Evidence*, 16th ed. (London: Sweet & Maxwell, 2005), at 125.

<sup>18</sup> 9 Wigmore, *Evidence* (Chadbourn rev. 1981), §§ 2485, 2490, at 293: “... each party must first with his evidence pass the gauntlet of the judge”.

and its legal significance. A party, however, may satisfy an evidential burden without doing anything; for example, a witness called by the Crown testifies to facts which raise the issue of self-defence. Thus, a party may discharge an evidential burden by pointing to some evidence on the record. In these circumstances, the defendant does not adduce evidence but rather the issue is raised by the evidence. The term “evidential burden”, when properly understood, is as informative as the other terms, is less cumbersome, and has gained wide acceptance.<sup>19</sup> The Supreme Court of Canada has consistently used the term “evidential burden”.<sup>20</sup> The term “evidential burden” is used in this text for reasons of simplicity, conciseness, accuracy, and consistency. The application and effect of the evidential burden is discussed below.<sup>21</sup>

### III. THE DIFFERENCE BETWEEN THE BURDENS

#### A. General

§3.6 As noted, the term “burden of proof” is ambiguous and it has sometimes been used to mean that there is evidence of a fact, while on other occasions it has been used to mean that a fact has been proved by the evidence.<sup>22</sup> Since the term is applied without discriminating in which sense the term is being used,<sup>23</sup> it is difficult to determine which burden a party has satisfied in a particular case.<sup>24</sup>

<sup>19</sup> *R. v. Robertson*, [1987] 1 S.C.R. 918, [1987] S.C.J. No. 33 (S.C.C.). G. Williams, *Textbook of Criminal Law*, 2d ed. (London: Stevens & Sons, 1983), states that the term “evidential” has wide acceptance. Both Tapper, *Cross and Tapper on Evidence*, 12th ed. (Oxford: Oxford University Press, 2010), at 122-23 and Keane and McKeown, *The Modern Law of Evidence*, 9th ed. (Oxford: Oxford University Press, 2012), at 101-104 use it. See also *D.P.P. v. Morgan*, [1976] A.C. 182 (H.L.). See also *R. v. Schwartz*, [1988] 2 S.C.R. 443, [1988] S.C.J. No. 84 (S.C.C.); *R. v. Osolin*, [1993] 4 S.C.R. 595, 26 C.R. (4th) 1, at 35-39, [1993] S.C.J. No. 135 (S.C.C.); *R. v. Dar-rach*, [2000] 2 S.C.R. 443, [2000] S.C.J. No. 46 (S.C.C.); *R. v. K. (S.)* (2003), 177 C.C.C. (3d) 90, [2003] O.J. No. 2453 (Ont. C.A.).

<sup>20</sup> *R. v. Schwartz*, *ibid.*; *R. v. Stone*, [1999] 2 S.C.R. 290, [1999] S.C.J. No. 27 (S.C.C.), at para. 46 (*per* Binnie J.) and at paras. 164 and 187 (*per* Bastarache J.); *R. v. Cinous*, [2002] 2 S.C.R. 3, [2002] S.C.J. No. 28 (S.C.C.), at paras. 70-71 (*per* McLachlin C.J.C.), at paras. 147-150 (*per* Ar-bour J.); *R. v. Fontaine*, [2004] 1 S.C.R. 702, [2004] S.C.J. No. 23, at paras. 10-11 (S.C.C.), *per* Fish J.

<sup>21</sup> See this chapter, §§ 3.16-3.44.

<sup>22</sup> Kenneth S. Broun *et al.*, *McCormick on Evidence*, 7th ed. (St. Paul: Thomson Reuters, 2013), vol. 2, at 644.

<sup>23</sup> J.B. Thayer, *A Preliminary Treatise on Evidence at Common Law*, reprint of 1898 ed. (New York: Augustus M. Kelley, 1969), at 355. See, for example, *Abrath v. North Eastern Railway Co.* (1883), 11 Q.B.D. 440 (C.A.), *affd* (1886), 11 App. Cas. 247, [1881-85] All E.R. Rep. 614 (H.L.).

