Blakes

Blake, Cassels & Graydon LLP
Barristers & Solicitors
Patent & Trade-mark Agents
199 Bay Street
Suite 4000, Commerce Court West
Toronto ON M5L 1A9 Canada
Tel: 416-863-2400 Fax: 416-863-2653

Joshua A. Krane
Partner
Dir: 416-863-4187
joshua.krane@blakes.com

January 17, 2018

Reference: 14229/1

VIA E-MAIL
CONFIDENTIAL

Mr. Rafe Engle
R.S. Engle P.C.
26 Sussex Avenue
Toronto, ON M5S 1J7

PRIVILEGED AND CONFIDENTIAL – DRAFT

Dear Rafe:

Twitter Matter

Further to your email of January 4, 2018, we are writing to respond to the issues you raised concerning a complaint received by Ad Standards on December 28, 2017 with respect to a tweet from Premier Kathleen Wynne highlighting the government's policy decision to reduce electricity bills by 25%.

My client's position is that your email represents a significant departure from Ad Standards' previous statement regarding the 25% Reduction Claim. In any event, the Claim is regarding a provincial government policy and, therefore, excluded from the application of the Code. Further, the suggestion in your email that the Ministry breached its commitment to Ad Standards is very concerning to my client and it strongly opposes this view.

It is our view that the Premier's tweet is not reviewable under the Code. The tweet is a political message by the Premier about a government policy. Please see examples in Appendix "**A**" below of comparable messages from other political leaders concerning the same area of government policy.

Moreover, and as set out in our October 31, 2017 letter, the 25% Reduction Claim requires no additional explanation or clarification. The letter explained how the Ontario Energy Board, pursuant to Ontario Regulation 195/17, ensured that a typical consumer's electricity invoice was 25% lower than the invoice that consumer would have received absent the adjustment under the Fair Hydro Plan. The memo of November 13, 2017 acknowledged that Ad Standards had no further issues with this claim provided its understanding of how the program worked was correct. It was.

The Premier's tweet was not part of the advertising campaign in issue. The complainant acknowledges this. It remains the case that the Ministry has not revised the same advertising campaign.

We elaborate on these points in the remainder of this letter.

1. The Premier's Tweet is "Political Advertising"

Ad Standards has made it clear that "it is not intended that the Code govern or restrict the free expression of public opinion or ideas through 'political advertising' or 'election advertising', which are excluded from the application of this Code."[1] While the Code could have excluded political expression from the definition of "advertising", it instead adopted a very broad definition of advertising but carved out political expression/advertising as an express exclusion. Under the Code, "political advertising" is defined as "'advertising' appearing at any time regarding a political figure, a political party, a government or political policy or issue publicly recognized to exist in Canada or elsewhere, or an electoral candidate."[2] This is in contrast to advertising intended to promote a business interest, which is the main focus of the Code.[3]

The measures taken to reduce Ontarians' electricity bills by 25% on average under the Fair Hydro Plan is government policy. On March 2, 2017, the Office of the Premier released a news release indicating that the government would take measures to lower electricity bills by 25% on average for all residential customers.[4] On May 11, 2017, the Minister of Energy introduced the *Fair Hydro Act, 2017* to direct the Ontario Energy Board to implement the reduction (see Appendix "**B**").[5] On May 31, 2017, the Legislature passed the *Fair Hydro Act, 2017*.[6] On June 22, 2017, the Ontario Energy Board announced how bills would be reduced by an average of 25% as of July 1, 2017.[7] The Premier has reiterated in the

---

[1] See "Exclusions", online: http://www.adstandards.com/en/Standards/canCodeOfAdStandards.aspx#codeProvisions.

[2] Emphasis added.

[3] See *Competition Act*, R.S.C. 1985, c. C-34, s. 74.01(1).3

[4] See Ontario, Office of the Premier, "Ontario Cutting Electricity Bills by 25 Per Cent" (March 2, 2017), online: https://news.ontario.ca/opo/en/2017/03/ontario-cutting-electricity-bills-by-25-per-cent.html:

> Ontario is lowering electricity bills by 25 per cent on average for all residential customers as part of a significant system restructuring that will address long-standing policy challenges and ensure greater fairness.
>
> Starting this summer, Ontario's Fair Hydro Plan would provide households with this 25 per cent break.

[5] See Ontario, Ministry of Energy, "Ontario Cutting Electricity Bulls by 25 Per Cent" (May 11, 2017), online: https://news.ontario.ca/mei/en/2017/05/ontario-cutting-electricity-bills-by-25-per-cent.html.

