Ministry of the Attorney General
Briefing Note
Civil Law Division
Legal Services Branch – ENERGY/ MEDG / MRIS / MOI / Accessibility/ Small Business

ISSUE: This note provides an overview with respect to complaints made to the Advertising Standards Council ("ASC") regarding government advertising on the Ontario Fair Hydro Plan ("OFHP").

SUMMARY:

The Legal Branches of ENE, TBS and CLOC have reviewed the questions from the Secretary of the Cabinet with respect to complaints against the Province arising from advertising that ran in connection with the OFHP. Below are summary answers and background on the issues.

The complaints process is described in greater detail below. When a complaint is received, the ASC will conduct a preliminary assessment and may resolve the matter administratively. If a complaint is not resolved, the ASC may refer a complaint to a "Standards Council" for adjudication. The complaints at issue are currently under review at the ASC staff level and have not yet been referred to the ASC's Toronto Standards Council (the "Council"), which would ultimately hear this matter.

A. <u>Reference to 25%</u>

- There has been no decision or direction to the Province to remove the references to 25% reduction on electricity bills as it relates to the OFHP from Ontario.ca websites. ASC staff have proposed this as an option to facilitate resolution at an early stage. We understand that Energy has removed these references from its Ontario Fair Hydro website but they may still appear on other government websites.

- Given that there is no precedent on such a proceeding against the Province, it is difficult to predict the outcome of the adjudication process. However, Blakes has advised that, based on their experience and the available data on case resolution (advertised on the website), there is a moderately high chance that, if the submission on the merits is accepted at the staff level, the matter will not proceed to adjudication before the Council.

- As set out further below, decisions of the Council can be appealed to an Appeal Panel made up of 5 members of the Council. The member must undertake to withdraw the advertising at issue *before* an appeal will be heard. The decisions of the Appeal Panel are binding and final.

B. Integrity of the ASC's Processes

- CLOC counsel considered whether the Ontario government could potentially challenge any of the ASC's decisions to date or the ultimate decision of the Council on this matter by questioning the integrity of the complaints process. The Ontario government could potentially claim that the working relationship between the Chair of the Council and the Auditor General compromises the integrity of the Council's processes. We understand that the Chair, a lawyer, has provided legal advice to the Auditor General respecting the advertising standards contained in the *Government Advertising Act, 2004*.
- CLOC recommends that the government should not raise such arguments. As a matter of law, in order to successfully challenge the Council's processes on this basis, it would be necessary to establish that a reasonable apprehension of bias exists in these circumstances. Based on our current understanding of the facts, CLOC's view is that it would be difficult for the government to establish that a reasonable apprehension of bias exists for the following reasons:

    - The Chair is not an employee of the Auditor General. In addition, we are not aware that the Chair has provided legal advice to the Auditor General of Ontario in respect of the OFHP advertisements.
    - Although the Chair has provided the Auditor General with legal advice respecting the advertising standards contained in the *Government Advertising Act, 2004*, these advertising standards are quite different from the standards set out in the ASC's Canadian Code of Advertising Standards ("the Code"). The Act's advertising standards only require that the advertisement (a) state that it was paid for by the Government of Ontario and (b) not be "partisan". By contrast, the relevant complaint to the ASC appears to relate to whether the OFHP advertisements comply with the Code's standards for accuracy and clarity.
    - The ASC's procedures indicate that the Chair has no vote in Council decisions. As a result, it is not clear whether the Chair has or will play a significant role in Council's consideration of this matter.

C. Potential Litigation Options

- A decision of an Appeal Panel of the Council is potentially subject to judicial review on the grounds that it was made in excess of the Council's jurisdiction, that there was a breach of natural justice, or that the decision was tainted by bias. However, such an application would be novel and CLOC's view is that the Divisional Court would likely find that it does not have jurisdiction to determine such an application.
- A civil action in defamation against the ASC is not a possible recourse for the government as Ontario courts have held that absolute privilege attaches to all statements made about the government.

