

ONTARIO
SUPERIOR COURT OF JUSTICE
(Toronto Divisional Court)

IN THE MATTER of an application for Judicial Review under the *Judicial Review Procedure Act*, R.S.O. 1990, c. J. 1, as amended

AND IN THE MATTER of the decision of the Ontario Integrity Commissioner, dated June 23, 2021.

B E T W E E N :



DEMOCRACY WATCH

Applicant

- and -

ONTARIO INTEGRITY COMMISSIONER

Respondent

NOTICE OF APPLICATION TO DIVISIONAL COURT FOR JUDICIAL REVIEW

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicant. The claim made by the applicant appears on the following page.

THIS APPLICATION for judicial review will come on for a hearing before the Divisional Court on a date to be fixed by the registrar at the place of hearing requested by the applicant. The applicant requests that this application be heard at Hamilton.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the office of the Divisional Court, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the office of the Divisional Court within thirty days after service on you of the applicant's application record, or at least four days before the hearing, whichever is earlier.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN TO IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

TAKE NOTICE: THIS APPLICATION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for hearing or terminated by any means within five years after the notice of application was filed with the court, unless otherwise ordered by the court.

Date: July 22, 2021

Issued by Nizhane Para
Registrar

Address of
court office: Divisional Court
Superior Court of Justice
Osgoode Hall
130 Queen Street West
Toronto, ON
M5H 3K6

TO: **J. DAVID WAKE**
Office of the Integrity Commissioner
2 Bloor Street West
Suite 2100
Toronto ON
M4W 3E2

AND TO: **ATTORNEY GENERAL OF ONTARIO** (as required by subsection 9(4) of the *Judicial Review Procedure Act*)
Crown Law Office – Civil
720 Bay Street
8th Floor
Toronto, Ontario
M7A 2S9

APPLICATION

1. The Applicant makes application for:

- a. An Order in the nature of *certiorari*, quashing the “Issue: Placing public office holders in a conflict of interest” decision (the “Decision”) of the Ontario Integrity Commissioner (the “Commissioner”) on pages 53-54 of the Commissioner’s 2020–2021 Annual Report;
- b. In the alternative to (a), an Order in the nature of *certiorari*, quashing the Commissioner’s Decision and remitting the matter back to the Commissioner in accordance with the Directions of this Court;
- c. An Order granting public interest standing to the Applicant, if required;
- d. An Order consolidating this Application with the other four Applications challenging decisions of the Commissioner that have been filed concurrently with this Application; and
- e. Such further and other relief as this Honourable Court may deem just.

2. The grounds for the application are:

A. Legislative Context

- a. Section 23 of the *Members Integrity Act*, S.O. 1994, c. 38 (the “MIA”), provides for the appointment of an Integrity Commissioner. Ontario’s Office of the Integrity Commissioner is independent of government, and was established to maintain high standards of ethical conduct in the Ontario Public Service.
- b. Under subsection 1(1) and section 10 of the *Lobbyists Registration Act, 1998*, S.O. 1998, c. 27, Sched. (the “LRA”), the Integrity Commissioner is designated as the Registrar for lobbyists who lobby provincial public office holders. “Public officer holder” is defined in subsection 1(1) of the *LRA* as a minister, officer or employee of the Crown; a member of the Legislative Assembly (“MPPs”) and their staff; an

appointee of the Crown other than judges and justices of the peace; an officer, director or employee of any agency, board or commission of the Crown, and; members of the Ontario Provincial Police (“OPP”).