<sup>24</sup> In *R. v. Appleby*, [1972] S.C.R. 303, at 317, [1971] S.C.J. No. 112 (S.C.C.), Laskin J. (as he then was) confuses the evidentiary effect of the incidence of the burden of proof on the accused. See *R. v. Oakes*, [1986] 1 S.C.R. 103, at 123, [1986] S.C.J. No. 7 (S.C.C.), where Dickson C.J.C. points out this confusion.

§3.7 The term “evidential burden” means that a party has the responsibility to insure that there is sufficient evidence of the existence or non-existence of a fact or of an issue on the record to pass the threshold test for that particular fact or issue.<sup>25</sup> As Lord Devlin explained in *Jayasena v. R.*,<sup>26</sup> to satisfy an evidential burden a party is not required to prove anything:

Their Lordships do not understand what is meant by the phrase “*evidential burden of proof*” ... It is doubtless permissible to describe the requirement as a burden, and it may be convenient to call it an evidential burden. But it is confusing to call it a burden of proof. Further, it is misleading to call it a burden of proof, whether described as legal or evidential or by any other adjective, when it can be discharged by the production of evidence that falls short of proof. The essence of the appellant’s case is that he has not got to provide any sort of proof that he was acting in private defence. So it is a misnomer to call whatever it is that he has to provide a burden of proof ...<sup>27</sup> [emphasis added]

In contrast, the term “persuasive (legal) burden” means that a party has an obligation to prove or disprove a fact or issue to the criminal or civil standard. The failure to convince the trier of fact to the appropriate standard means that party will lose on that issue.<sup>28</sup> Because the evidential burden and the persuasive (legal) burden will on occasion be distributed between the parties, it is essential that the issues to be tried, and the underlying facts in support of the issues, be clearly identified.<sup>29</sup>

§3.8 A party who bears an evidential burden is subject to an adverse ruling for failing to meet the threshold test for that particular fact or issue. In a jury trial, the trial judge has the authority to decide that issue without leaving it for the jury’s consideration. However, where a party satisfies an evidential burden, the trial judge must leave that issue for the jury’s determination. For example, the incidence of the evidential burden in relation to the definitional elements of a

<sup>25</sup> J.B. Thayer, *A Preliminary Treatise on Evidence at Common Law*, reprint of 1898 ed. (New York: Augustus M. Kelley, 1969), at 355 states: “... the duty of going forward in argument or in producing evidence; whether at the beginning of a case or at any moment throughout the trial or the discussion”.

<sup>26</sup> [1970] A.C. 618, [1970] 1 All E.R. 219 (P.C.).

<sup>27</sup> *Ibid.*, at 624 (A.C.). In *R. v. Schwartz*, [1988] 2 S.C.R. 443, at 467, [1988] S.C.J. No. 84 (S.C.C.), Dickson C.J.C. stated: “The party with an evidential burden is not required to convince the trier of fact of anything, only to point out evidence which suggests that certain facts existed.”

<sup>28</sup> J.B. Thayer, *A Preliminary Treatise on Evidence at Common Law*, reprint of 1898 ed. (New York: Augustus M. Kelley, 1969), at 355 states: “The peculiar duty of him who has the risk of any given proposition on which the parties are at issue — who will lose the case if he does not make this proposition out, when all has been said and done.” See *R. v. Laba*, [1994] 3 S.C.R. 965, [1994] S.C.J. No. 106 (S.C.C.), for an analysis of the different evidentiary effect of the two burdens.