[6] See Ontario, Ministry of Energy, "Ontario Passes Legislation to Lower Electricity Bills by 25 Per Cent" (May 31, 2017), online: https://news.ontario.ca/mei/en/2017/05/ontario-passes-legislation-to-lower-electricity-bills-by-25-per-cent.html: "Ontario passed legislation today that will lower electricity bills by 25 per cent on average for all residential customers to provide significant rate relief and ensure greater fairness."

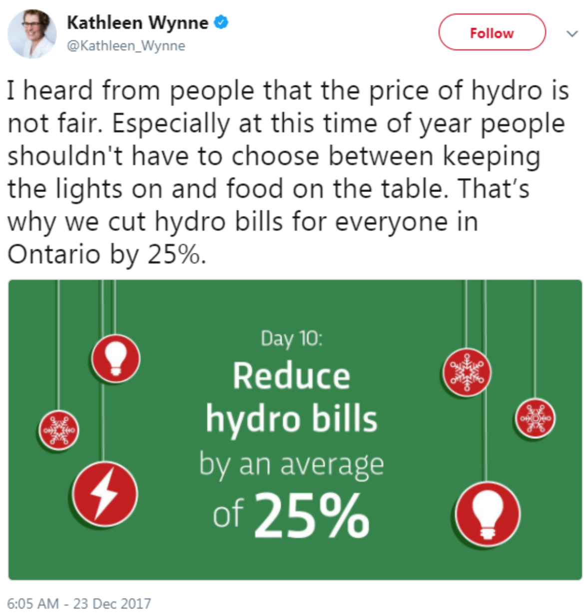
[7] See Ontario, Ontario Energy Board, "Electricity prices are dropping again on July 1" (June 22, 2017), online: https://www.oeb.ca/newsroom/2017/electricity-prices-are-dropping-again-july-1:

> For residential and small business customers that buy their electricity from their utility, the OEB has set new lower Regulated Price Plan (RPP) electricity prices that build on the reduction in RPP prices that came into effect on May 1. With the new RPP prices that will start to apply on

Legislature how the Fair Hydro Plan has resulted in an average 25% cut to residential ratepayers' invoices.[8]

The Premier's tweet, which is reproduced below, falls squarely within Ad Standards' definition of political advertising as it is clearly advertising regarding government policy.

Figure { SEQ Figure * ARABIC } – Tweet of Premier Kathleen Wynne (December 23, 2017, 6:05 am)



The policy being expressed in this communication is the reduction in electricity bills by 25%. This is a policy being promoted to the electorate by the Premier.

It would be inconsistent with the Code for Ad Standards or a Standards Council to treat communications from the Premier expressing a policy choice as reviewable. The Code includes an express exclusion for advertising regarding government policy. It is not intended for a Standards Council to review communications between elected representatives and their constituents on matters of public policy, as is plain in the text of the Code. Ad Standards' mandate is to protect consumers not voters. It is up to the voters of Ontario to assess the policy statements made by political leaders and candidates.

July 1, the total bill for the proxy customer described under the Fair Hydro Act, 2017 will be about $121. That is about $41 or 25% lower than it would have been without the following mitigation:

[8] Ontario, Legislative Assembly, Official Report of Debates (Hansard), 41st Parl, 2nd Sess, No 106 (18, October 2017) at 5709 (Hon. Kathleen O. Wynne).

2. The 25% Reduction Claim is Accurate

It is our view that the Code does not apply to this tweet. In any event, the claim in the tweet is accurate for the reasons set out in our October 31, 2017 letter. That letter described the 25% Reduction Claim as follows: "Household electricity bills will be an average of 25% less". There was no reference in that letter to qualifying language being part of this claim. We see no reason why this language should have to be included now.

The memo to me of November 13, 2017 acknowledged that Ad Standards had no further issues with the 25% Reduction Claim provided its understanding below was correct – which it is:

> Ad Standards does not, at this time, take issue with the "25% reduction" claim made in the advertising which, Ad Standards understands, is this: electricity bills to hydro's customers will be lowered, on average, by 25% effective now; and, for the next four years, any increases to these reduced rates will not exceed the annual rate of inflation. On that basis, Ad Standards would not ask Council to adjudicate on the merits of the complaints about "issue one".

The memorandum did not indicate that the claim was acceptable, *so long as* it included qualifying language.