- c. If they meet the conditions specified in the *LRA* and its regulations, individuals, partnerships and organizations are required to register and disclose their lobbying accurately in the Registry maintained by the Registrar under section 11 of the *LRA*. The requirements for individuals to register as a “consultant lobbyist” and disclose their lobbying activities are set out in section 4 of the *LRA*, with reference to the definitions of “client” and “consultant lobbyist” and “lobby” and “payment” in subsection 1(1) of the *LRA*. The requirements essentially cover people who are paid by clients to communicate “in an attempt to influence” with a public office holder or to arrange a meeting with a public office holder. A consultant lobbyist must register within 10 days after “commencing a performance of an undertaking” to lobby.
- d. The requirements for a person (including a corporation) or a partnership to register its lobbying activities are set out in section 5 of the *LRA*, with reference to the definitions of “lobby” and in subsection 1(1) of the *LRA*. Essentially, the senior officer is required to register the corporation or partnership if its directors, employees, and compensated board officers (“in-house lobbyists) communicate “in an attempt to influence” a public office holder individually or collectively for more than 50 hours in a year. The senior officer is required to register within two months after the 50-hour threshold has been reached, and to list all in-house lobbyists in the registration and their current and prospective lobbying activities, and to update the registration within 30 days if any changes in lobbying activities occur, and to update the registration every six months after the first registration within 30 days after the six-month period has commenced.
- e. The requirements for an organization to register its lobbying activities are set out in section 6 of the *LRA*, with reference to the definitions of “lobby” and “organization” in subsection 1(1) of the *LRA*. The requirements are essentially the

same as those summarized above for corporations and partnerships under section 5 of the *LRA*.

- f. Subsections 3.4(1) and (2) of the *LRA* prohibit a registered lobbyist, whether consultant or in-house, from lobbying a public office holder if the lobbyist's lobbying would "knowingly place the public office holder in a position of real or potential conflict of interest..." The office holder's position of "conflict of interest" is defined in subsections 3.4(3) and (4) of the *LRA* as when the office holder "engages in an activity that is prohibited by section 2, 3 or 4 or subsection 6(1)" of the *MIA*.
- g. The activities that office holders are prohibited from engaging in by those provisions in the *MIA* are making or participating in (section 2) or attempting to influence (section 4) a decision, or using or communicating insider information (section 3), when the office holder "knows or should reasonably know" doing these things is an opportunity "to further the member's private interest or improperly to further another person's private interest" (all three sections). Subsection 6(1) of the *MIA* further states that a public office holder "shall not accept a fee, gift or personal benefit that is connected directly or indirectly with the performance of his or her duties of office."
- h. The Commissioner's enforcement regime in his role as Registrar for provincial lobbyists is set out in sections 17.1–17.12 of the *LRA*. The Commissioner may investigate within two years of becoming aware of a violation and can stop an investigation for various reasons (section 17.1) and the *Statutory Powers and Procedures Act*, R.S.O. 1990, c. S.22 does not apply to investigations (section 17.11). The Commissioner can refer a matter to be investigated to the OPP (section 17.2), and may suspend an investigation if criminal charges have been laid, and then re-commence the investigation after the criminal trial (section 17.3).
- i. The Commissioner has powers to require disclosure of evidence during an investigation (section 17.4), and must give written notice to anyone the Commissioner concludes has violated the law as well as an opportunity to be heard

(section 17.5) and an opportunity to appeal for re-consideration and/or to apply to court for judicial review (sections 17.6–17.8).

- j. The Commissioner may penalize a lobbyist for a violation, taking into account all of the circumstances and the public interest, but may not disclose the investigation, ruling or penalty publicly until the time for applying for judicial review of the ruling has passed (sections 17.9 and 17.10). The Commissioner’s rulings on “each investigation concluded...” are required to be disclosed in the Commissioner’s Annual Report (section 17.12).

B. The Integrity Commissioner’s Decision

- a. On June 23, 2021, the Integrity Commissioner issued the Commissioner’s Annual Report for fiscal year 2020–2021. The one-paragraph Decision at issue in this proceeding is the first part of the two “Issue: Placing public office holders in a conflict of interest” decisions on page 53-54 of the Annual Report.
- b. The situation the Decision addresses is the first of two situations the Commissioner investigated involving the lobbyist. In this first situation, the lobbyist “held a senior role within a political party and registered to lobby a public office holder who was the leader of the same political party.” The Commissioner found that the lobbyist’s actions had not violated the *LRA* because:
 - “the lobbyist’s role within the party had not granted him direct or increased interactions with the public office holder. In addition, the lobbyist and the public office holder had no meaningful personal or professional relationship, which would have significantly increased the risk of a conflict.”
- c. Although the Decision does not mention it, presumably the Commissioner investigated the lobbyist with regard to section 3.4 of the *LRA*, as the Decision states that the lobbyist was investigated for failing to comply with the *LRA* by knowingly placing public office holders in a real or potential conflict of interest.
- d. Although the Commissioner’s Decision also does not mention either document, the Decision must have been based at least in part on the *Guidance for Lobbyists on*

Political Activity document (the “*Guidance*”) concerning section 3.4 of the *LRA*, which was issued by the Commissioner in 2018, and/or *Interpretation Bulletin #11: What is a conflict of interest and how does it affect my lobbying* document (the “*Bulletin*”) issued by the Commissioner in June 2020. While the *Bulletin* does not mention section 3.4 of the *LRA* or the *Guidance*, it addresses conflicts of interest as defined by section 3.4, including conflicts caused by political activity.