<sup>29</sup> C. Tapper, *Cross and Tapper on Evidence*, 12th ed. (Oxford: Oxford University Press, 2010), at 119 states: “The key to clarity in this whole area lies in the precise definition and discrimination of the issues to be tried, and of the facts upon the determination of which they depend.”

crime in a criminal prosecution<sup>30</sup> or the negligence of the defendant in a civil action, requires the Crown or plaintiff to call evidence at the commencement of proceedings. To satisfy this evidential burden, these parties must adduce some evidence on these issues to succeed on a motion for a non-suit or a directed verdict of acquittal.<sup>31</sup> The trial judge's determination as to the sufficiency of the evidence to satisfy the evidential burden is a question of law.<sup>32</sup>

**§3.9** The significance of the evidential burden arises when there is a question as to which party has the right or the obligation to begin adducing evidence. It also occurs when a question arises whether there is sufficient evidence to raise an issue for determination by the trier of fact.<sup>33</sup> It must be underlined that when there is a reference to discharging an evidential burden, or a reference to adducing evidence, it should be understood to include pointing to some evidence already on the record. The persuasive (legal) burden of proof normally arises after the evidence has been completed and the question is whether the trier of fact has been persuaded with respect to the issue or case to the civil or criminal standard of proof.<sup>34</sup> The persuasive (legal) burden, however, ordinarily arises after a party has first satisfied an evidential burden in relation to that fact or issue.<sup>35</sup>

**§3.10** Professor Williams described the differences between the burdens as follows:

In short, the rule imposing an evidential burden is applied by the judge, in deciding whether to leave an issue (the general issue or some specific question) to the jury. The rule imposing the persuasive burden is for application by the jury. Putting this in another way, the evidential burden governs what the judge *does*, in leaving the

<sup>30</sup> It is sometimes difficult to distinguish between definitional elements and defences: see *R. v. Holmes*, [1988] 1 S.C.R. 914, [1988] S.C.J. No. 39 (S.C.C.).

<sup>31</sup> See Chapter 5, Standards of Proof, §§ 5.1-5.11 for a discussion of these motions.

<sup>32</sup> *R. v. Cinous*, [2002] 2 S.C.R. 3, [2002] S.C.J. No. 28, at paras. 55, 189 (S.C.C.); *R. v. Fontaine*, [2004] 1 S.C.R. 702, [2004] S.C.J. No. 23, at para. 12 (S.C.C.). Contra: *R. v. Stone*, [1999] 2 S.C.R. 290, [1999] S.C.J. No. 27, at para. 168 (S.C.C.), *per* Bastarache J. See Chapter 5, Standards of Proof, *ibid*.

<sup>33</sup> *R. v. Parks*, [1992] 2 S.C.R. 871, 75 C.C.C. (3d) 287, at 303, [1992] S.C.J. No. 71 (S.C.C.), *per* La Forest J.

<sup>34</sup> Kenneth S. Broun *et al.*, *McCormick on Evidence*, 7th ed. (St. Paul: Thomson Reuters, 2013), vol. 2, at 645, states: "When the time for a decision comes, the jury ... must be instructed how to decide the issue if their minds are left in doubt. The jury must be told that if the party having the burden of persuasion has failed to satisfy that burden, the issue is to be decided against the party having the burden of persuasion."

<sup>35</sup> *R. v. Stone*, [1999] 2 S.C.R. 290, [1999] S.C.J. No. 27, at para. 46 (S.C.C.), *per* Binnie J. A presumption may obviate the need for a party to satisfy an evidential burden: see Chapter 4, Presumptions. Also, the evidential and legal burdens for an issue may be distributed between the parties: see this chapter, §§ 3.7, 3.12, 3.16, 3.45.

question to the jury or withdrawing it from them; the persuasive burden governs what he *says*, in directing the jury how they are to reach their verdict.<sup>36</sup>

Justice Fish in *R. v. Fontaine* succinctly described how the two burdens operate in a judge and jury trial:

An “evidential burden” is not a burden of proof. It determines whether an issue should be left to the trier of fact, while the “persuasive burden” determines how the issue should be decided.