- Assuming that the Advertising Review Board has a contractual relationship with the ASC (which we have not been able to confirm), it is possible that the government could bring a claim for breach of contract against the ASC. CLOC has not had the opportunity to review any such agreement (if one exists). However, we caution that, in the absence of bad faith, it may be difficult to claim that the ASC has breached its agreement with the government solely on the basis that the government disputes a decision made by the Council.
- Equally, a civil action in negligence against the ASC does not have a likelihood of success, in that it would be difficult to establish that (i) the ASC owes a duty of care toward the government; (ii) the duty, if any, should not be negated for policy reasons given that the ASC acts in the broader public interest; and (iii) an amount in general damages could be quantified for the loss of government reputation that could be attributable solely to the alleged negligence of the ASC.

BACKGROUND

A. <u>Advertising Standards Council</u>

- The ASC is an advertising industry self-regulating body that administers the Code. The Code contains 14 provisions, which the ASC describe as setting criteria for "acceptable advertising that is truthful, fair and accurate".

- The Code applies to members of the ASC (subject to certain exclusions which are not applicable here). Membership in the ASC is voluntary. There are approximately 190 members of the ASC. Most members appear to be large organizations that purchase a lot of advertising. The Ontario government is a member of the ASC through the province's Advertising Review Board ("ARB").The Government of Canada and a number of provincial agencies (OLG, LCBO, Nova Scotia Provincial Lotteries and Casino Corp., BC Transit) and regional transit authorities are also members of the ASC.

- <u>The ASC Complaint Process</u>:

  - As a self-regulatory body, the ASC accepts written complaints from consumers about advertisements in Canadian media.

(A) Complaint submission and preliminary review

  - Consumers can submit written complaints by email, mail or fax. As a condition of their complaint submission, consumers must agree that the complaint and all correspondence with the ASC about the complaint are confidential and cannot be made public.
  - The ASC conducts a preliminary evaluation of the complaint against the Code. If the complaint does not raise an issue under the Code, the ASC sends an explanation letter to the complainant and closes the file.

(B) Resolution or determination of *prima facie* cases

- If the ASC identifies a *prima facie* case, the ASC sends the complaint to the advertiser for a written response.[1] We are advised that the advertiser's response is private: the ASC does not published the response or share it with the complainant.

- There are two streams to resolve these complaints: administrative resolution and Standards Council adjudication. If the advertiser acknowledges the Code infraction and permanently withdraws or appropriately amends the advertisement before or immediately upon being advised of the complaint, the ASC can administratively resolve the complaint. This means that the case is resolved and the ASC will not publish a report about the case.

- If the advertiser does not acknowledge a Code infraction and withdraw or appropriately amend the advertisement, the ASC forwards the complaint and response to the Standards Council for adjudication. There is no right to appear before the Council: its review is based solely on the written complaint and response. The ASC informs both the consumer and the advertiser in writing of the Council's decision.

- If the Council finds that the advertisement contravenes the Code, the advertiser is asked to amend or withdraw the advertisement. The ASC will publish a case summary in its online *Ad Complaints Report*. In the summary, the ASC will name the advertiser unless it withdrew or amended the advertisement before the Council met to adjudicate the complaint.

(C) Enforcement

- In the event that an advertiser does not voluntarily comply with the Council's direction to remove or amend advertising, the ASC will "name and shame" the advertiser. The ASC does not have any formal legal authority to impose sanctions.

- ASC enforcement steps can include:
  - Advising media of the advertiser's failure to cooperate and comply;
  - Requesting media's support in no longer exhibiting the advertisement;
  - Publicly declaring, in such manner as the Council deems appropriate, that the advertising contravenes the Code and identifying the advertiser; and

[1] The balance of the discussion of the ASC's procedure is specific to complaints about accuracy and clarity (Clauses 1 and 3 of the Code, respectively). As will be discussed later in this note, the current complaints are about accuracy and clarity.

- Notifying any relevant regulators that the advertiser has not participated in or with the ASC's consumer complaint procedure, that the advertising has been found to contravene the Code, and/or that the advertiser has not complied with a decision of Council.

- Where the advertiser has voluntarily withdrawn the complaint, the ASC retains discretion to re-open the case if the advertiser subsequently violates its undertaking to withdraw the non-compliant advertising.

(D) Appeals

- The consumer complainant or the advertiser can appeal from the Council's decision. If the advertiser commences an appeal, it must withdraw the advertising at issue before the appeal will be heard.

- The appeal is conducted via a hearing before a five person appeal panel. At the appeal hearing, the complaint will be treated as a new complaint and the matter reconsidered in its entirety.