While the government disagrees that any qualification or explanation is required when communicating the 25% Reduction Claim, consumers are routinely getting this information from their LDCs as required by regulation. Indeed, every residential electricity consumer in Ontario must receive a bill insert at least once a quarter that expressly states that a) "electricity bills will be lowered by 25 per cent on average for residential consumers", b) "rate increases will be held to inflation for four years", c) "the benefit will vary for individual consumers depending on electricity usage and service territory and these measures include the eight per cent rebate introduced in January 2017 and build on previous initiatives to deliver broad-based relief on all electricity bills", and d) "to find out more, visit ontario.ca/FairHydroPlan".

3. The Ministry did not breach its commitment to Ad Standards

The Ministry has not breached its commitment to Ad Standards. The advertising in question, namely the radio advertising referenced in the three complaints, was discontinued. The Premier's tweet was not part of the advertising campaign in issue and does not apply to the scope of the response by the Ministry. Further, the complainant acknowledges this in its Complaint. It remains the case that the Ministry has not revised the same advertising campaign.

* * * * *

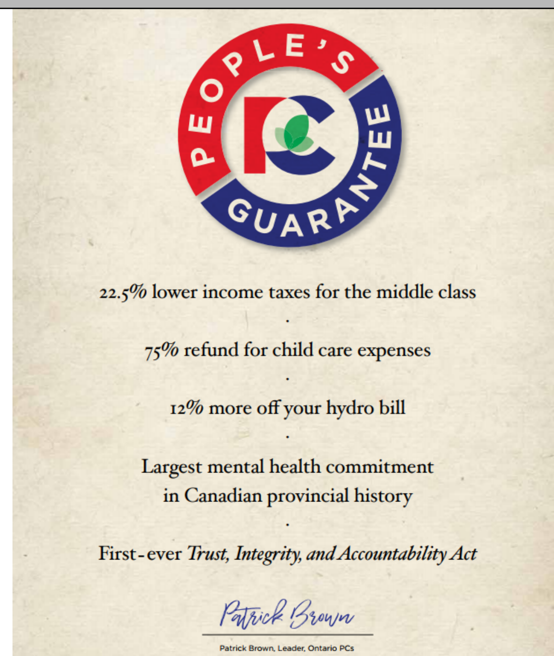
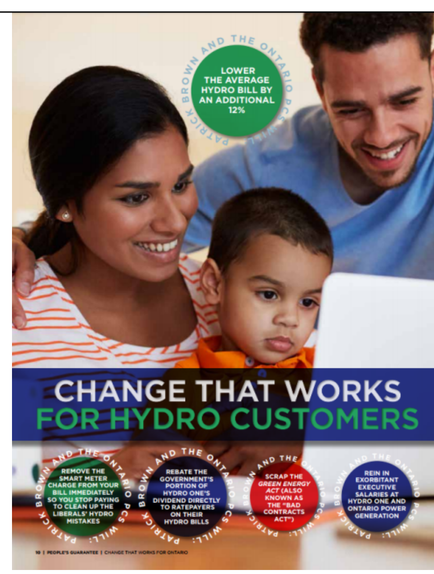
Yours very truly,

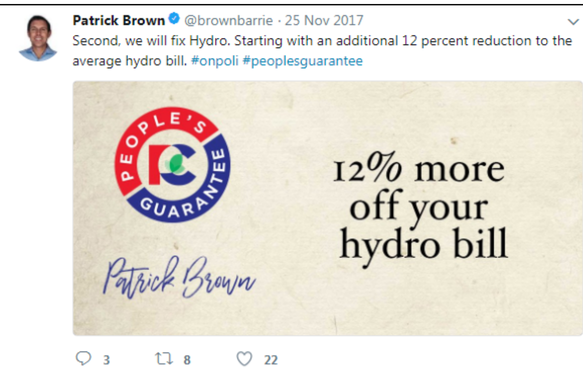
Joshua A. Krane

c. Maud Murray and Alena Thouin, *Legal Services Branch*

APPENDIX "A" – Other Political Commitments and Claims in Regards to Hydro Bill Savings

The Progressive Conservative Party's platform and campaign materials include claims that are similar to the 25% reduction claim (without qualification).