These are fundamentally different questions. The first is a matter of law; the second, a question of fact. Accordingly, on a trial before judge and jury, the judge decides whether the evidential burden has been met.<sup>37</sup> [original text underlined]

### **B. The Persuasive or Legal Burden of Proof**

§3.11 The incidence of the persuasive (legal) burden of proof means that the party has the obligation to prove or disprove the existence or non-existence of a fact or issue to the civil or criminal standard; otherwise that party loses on that issue. The substantive law,<sup>38</sup> such as the law of torts or the criminal law, and not the adjectival law of evidence, governs which party has the burden of proof in relation to a fact or issue.<sup>39</sup> Consider the resulting uncertainty if the rules governing the persuasive (legal) burden of proof would allow the jury to allocate this burden by its perception of fairness or of expediency in a particular case. For instance, in a straightforward motor vehicle negligence action, a jury allocated the onus to disprove negligence to the defendant because he or she was intoxicated. Or, to take an illustration in the context of the criminal law, assume two persons were jointly indicted but separately tried for the same crime.<sup>40</sup> In the trial of one accused, the jury decided that the Crown should negate a common law defence, but at the trial of the other accused, a different jury allocated the persuasive (legal) burden to the accused for the same common law defence. Clearly, the need for predictability in the litigation process demands that the burden of proof be allocated according to rules of law and not *ad hoc* decisions by the trier of fact.

§3.12 In most cases, there are multiple factual and legal issues. Where there are several disputed facts or issues in a case, the persuasive (legal) burden in

<sup>36</sup> G. Williams, *Textbook of Criminal Law*, 2d ed. (London: Stevens & Sons, 1983), at 55.

<sup>37</sup> [2004] 1 S.C.R. 702, [2004] S.C.J. No. 23, at paras. 11-12 (S.C.C.).

<sup>38</sup> See *Caisse Populaire de Maniwaki v. Giroux*, [1993] 1 S.C.R. 282, [1993] I.L.R. para. 1-2913, at 2198, [1993] S.C.J. No. 9 (S.C.C.), where the Civil Code of Lower Canada determines the burden of proof for the extinction of an obligation under an insurance contract.

<sup>39</sup> While this is true as a general proposition, the incidence of the burden of proof is also part of the law of evidence.

<sup>40</sup> Assume the first accused successfully obtained severance.

relation to different issues may be distributed between the parties.<sup>41</sup> For example, the Crown has the persuasive (legal) burden in relation to the external circumstances and the mental element for the crime of murder. However, at common law<sup>42</sup> and under the *Criminal Code*,<sup>43</sup> the accused bears the persuasive (legal) burden for the defence of not criminally responsible due to a mental disorder.<sup>44</sup>

**§3.13** In civil proceedings, the persuasive (legal) burden of proof operates in a similar manner. In an action for assault and battery, the plaintiff must prove that there was an application of force to the victim, that the blow caused the injury, and the quantum of damages.<sup>45</sup> However, the defendant has the persuasive burden in relation to a defence of justification and to prove that he or she used no more force than was necessary.<sup>46</sup>

**§3.14** In civil proceedings, the persuasive burden does not play a part in the decision-making process if the trier of fact can come to a determinate conclusion on the evidence. If, however, the evidence leaves the trier of fact in a state of uncertainty, the persuasive burden is applied to determine the outcome.<sup>47</sup> In *Robins v. National Trust Co.*,<sup>48</sup> the Privy Council explained the operation of the legal burden in civil cases as follows:

But onus as a determining factor of the whole case can only arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no sure conclusion. Then the onus will determine the matter. But if the tribunal, after hearing and weighing the evidence, comes to a determinate conclusion, the onus has nothing to do with it, and need not be further considered.<sup>49</sup>

<sup>41</sup> The criteria used by the courts for allocating the burden of proof are examined in this chapter, § 3.61 ff.

<sup>42</sup> *M'Naghten's Case*, [1843-60] All E.R. Rep. 229, 8 E.R. 718 (H.L.).

<sup>43</sup> R.S.C. 1985, c. C-46, s. 16; see this chapter, § 3.46.

<sup>44</sup> R.S.C. 1985, c. C-46, s. 16; *R. v. Chaulk*, [1990] 3 S.C.R. 1303, [1990] S.C.J. No. 139 (S.C.C.); *R. v. Romeo*, [1991] 1 S.C.R. 86, [1991] S.C.J. No. 6 (S.C.C.); for a criticism of the allocation of the legal burden to the accused, see D. Stuart, *Canadian Criminal Law*, 5th ed. (Toronto: Carswell, 2007), at 50-52.