- Appeal panel decisions are made by majority vote and are sent to both parties within five working days of the appeal hearing. The decision is binding and final.

B. <u>OFHP Complaints</u>

- The ARB monitors advertising and creative communications services policy, oversees the advertising or creative communications services agency selection process and ensures government policy standards are met.
- On May 4, 2017 the ARB received a letter from ASC seeking Ontario's submissions in respect of a complaint about our advertisement stating that the average consumer's electricity bill would be reduced by 25% as part of the OFHP ("Initial Complaint"). The Initial Complaint claimed that this number was misleading because of the expiry of the clean energy rebate.
- On May 18, 2017, the ARB responded to ASC stating that the advertisement was factually accurate and provided the specific calculations which make up the OFHP's reference to the 25% reduction. ARB also directed the ASC to the OFHP website that provided further details about the plan which were consistent with the advertisement.

- The ASC reviewed the ARB response and concluded that the matter would be resolved administratively and not proceed to adjudication. This meant the complaint would be dismissed and the case closed.

- On August 14, 2017, the ARB received a letter from ASC advising of two additional complaints with respect to the OFHP advertisement on the same issue raised in the spring ("Subsequent Complaints").

- The Initial Complaint and the Subsequent Complaints focus on the following themes
    - "Household electricity bills will be an average of 25% less" ("**25% reduction claim**");
        - This Complaint challenges the 25% reduction and states that it is incorrect.
    - "Upgrades to our [Ontario's] electricity system have made it more reliable for Ontarians" ("**reliability claim**"); and
        - This Complaint is a comment by an individual advising that the system is not reliable and providing some anecdotal evidence to the effect.
    - "Recent changes have made bills more affordable" ("**affordability claim**")
        - The Complaint challenges that the rates are more affordable by indicating that these have simply been hidden elsewhere from consumers.

- On September 19, 2017, the ARB responded to the ASC with an explanation indicating that the advertisement was not misleading as it was factually accurate.

- On September 25, 2017, ARB/ENE Communications received a response from the ASC advising that it had re-evaluated both the Initial Complaint and the Subsequent Complaints and had determined that the matter would proceed to adjudication at the Council's next meeting in October.

- On September 28, 2017, ENE-LSB re-engaged Blakes to assist in responding to the re-opened complaints. ENE Communications also engaged ARB/CAB Staff.

- On October 3, 2017, staff from CAB, ARB, ENE – LSB and Blakes participated in a preliminary call with ASC staff to obtain further information and determine potential next steps. During the call, the ASC indicated that they took issue with the 25% reduction statement in the Province's advertisement and would require further information about it. We understand that a response will be provided by October 31, 2017.

C. <u>Integrity of the ASC's Processes</u>

- CLOC counsel considered whether the Ontario government could potentially challenge any of the ASC's decisions to date (or the ultimate decision of the Council on this matter) by questioning the integrity of the complaints processes. We understand that the Chair of the Council is Rafe Engle, a lawyer. We further understand that Mr. Engle has provided advice (and may still be providing advice) to the Auditor General of Ontario in respect of the application of the advertising standards contained in the Ontario *Government Advertising Act, 2004*. The Auditor General has criticised certain aspects of the Fair Hydro Plan, including the government's advertisements respecting the Plan. The Ontario government could potentially claim that Mr. Engle's working relationship with the Auditor General compromises the integrity of the Council's processes.

- CLOC recommends that the government should not raise such arguments. As a matter of law, in order to successfully challenge the Council's processes on this basis, it would be necessary to establish that a reasonable apprehension of bias exists in these circumstances. Based on our current understanding of the facts, CLOC's view is that it would be difficult for the government to establish that a reasonable apprehension of bias exists here.

- CLOC's view is that it is likely that the Council owes a duty of fairness to ASC's members, including the Ontario government. One of the components of the duty of fairness is the rule against bias. The rule against bias protects the integrity of the Council's processes by prohibiting the Council from making a decision in a matter where a reasonable apprehension of bias exists.

- The Supreme Court of Canada recently affirmed that the legal test for whether a "reasonable apprehension of bias" exists is as follows: "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly" (*Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25 at para. 20). The Court also noted that the inquiry into whether a reasonable apprehension of bias exists is inherently contextual and fact-specific (para. 26).

