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OPINION

TO: James Rehob, Counsel
Civil Law Division, Ministry of Energy

FROM: Padraic Ryan, Counsel
Civil Law Division, Constitutional Law Branch

DATE: December 8, 2017

RE: Invoicing requirements under proposed *Ontario Fair Hydro Plan Act, 2017* regulations

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You have asked for our advice on two proposed regulations on an urgent basis. Our advice is necessarily limited to the information you have provided.

You have provided a proposed regulation which requires electricity vendors and unit sub-meter providers to include certain information in invoices provided to consumers which advise of the effect of the *Ontario Fair Hydro Plan Act, 2017*. Specifically, the proposed regulation requires these entities to calculate the difference between the invoiced amount being provided to the consumer compared to the amount which would have been owing but for the Act, and to describe the difference between the two amounts in the following text: "Ontario's Fair Hydro Plan saved you [insert specified amount] on your bill. This includes the 8% Provincial Rebate."

Freedom of expression under s. 2(b) of the Charter includes "the right to say nothing or the right not to say certain things" (*RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 at para 113). Therefore, when a law requires persons to communicate information, this is a violation of s. 2(b) which must be justified as a reasonable limit under s. 1 of the Charter.

Courts have upheld laws which require companies to disclose relevant and factually accurate information to consumers as reasonable limits on the right to say nothing. Commercial expression has also generally been held to be a type of expression outside the core values of the s. 2(b) right, and therefore limitations on this type of expression are more likely to be justified. However, even in the commercial context, compelled speech laws cannot be overbroad by requiring speech which is not necessary to serve the government's purpose.

We assume that the purpose of the proposed regulation is to inform electricity consumers of the effect of the *Act* on the electricity costs outlined in the invoice so that they are better informed about how the amounts in their invoice are arrived at. While the courts have traditionally been deferential to government at this stage of the s. 1 test, it is not a guarantee that this purpose would be accepted, since unlike a traditional invoice line item, which informs the consumer the actual calculation of their bill, the expression in question is informing the consumer about how their actual bill compares to a counterfactual scenario where the *Act* was not implemented. Ontario would need to convince a court that the law has a genuine consumer information purpose and not merely an attempt to conscript private persons into political communications to benefit the government of the day. Compelled political speech (as opposed to compelled commercial speech aimed at accurately informing consumers) engages the core protections of s. 2(b).

Assuming that the law has a compelling and substantial purpose, it appears there may be alternative approaches which still achieve this purpose in a less infringing way. For example, a consumer may not realize that "Ontario's Fair Hydro Plan" refers to legislation, and not to a political party's campaign platform, and a consumer may mistakenly attribute an endorsement of such a platform to the company that provides the invoice. It may be less infringing to require a reference to the *Ontario Fair Hydro Plan Act, 2017* using its legislative title and/or to indicate that the required text was created by the government, not the company. We understand that the 8% Provincial Rebate was provided for under a different statute, the *Ontario Rebate for Electricity Consumers' Act, 2016*, and therefore the text would have to refer to both laws to be accurate. In the absence the use of statutory titles, a consumer may erroneously think the rebate is part of the *Act*, since the proposed language refers to it as part of the "Plan".

The requirement that the invoice indicate that the Plan "saved you" money may not been seen as the least infringing way of stating the effect of the Act on the consumer's invoice, given that we understand that some of the savings in question are the result of electricity costs being born by taxpayers, and others are the result of debt being issued which will be paid by future electricity consumers. A more neutral alternative would be to refer to a "reduction' in the invoiced amount, not "savings".

We assume that the calculations in the proposed regulation are accurate as to the effect of the *Act* on consumer bills. Less risk will arise where the compelled expression is indisputably accurate information.

In *RJR MacDonald*, one way in which a law that required tobacco products to contain health warnings was not minimally impairing was that the tobacco companies were prohibited from including any information on the product packages that was not authorized under the legislation. This removed the companies' ability to attribute the health warnings to government, or to express their own views on the issues addressed in the compelled speech. It does not appear that the proposed regulation includes such a prohibition, and this is another risk reducing feature.

Taking all of these factors into account, we consider there to be a **moderately high risk** that the proposed regulation would be found to be an unjustified infringement of freedom of expression. Moderately high risk means that although the outcome is difficult to predict because there are good arguments on both sides, a court would more likely than not find the law unconstitutional.

In our view, the types of language modifications we describe above as being less infringing would be at a **moderate risk** of being found unconstitutional. Moderate risk means in light of equally good arguments on both sides, it is impossible to predict the outcome. There are many possible formulations which would reduce risk by being less impairing due to using more specific and neutral language. One less-impairing formulation of alternative language would be:

> The *Ontario Fair Hydro Plan Act, 2017* and the *Ontario Rebate for Electricity Consumers' Act, 2016* resulted in a reduction of this amount by [insert specified amount]. This includes the 8% Provincial Rebate.

We also recommend that this language include text attributing this message to the Government of Ontario, or otherwise making clear that it is not expression on behalf of the entities providing invoices.

You have also advised that under the current regulation, Ontario Regulation 196/17, the same entities are required to include the following text on invoices: "Ontario's Fair Hydro Plan substantially lowers electricity bills for typical residential consumers. This includes the eight per cent rebate introduced in January 2017, and builds on previous initiatives to deliver broad-based relief on all electricity bills." The current regulation also requires the entities to include an insert accompanying invoices which includes the Ontario government trillium logo and similar, but more detailed text, describing the Fair Hydro Plan.

In our view, the current regulation likely shares at least the same risk as the proposed regulation, as it requires the entities to provide consumers with information about government policy described in a favorable light. While the required insert may be at less risk since the information therein is attributed to the Government of Ontario, there is a less compelling case for the invoice language since unlike the proposed regulation, it does not contain individualized information about the consumer's bill and essentially repeats publicly available government communications.

In any event, given the content of the current regulation, in our view the proposed regulation does not increase legal risk relative to the status quo.

Finally, you have provided a second proposed regulation which requires the Ontario Energy Board to publish certain information relating to electricity prices. As the Energy Board is part of the provincial government, it enjoys no *Charter* protection, and therefore compelling it to communicate information does not engage s. 2(b). In any event, the proposed language appears to be sufficiently neutral to not raise any concerns as to overbroad compelled expression, given that the proposed regulation only requires the Board to "publish the rates calculated" under the regulation and does not require the use of specific language in describing those calculations.