<sup>45</sup> *Norberg v. Wynrib*, [1992] 2 S.C.R. 226, 92 D.L.R. (4th) 449, at 457 (*per La Forest J.*), at 474 (*per Sopinka J.*), [1992] S.C.J. No. 60 (S.C.C.).

<sup>46</sup> *Norberg v. Wynrib*, *ibid.*; *Mann v. Balaban*, [1970] S.C.R. 74, [1969] S.C.J. No. 69 (S.C.C.).

<sup>47</sup> *Rhesa Shipping Co. SA v. Edmunds*, [1985] 2 All E.R. 712, at 718 (H.L.). If the evidence upon an issue is found to be too evenly balanced to determine the matter one way or the other, then the issue must be determined by the incidence of the persuasive burden (C. Tapper, *Cross and Tapper on Evidence*, 12th ed. (Oxford: Oxford University Press, 2010), at 121.)

<sup>48</sup> [1927] A.C. 515, [1927] 2 D.L.R. 97 (P.C.).

<sup>49</sup> *Ibid.*, at 520 (A.C.), 101 (D.L.R.). Kenneth S. Broun *et al.*, *McCormick on Evidence*, 7th ed. (St. Paul: Thomson Reuters, 2013), vol. 2, at 645 states: "Clearly, the principal significance of the burden of persuasion is limited to those cases in which the trier of fact is actually in doubt."

# **Attachment 2**

2016 - 10 - 07

# Practice and Procedure Before Administrative Tribunals

TITLE PAGE

## TITLE PAGE

### PRACTICE AND PROCEDURE BEFORE Administrative Tribunals

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## Practice and Procedure Before Administrative Tribunals

### Chapter 17 — Evidence and Witnesses

#### 17.2 — STANDARD AND BALANCE OF PROOF

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The concept of "standard of proof" refers simply to how convinced one must be that a certain fact exists. "Burden of proof" refers to who bears the burden of establishing a fact to that level of satisfaction.

##### 17.2(a) Standard of Proof

The concept of "standard of proof" deals with whether something has been adequately proven.

In considering that issue an agency should not look at evidence or portions thereof out of context but consider it as a whole, in context and weighed accordingly.<sup>17.1.3</sup>

There are two standards of proof.<sup>17.2</sup> The first, which is the standard applicable in civil proceedings, is proof on a balance of probabilities which requires that in order to find that a fact exists, the decision-maker be more convinced of the existence of that fact than not.<sup>18</sup> The second, which is the standard used in criminal proceedings, is proof beyond a reasonable doubt according to which a decision-maker cannot find a fact unless he or she has no reasonable doubt that that fact exists.<sup>19</sup>

To the extent that most proceedings before administrative agencies are civil (as opposed to criminal) in nature, the burden of proof is the civil burden of "balance of probabilities" (as opposed to the criminal standard).<sup>20</sup>

This is true even if the agency is attempting to establish a fact that relates to, or establishes a crime.<sup>21</sup> For example, criminal injury compensation agencies generally have to establish, as part of their mandate, that a crime was committed. Notwithstanding the necessity of proving the commission of a crime, the existence of this crime need only be established on the civil standard.<sup>22</sup>

In layman's language it is sometimes suggested that the more serious the consequences of a finding, the more certain one must be — although one does not have to find it established beyond a reasonable doubt. This implies that there is a shifting standard within the civil standard of proof where some facts require more certainty than others. This notion of a "flexible" standard of civil proof, or of degrees of proof within the civil standard has come under increasing criticism from the courts.<sup>22.1</sup> Rather, the Courts prefer to speak of the cogency of the evidence required to prove a fact, rather than the certainty with which the fact has to be proven. Thus, while insisting that there is only one standard of proof in civil proceedings which does not fluctuate regardless of the seriousness of the matter, the Courts also insist that the more serious the matter, the more cogent the evidence must be — that is to say, the better the quality of the evidence must be.<sup>23</sup>