- CLOC's view, based on our current understanding of the facts, is that it would be difficult for the government to establish that a reasonable apprehension of bias exists in these circumstances for the following reasons:

    - Mr. Engle is not an employee of the Auditor General. In addition, we are not aware that Mr. Engle has provided legal advice to the Auditor General of Ontario in respect of the Fair Hydro Plan advertisements. In our view, the fact that Mr. Engle, as a lawyer, has provided legal advice to the Auditor General in respect of other advertising matters does not, in itself, give rise to a reasonable apprehension of bias in these circumstances.
    - Although Mr. Engle has provided the Auditor General with legal advice respecting the advertising standards contained in the *Government Advertising Act, 2004*, these advertising standards are quite different from the standards set out in the Code. The Act's advertising standards only require that the advertisement (a) state that it was paid for by the Government of Ontario and (b) not be "partisan", as defined therein (s. 6(1)). By contrast, the relevant complaint to the ASC appears to concern whether the Government's Fair Hydro Plan advertisements comply with the Code's standards for accuracy and clarity (see Code, s. 1).

- The ASC's procedures indicate that Mr. Engle, as the Chair of the Council, has no vote in Council decisions. As a result, it is not clear whether Mr. Engle played a significant role in Council's consideration of this matter.
- Generally, the ASC's procedures provide for less procedural fairness than, say, a court or an administrative tribunal governed by the *Statutory Powers Procedure Act*. The Council consists of the Chair and a group of volunteers (advertising industry representatives and public representatives). It reviews complaints without an oral hearing. As a result, in these circumstances, it is likely that the Council would be subject to relatively flexible requirements concerning the avoidance of bias.

D. <u>Potential Litigation Options</u>

- A decision of the appeal panel of the Council is potentially subject to judicial review, on an application to the Divisional Court brought by the government to seek review of the decision on the grounds that it was made in excess of the Council's jurisdiction, that there was a breach of natural justice, or that the decision was tainted by bias.
- However, such an application would be novel and CLOC's view is that the Divisional Court would likely find that it does not have jurisdiction to determine such an application.
- The ASC has a broad impact on the public, the subject matter of the ASC's review is expressive content guaranteed by section 2(b) of the Charter, and the purpose of the ASC's review is of a public nature and for the purpose of ensuring that advertisers engage in acceptable advertising practices. These are all factors militating in favour of a court finding that it has jurisdiction to review a decision of the Council appeal panel.
- However, the decision of the panel is not binding, the ASC has no enforcement powers over an advertiser, and the activities at issue are more commercial in nature, even though they have an expressive component. The impact of a finding of the Council or of its appeal panel cannot compel an advertiser to change either its conduct or the content of its advertising.
- A civil action in defamation is not a possible recourse for the government as Ontario courts have held that absolute privilege attaches to all statements made about the government.
- Assuming that the ARB has a contractual relationship with the ASC, it is possible that the government could bring a claim for breach of contract against the ASC. CLOC has not had the opportunity to review any such agreement, if one exists. However, we caution that, in the absence of bad faith, it may be difficult to claim that the ASC has breached its agreement with the government on the basis that the government disputes a decision made by the Council.
- Equally, a civil action in negligence against the ASC does not have a likelihood of success, in that it would be difficult to establish that (i) the ASC owes a duty of care toward the government; (ii) the duty, if any, should not be negated for policy reasons given that the ASC acts in the broader public

interest; and (iii) an amount in general damages could be quantified for the loss of government reputation that could be attributable solely to the alleged negligence of the ASC.

E. Next Steps

- Blakes response will be submitted for MAG and Energy approval prior to filing.

Originated: October 12, 2017

Updated: October 24, 2017

Prepared by: Alena Thouin
Deputy Director
Legal Services Branch
ENERGY/ MEDG / MRIS / MOI / Accessibility / Small Business

In consultation with TBS LSB and CLOC Advisory

Reviewed by: Maud Murray
Legal Director/A
Legal Services Branch
ENERGY/ MEDG / MRIS / MOI / Accessibility / Small Business

Approved by: ______________________________

Jane Mallen
Portfolio Director
Civil Law Division
` Ministry of the Attorney General

Approved by: ______________________________

Michel Helie
Assistant Deputy Attorney General
Civil Law Division
` Ministry of the Attorney General

Approved by: ______________________________

Irwin Glasberg
Deputy Attorney General
Ministry of the Attorney General