C. Applicant’s Legal Position

- a. The *Guidance* summarizes section 3.4 of the *LRA*, and then states that “depending on your interaction with a candidate, your ability to lobby may be restricted ... after the election if the candidate remains or becomes a public office holder.” The *Bulletin* states that certain activities by lobbyists “might” or “may” create a conflict of interest for a public office holder. The *Bulletin* lists political activities that create a “higher risk” and a “lower risk” for a conflict of interest in lobbying, and states that “significant interaction with the public office holder” more likely creates a conflict.
- b. Higher-risk activities listed in the *Bulletin* are serving in a senior position in a campaign, being on the board of an MPP’s constituency association, or organizing a fundraising event for an MPP or their constituency association. Listed lower-risk activities are volunteering, canvassing or scrutineering for a political party or constituency association, attending fundraising events, making a donation to a political party, or expressing political views.
- c. The *Bulletin* also states that the Commissioner “may sometimes advise” that a lobbyist can lobby the office holder after a “cooling-off period that is often one-year after the end of the political activity, but it can be longer if you have an ongoing relationship with the public officer holder or do ongoing political activity.”
- d. The *Guidance* and *Bulletin* state that lobbyists should always contact the Commissioner’s office to obtain an Advisory Opinion concerning whether their activities may have caused a conflict of interest for a public office holder that would

mean they would be in violation of section 3.4 of the *LRA* if they lobbied the office holder.

- e. The Commissioner's Decision, *Guidance* and *Bulletin* describe public office holder's conflicts of interest generally but do not mention, or address, the provisions of the *MIA* that section 3.4 of the *LRA* refers to directly. Specifically, the Decision and *Bulletin* do not address the fact that section 3.4 prohibits putting a public office holder even in a "potential" conflict of interest. As well, the Decision and *Bulletin* do not address the legal implications for lobbyists of the part of sections 2, 3 and 4 of the *MIA* that prohibit an office holder from participating in a decision, influencing a decision or using or sharing inside information "improperly to further another person's private interests" which are part of the definition of the prohibition in section 3.4 of the *LRA* on a lobbyist putting an office holder in a "real or potential conflict of interest."
- f. Although the Decision is very brief and vague, it seems the Commissioner decided that the lobbyist did not have enough access or a close enough relationship with the public office holder he was lobbying to create even a potential conflict of interest (which would violate section 3.4 of the *LRA*), even though the lobbyist was in a senior position of the political party and the office holder was the leader of the party.
- g. The Commissioner's Decision was an incorrect and unreasonable interpretation and application of section 3.4 of the *LRA* to the lobbyist's actions. When a lobbyist is in a senior position in a political party, the lobbyist creates a sense of obligation and a conflict of interest on the part of every MPP of that party (especially the party leader) at the time the lobbyist holds the position, and arguably for years after the lobbyist ceases to hold that position in the party. As a result, when the lobbyist lobbies the party leader while holding that senior position in the leader's party, the lobbyist knowingly clearly places the office holder in a real or at least a potential conflict of interest and, therefore, violates section 3.4.