The explanation given respecting this civil standard in matters of significant consequence can be tricky. The general judicial approach is to require that a finding be supported by "clear, cogent and convincing" evidence in order to meet the required standard of proof. In *Law Society of Upper Canada v. Neinstein*, 2007 CarswellOnt 1560, 2007 WL845573 (Div. Ct.), the Divisional Court discussed this in some detail. In that case the Court re-affirmed that as proceedings before a law society disciplinary panel as not criminal the standard of proof was the civil standard of a balance of probabilities. It also noted that "given the seriousness of the allegations of professional misconduct and the possible consequences for the respondent, the allegations had to be proven by clear, convincing and cogent evidence. . ."

The Court attempted to delineate what this meant by rejecting the idea that the standard of proof rises with the gravity of the allegation. Rather, it was a question of the assessment or care to be taken in scrutinizing the evidence tendered. Referring to Gavin Mackenzie's *Lawyers and Ethics: Professional Responsibility and Discipline* the Court noted that when Mr. Mackenzie spoke of a rising standard of proof what the author meant was that that the trier of fact must scrutinize the evidence with great care when the allegations are serious.

The significance of the requirement of clear, convincing and cogent evidence is well-explained in Linda R. Rothstein, Robert A. Centra and Eric Adams, "Balancing Probabilities: The Overlooked Complexity of the Civil Standard of Proof". . . . While the civil standard of balance of probabilities applies in the professional discipline context, the authors say,

. . . probability depends on the circumstances, and where there are serious consequences at issue, a higher or more rigorous evidentiary standard must be met for the fact to be found probable. This more rigorous approach to the evidence involves a qualitative assessment of the evidence — for "cogency" and "persuasiveness" — in determining whether the fact in question has been demonstrated to be probable.

The Divisional Court's decision in *Neinstein* was reversed on appeal to the Court of Appeal — *Law Society of Upper Canada v. Neinstein*, 2010 CarswellOnt 1459, 2010 ONCA 193 (Ont. C.A.). However, the appeal did not turn on, or discuss the issue or meaning of standard of proof.

The approach of referring to the quality of evidence is very much in the standard stream of judicial decisions concerning the standard of proof in civil cases with significant consequences. Thus, in *Stetler v. Ontario (Agriculture, Food & Rural Affairs Appeal Tribunal)*, 2005 CarswellOnt 2877, 200 O.A.C. 209, 76 O.R. (3d) 321, 36 Admin. L.R. (4th) 212 (Ont. C.A.) the Ontario Court of Appeal stated:

There are only two standards of proof used in legal proceedings. In civil and administrative matters, absent an express statutory provision to the contrary, the standard of proof is on a balance of probabilities, while in criminal matters it is proof beyond a reasonable doubt. The well-established standard articulated in *Bernstein* and numerous subsequent cases is an evidential standard that speaks to the quality of evidence required to prove allegations of misconduct or incompetence against a professional. Thus, within the administrative context, it is accepted that strong and unequivocal evidence within the civil standard of proof is required where either the issues, or the consequences for the individual, are very serious. . . .

On a practical basis I suggest that agencies avoid discussions of whether the burden of proof in matters of significant consequence is a case of a "higher" standard within the overall balance of probabilities or whether it is a case of demanding greater scrutiny of evidence. Presumably, the only effect of subjecting evidence to a greater degree of scrutiny and ensuring that it is clear, convincing and cogent will be to increase the degree of that evidence's reliability and increase the confidence of the agency in the existence of whatever fact that evidence tends to indicate. It strikes me very much as using different words to mean the same thing. In all cases the agency, in order to find that something has been proven, must be satisfied that the thing was more likely than not. There are obvious degrees of certainty within this broad category falling below the criminal standard of being satisfied beyond a reasonable doubt. In a number of cases a person may be satisfied that some fact is more likely than not but in some of those be more certain of the fact than in others — without in any case being satisfied beyond a reasonable doubt. To say either that on the evidence one has a high certainty in the likelihood of a fact, or that the evidence on which a factual finding was based was particularly scrutinized and was found to be "clear, convincing and cogent" seems to be saying very much the same thing. It appears to me to be very difficult for an agency to reach a high degree of certainty without clear, convincing and cogent evidence. In each case the result is a statement of greater certainty or comfort level in the finding. Having said that, in order to avoid reviews based on the technicalities of language, where the issue of the civil standard of proof is at issue in agency proceedings of significant consequence, the prudent agency, having ensured a strong evidentiary base for its findings should refer to those findings being based on "clear, convincing and cogent evidence" rather than risking a judicial review by stating that the evidence was such that the agency is well satisfied, or has a high degree of comfort that something was more likely than not.<sup>23.1</sup>