Claim	Representation
The Ontario PC platform for the 2018 election (People's Guarantee) includes specific commitments in relation to the costs of hydro paid by consumers, including committing to "12% more off your hydro bill". The only qualification re timing is that it will occur in the first mandate of a PC government. A long form description of the Ontario PC's various commitments related to hydro are set out at pp. 36-39 of the platform with a footnote explaining the 12% reduction: *30: Note that the rebate is approximately 11.7% and rounded to 12%. The total is also using the average monthly bill of $123 for 2018, which can be found in the 2017 long-term energy plan (page 28) – Government of Ontario, "Ontario's Long-Term Energy Plan 2017: Delivering Fairness and Choice"*	
The Ontario PC website includes the same content as pages 10-11 of the platform with no further detail or links to additional information.	

Claim	Representation
A November 25, 2017 tweet from Patrick Brown referenced the “12% more off” claim without qualification or any link to further detail.	
A November 25, 2017 tweet from Patrick Brown referencing the “12% more off” claim without qualification. A series of tweets was made on November 29, 2017 using the same message, including one that used the same image with the unqualified “12% more off” commitment.	
On November 29, 2017, Patrick Brown made additional statements on the hydro bill reduction commitment. This included a video posted on twitter which contains no qualifications with respect to the timeframe of the commitment. In the video, Brown states the platform commitment to “lower the average hydro bill by an additional 12% that means the average family will save $173 a year off their hydro bill”.	

The Ontario New Democratic Party has also made commitments in regards to savings on hydro bills. Below are excerpts of some of those communications that outline their plan which includes “up to 30% savings” on hydro.

Claim	Representation
The Ontario NDP released a policy plan on March 28, 2017 that included the claim of “up to 30% savings” on hydro. In the 14 page plan, there are a number of different references to savings including: “bring down hydro bills by 20 to 30 percent” “Reducing bills by as much as 30 percent is an ambitious but realistic goal” “These initial steps will create savings reaching as much as 17 per cent16 for residential customers. Rural customers could see savings reaching 32 per cent” More detail on this final point is provided in a footnote: *16 Minimum of a permanent 8% HST reduction, and potentially also including 5% federal HST reduction, a 3.2% reduction from Hydro One’s deferred asset tax benefit, and a conservative estimate of 0.8% savings through capping private profits, a more robust OEB and minimal TOU savings (17%). Customers paying rural delivery rates would see an additional 15% from lowered delivery rates.*	 
The Ontario NDP website on hydro claims the plan “will cut your bill by about 30%”. Video on this website includes claim by Andrea Horwath that, “My plan is ambitious and will drop hydro bills for all Ontarians, for some by as much as 30%.”	

Claim	Representation
A March 31, 2017 tweet by Andrea Horwath claims customers would “save up to 30%”	Andrea Horwath @AndreaHorwath · 31 Mar 2017 .@ssbbqhouse today w/ owner Terrilea in #HamOnt talking abt her soaring hydro costs and how the #ondp plan will help her save up to 30%  4 6 7
A May 9, 2017 tweet by Andrea Horwath claims her plan would “lower hydro bills by 30%”.	Andrea Horwath @AndreaHorwath · 9 May 2017 Electricity shouldn't be a luxury – that's why I have a plan to bring hydro back under public control & lower hydro bills by 30%. #onpoli
An October 19, 2017 tweet by the Ontario NDP claims the Ontario NDP’s plan will “cut bills 30%”.	Ontario NDP @OntarioNDP · 19 Oct 2017 Conservatives say they'll keep Wynne's bad hydro plan. Only the #ONDP have a plan to return hydro to the public & cut bills 30%. #onpoli  **Lib Tory same old privatization story** The Conservatives say they plan to keep Kathleen Wynne's disastrous hydro plan in place. Andrea Horwath and the Ontario NDP have a plan to return hydro to the public and reduce hydro bill by 30%. 10 55 48

Appendix "B" – How the Board Achieved a 25% Reduction

The Board implemented the following measures to reduce invoiced amounts to residential consumers by 25%:

- A portion of the fixed costs of running Ontario's power generation fleet and conservation programs were refinanced over a longer term. This accounted for a 15% reduction to the Electricity line on hydro bills. To achieve the reductions for consumers, the Board lowered the time-of-use prices per kilowatt hour (kWh) effective July 1, 2017.

- The Board shifted the costs associated with social support programs such as the Ontario Electricity Support Program and the Rural or Remote Protection Program from rate payers to the general revenue fund, resulting in a 2% reduction.

- The Government issued an 8% rebate for the provincial portion of the HST.

The Board determined that the rates effective July 1, 2017 under the Program resulted in a typical monthly bill of $121, which is 25% lower than the $162 bill the consumer would have received absent the Program.