RE: Advertising Standards Council Issue

From: "Bromm, William (CAB)" <"/o=govon/ou=ontario public sector - iserv ems/cn=recipients/cn=brommwi">
To: "McKenzie, Ashley (MAG)" <ashley.mckenzie2@ontario.ca>
Cc: "Shin, Linda (MAG)" <linda.shin@ontario.ca>
Date: Wed, 25 Oct 2017 10:40:18 -0400

Thank you

From: McKenzie, Ashley (MAG)
Sent: October 25, 2017 10:38 AM
To: Bromm, William (CAB)
Cc: Shin, Linda (MAG)
Subject: RE: Advertising Standards Council Issue

Hi William,

Attached is a BN from ENE legal on the Advertising Standards Council (ASC). This note sets out the ASC's process and the status of the current complaints. It also provides analysis on the SOC's question regarding a possible apprehension of bias and on possible litigation options.

The BN doesn't discuss the merits of the complaints. However, we understand that we will soon receive Blakes' draft submissions which will, of course, address the merits.

Please let us know if you have any questions.

Ashley McKenzie
Counsel to the Deputy Attorney General
Tel.: 416-326-2055

From: Shin, Linda (MAG)
Sent: October 17, 2017 5:59 PM
To: Bromm, William (CAB)
Cc: McKenzie, Ashley (MAG)
Subject: RE: Advertising Standards Council Issue

Hey William,

CVLD continues to work on developing a comprehensive briefing note on these issues (in particular on the advisability of removing the references to 25%) but I can provide you with some information on your questions:

Issue 1: potential apprehension of bias – Bottom line opinion, it would be difficult to establish a reasonable apprehension of bias. Here's some analysis:

- CLOC counsel considered whether the Council's initial view is potentially subject to challenge on the ground of bias. 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.

- CLOC's view 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 Supreme Court of Canada recently affirmed that, for the rule against bias, the relevant legal test is whether a "reasonable apprehension of bias" exists: "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 ASC 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 ASC Code's standards for accuracy and clarity (see ASC Code, s. 1).
- The ASC's procedures indicate that Mr. Engle, as the Chair of the Council, has no vote in Council decision. 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.

Issues 2 and 3: removal of reference to the 25% - We understand the ASC has not instructed the Province to remove reference to the 25%. During the call of October 3, 2017 between staff from CAB/ENE/ARB it was suggested by ASC that as part of a potential solution the Province may consider removing the references to 25% reduction as it relates to the OFHP from Ontario.ca websites. The ASC has not actually instructed the Province to proceed in any one way, but merely proposed it as an option to facilitate resolution at this early stage. CLOC is considering the issue further and we hope to get more advice to you soon.

Issue 4: Outcome of the complaint – I understand there has been no outcome yet. We will get you further information on what a finding of contravention would mean and what the review mechanism would be.

Hoping to have that comprehensive BN by end of week.

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From: Bromm, William (CAB)
Sent: October-10-17 12:58 PM
To: Shin, Linda (MAG)
Subject: Advertising Standards Council Issue

Hi Linda, this issue would not be on your radar screen at all, but the SOC would like the Deputy to review the situation and provide some advice to our office.

As you know, there is a federal Advertising Standards Council that can review complaints about government advertising. The council is in receipt of a complaint regarding the government's fair hydro plan ads, specifically the reference to rate payers receiving 25% off their hydro bills.

Originally this was being managed through the Ministry of Energy and they were working with external counsel, Blakes, on the province's defence to the complaint. At one point it looked as though the matter had been resolved, but the council has recently revived the complaint (which I understand is quite unusual).

A couple of issues have recently come up that move it from a standard issue, and this is where the SOC would like the Deputy's advice.

The first issue relates to a potential apprehension of bias on the part of the adjudicator. Mr. Rafe Engle is the adjudicator for the council. Although we understand he is very respected in the advertising legal world, he has been in the past and may still be an advisor to Ontario's Auditor General on the application of the Government Advertising Act standards. This raises the question of at least some apprehension of bias on the part of Me. Engle to adjudicate this particular matter, particularly given the Auditor General's issues with government advertising in recent years. This was discussion with Blake's counsel, who felt this was not the appropriate time to raise this issue. I am not fully aware of their reasons for this position – it may be that they have taken this view simply because this is in very early stages. The Secretary would like to ensure this issue is properly explored.

The second issue relates to recent instruction from the Council. Apparently in a call last week, they indicated that the government must remove all reference to the 25% issue from all government websites. We are not aware of how extensively the figure is raised on Ontario.ca, but the SOC would like to understand 1) the authority of the council to give that instruction and 2) the implications for either agreeing or not agreeing to remove those references (the formal ads themselves were pulled following the complaints, so this is primarily about Ontario.ca).

A third and related issue relates to the implications should the government agree to remove the references. For example, one of the reasons counsel might say we should agree is because it could render the complaint moot, meaning the Council will not continue with the complaint. However, should that occur, we would need to know whether this would mean the government is essentially precluded from raising the 25% figure in the future because of the risk that the Council will once again revive the complaint.

Finally, the Secretary would like to have a good understanding of the outcome of the complaint, particularly the implications for a finding that the standards have been contravened. As I understand it, there may be no formal enforcement mechanism other than reference in an annual report of the council, but we would like confirmation of this. We would also like confirmation of any appeal/JR mechanism should the complaint proceed and the council make an adverse finding.

Maud Murray in Energy Legal is familiar with these issues. Maude and I spoke earlier today so she is aware that I will be reaching out to you for some assistance.

Give me a call when you have a chance and we can discuss next steps, etc.

Thanks

William