However, if the proceedings before the agency are criminal in nature, then the standard of proof is the criminal standard. The Supreme Court of Canada has indicated a proceeding will be "criminal" in nature if:

- it is aimed at maintaining public order (rather than regulating an industry for example); or
- it carries a "true penal" consequence (imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline).<sup>24</sup>

### 17.2(b) Burden of Proof

As noted above, the concept of "burden of proof (or "onus of proof") simply refers to who has the burden of establishing a fact. As noted by the Alberta Court of Appeal in *Alberta Provincial Judges' Association v. Alberta* (1999), [1999 CarswellAlta 687](#), [177 D.L.R. \(4th\) 418](#), [16 Admin. L.R. \(3d\) 154](#) (Alta. C.A.), additional reasons at (1999), [1999 CarswellAlta 1136](#) (Alta. C.A.), leave to appeal refused (2000), [2000 CarswellAlta 482](#) (S.C.C.), the concept is only really relevant where there is no evidence whatever to establish a fact or issue or where the evidence is evenly balanced. It serves as the rule which indicates who wins or loses.

The general rule is that whoever asserts a proposition bears the burden of proving it.<sup>24.1</sup>

However, on some occasions, where the facts necessary in order for a person to meet that burden are particularly in the hands of the other side *who actively has done something to block the ability of the first person to satisfy the legal burden*, then the burden will shift of proving the fact in question will shift to the side who interfered with the ability of the first person to establish the fact.<sup>25</sup>

An agency will err if it puts the burden of proof on the wrong person. For example, in a disciplinary hearing, the accused does not have to prove that there was no misconduct. It is the person who claims that there was misconduct who must prove it.

Often the legislation will place the burden on the agency itself. There may not necessarily be parties before the agency. For example, in an inquisitorial proceeding where a regulator is directed to take action where it is satisfied that some state of facts exists, the burden is on the agency to be satisfied. Or where an investigative body is established to look into facts and make a report. In those cases there may not actually be any person making assertions who properly speaking can be said to bear the burden of proof. There the burden of establishing something rests with the agency.

The concept of burden of proof helps determine:

- Who leads off in agency proceedings (usually the person who is asserting the claim, who has to bring something to be answered). This is just a matter of logic, not a legal rule.
- If a claim or case is established or lost. (For example, in a disciplinary proceeding, the professional body bringing the allegation of misconduct bears the burden of proving the misconduct. If it cannot, then the allegation is lost.)

### 17.2(c) Statutory Direction

Of course, as in so much of administrative law, the above principles can be displaced by express statutory direction. See for example, section 5(3) of the federal Pension Act:

5.(3) In making a decision under this Act, the Minister shall

- (a) draw from all the circumstances of the case and all the evidence presented to the Minister every reasonable inference in favour of the applicant or pensioner;
- (b) accept any uncontradicted evidence presented to the Minister by the applicant or pensioner that the Minister considers to be credible in the circumstances; and
- (c) resolve in favour of the applicant or pensioner any doubt, in the weighing of evidence, as to whether the applicant or pensioner has established a case

These provisions operate to displace the ordinary common law principles respecting standard and burden of proof. Section 5(3)(a) for example, directs the Minister to draw any reasonable inference from a set of circumstances that will operate in favour of the pensioner —