- h. According to statistics on pages 50–51 of the Commissioner’s Annual Report, the Commissioner undertook 210 Compliance Reviews in 2020–2021, closing 62 of those reviews at the initial stage and resolving 129 reviews through an informal process, presumably based on the Commissioner’s interpretations of various provisions of the *LRA* and its regulations, including the information in the Commissioner’s statements in the *Guidance* and *Bulletin*.
- i. No other information is provided in the Annual Report about the Commissioner’s decisions to close 62 reviews at the initial stage or resolve 129 reviews through informal processes. The Commissioner only concluded his investigation and issued a public decision on 18 of the 251 situations that were reviewed, resulting in the 11 decisions published in the Annual Report (some of the decisions covered the activities of more than one lobbyist involved in more than one situation).
- j. In addition, according to information on page 50 of the Commissioner’s Annual Report, the Commissioner issued 89 Advisory Opinions during the 2020–2021 fiscal year, also presumably based on the Commissioner’s interpretations of the *LRA* and its regulations, including the Commissioner’s statements in the *Guidance* and *Bulletin*.
- k. As a result, the public has no information concerning how and why the Commissioner made 322 of his 340 *LRA* enforcement decisions during the 2020–2021 fiscal year, including whether the Commissioner decided in any of those 322 situations that the Commissioner reviewed to conclude that the lobbyist had not violated section 3.4 of the *LRA*.
- l. The Integrity Commissioner exercises quasi-judicial functions, including conducting investigations, ascertaining the existence of facts, and drawing legal conclusions with respect to compliance with the *LRA* and the *MIA*.
- m. Although the Decision is undated, it was rendered sometime between April 1, 2020 and March 31, 2021 (the 2020–2021 fiscal year). As a result, when the Commissioner rendered the Decision, the Commissioner was likely in the final

months of his first five-year term (which ended January 31, 2021), and knew that he could be approved for a second five-year term appointment under sections 23 and 23.1 of the *MIA* only if MPPs in the Legislative Assembly agreed unanimously to re-appoint him (which they did, although in a vote on a motion introduced without notice on November 30, 2020).

- n. Therefore, before November 30, 2020, the Commissioner had an incentive to decide to find all lobbyists innocent who were alleged to have violated the *LRA*, and an incentive not to penalize them by naming them publicly, if they were affiliated in any way with ministers, party leaders or MPPs from any party, including being a supporter of any elected official. If the Commissioner ruled that the lobbyists violated the *LRA*, or penalized them by naming them publicly, ministers, party leaders and MPPs may not agree to his re-appointment.
- o. As a result of this structural aspect of the Commissioner's position, offering to the Commissioner the possibility of re-appointment, with the offer conditional on the unanimous approval of the office holders whose decisions and actions the Commissioner oversees, there was a reasonable apprehension of bias on the part of the Commissioner when he rendered the Decision.
- p. Transparency of quasi-judicial processes is a quasi-constitutional principle.
- q. A core tenet of democracy is that public officials must be held accountable to the public for their conduct in the course of exercising their duties.
- r. Discretion conferred by statute must be exercised in a manner that is within a reasonable interpretation of the legislature's intent, in accordance with the principles of the rule of law, and in compliance with the *Canadian Charter of Rights and Freedoms*.

D. Public Interest Standing

- a. The Applicant is a national non-profit, non-partisan organization, which advocates for democratic reform, government accountability, and corporate responsibility.

- b. The Applicant should be granted public interest standing, if necessary, because:
 - i. Ensuring the transparency and accountability of quasi-judicial tribunals that enforce laws that uphold the constitutional principles of democracy and the rule of law, and ensuring that lobbyists are transparent and ethical in their relationships with public officials, are serious issues that are fundamental to government integrity;
 - ii. The Commissioner's final decision in this matter is justiciable, and reviewable by the courts;
 - iii. The Applicant has a genuine interest and real stake in this issue; and
 - iv. In all the circumstances, this application is a reasonable and effective means to bring the issue before the courts.
- c. The Applicant does not seek costs of this application, and requests that costs not be awarded against it.

E. Statutory and Other Reliance

- a. Sections 2, 5, 6(1) and 9(2) of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1.
 - b. Rules 1.04, 2.03, 3.02, 6, 14.05, 38, and 68 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.
 - c. Sections 1, 3, 3.4, 4–6, and 17.1–17.12 of the *Lobbyists Registration Act, 1998*, S.O. 1998, c. 27, Sched.;
 - d. Such further and other grounds as counsel may advise and this Honourable Court may permit.
3. The following documentary evidence will be used at the hearing of the application:
- a. The Affidavit of Duff Conacher, to be sworn, and the exhibits thereto; and
 - b. Such further and other evidence as counsel may advise and this Honourable Court may permit.

Date: July 23, 2021

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For the Applicant Democracy Watch