Court File Nos. 632/20 646/20
633/20 647/20
634/20 648/20
644/20 660/20
645/20

ONTARIO

SUPERIOR COURT OF JUSTICE

(Toronto Divisional Court)

BETWEEN:

DEMOCRACY WATCH

Applicant
(Responding Party
on Motion to Quash)

- and -

ONTARIO INTEGRITY COMMISSIONER

Respondent
(Moving Party
on Motion to Quash

FACTUM OF THE APPLICANT
(RESPONDING PARTY ON MOTION TO QUASH)

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PART I: OVERVIEW

1. The Respondent Ontario Integrity Commissioner (the "OIC") moves to quash the nine Applications for judicial review filed by the Applicant Democracy Watch regarding decisions published in the OIC's Annual Report for 2019–20 (the "Annual Report").

2. These Applications concern nine final decisions made by the OIC, who, in his capacity as Registrar under the *Lobbyists Registration Act*, 1998, S.O. 1998, c. 27, Sched. (the "*LRA*"), initiated investigations of various lobbyists under the *LRA*.

3. The OIC asks that the Applications be quashed because he contends, *inter alia*, the nine decisions are not reviewable.[1] The OIC places significant emphasis on justiciability and likens the decisions under review to instances where an administrative decision-maker has chosen not to exercise their investigatory powers.

4. With respect, this analogy is inaccurate. The Applicant respectfully urges this Honourable Court to recognize the fact that, in each decision, the OIC *initiated and concluded an investigation* pursuant to the powers the *LRA* confers upon him. In so doing, the OIC exercised statutory powers that decided or prescribed the legal rights, duties, and/or privileges of the lobbyists, including whether they were permitted to continue their lobbying activities.

5. These Applications also raise the issue of bias. The OIC made the impugned decisions during the final year of his term of appointment, which could be renewed only with the approval of all members of the Ontario legislature—some of whom had close

[1] Notice of Motion, Motion Record of the Respondent / Moving Party (hereinafter "RMR"), Tab 1. The OIC also raises arguments about public interest standing and timeliness.

relationships with the lobbyists being investigated by the OIC. A reasonable, informed person would conclude that this caused an appearance of bias on the part of the OIC.

6. This Honourable Court must ultimately decide whether it is in the interests of justice to allow the OIC to be shielded from judicial scrutiny and to place questions of whether the *LRA* has been properly enforced beyond this Court's reach. The answer is clearly no.

7. If these Applications are quashed without a hearing on the merits, the nine impugned OIC decisions will be left as precedents that all other lobbyists can rely on to have secret communications and unethical relationships with public office holders; this will undermine the transparency and integrity of the Ontario government's decision-making.

8. The Applicant respectfully requests that the OIC's motion to quash be denied.

PART II: THE FACTS

A. The Legislative Framework

9. The OIC is appointed by the Legislative Assembly of Ontario under s. 23 of the *Members' Integrity Act*, 1994, S.O. 1994, c. 38 (the "*MIA*").[2] Under s. 10 of the *LRA*, the OIC is appointed as Registrar of lobbyists, which is tasked with maintaining a public registry of lobbying activities by lobbyists, conducting investigations into allegations of violations of the *LRA*, and penalizing lobbyists who violate the *LRA*.[3]

[2] *Members' Integrity Act, 1994*, S.O. 1994, c. 38, s. 23.
[3] *Lobbyists Registration Act, 1998*, S.O. 1998, c. 27, Sched., s. 10.

10. During or instead of an investigation, the OIC may refer the matter to another person or body to be investigated as an offence under s. 18 of the *LRA* or as a violation of another Act. Otherwise, the OIC is the sole investigator and decision-maker under the *LRA*.

11. If, after investigating, the OIC believes that a lobbyist has violated the *LRA*, s. 17.5 states that the OIC "shall" give the lobbyist notice of the alleged violation and reasons, and shall give the lobbyist an opportunity to respond. If the OIC then "finds" the lobbyist violated the *LRA*, s. 17.6 states that the OIC "shall" give the lobbyist notice of that finding.

12. The s. 17.6 notice requires the OIC to give notice of any penalty imposed under the OIC's statutory power in s. 17.9 along with the reasons for the finding and any penalty.

13. When the OIC makes a finding of non-compliance under section 17.6, the OIC "may" impose a penalty under s. 17.9. The OIC has the power to do either or both of the following: (i) prohibit the person from lobbying for a period of not more than two years or (ii) publish the person's name along with a description of the noncompliance.

14. Under ss. 17.12(b), the OIC is required to produce an Annual Report that "shall include … (b) a description in summary form of **each investigation concluded** or resumed, and of each matter referred, during the year". [Emphasis added]

B. The OIC Secret, and Published Final, Enforcement Decisions

15. The OIC made enforcement decisions under the *LRA* in 335 situations during fiscal year 2019–20. However, the OIC concluded investigations and issued a public decision in only 29 of the 335 situations (8.6%), resulting in the 24 final decisions published in the

Annual Report (some of the decisions covered the activities of more than one lobbyist). No other information is provided in the Annual Report about 306 (91.4%) of the OIC's enforcement decisions.[4] The Applicant is challenging nine of the 24 reported decisions.

16. In making five of these nine decisions, the OIC interpreted and applied s. 3.4 of the *LRA* publicly for the first time, thereby setting precedents that the OIC very likely also applied to at least some of the other 306 secret *LRA* enforcement decisions, and will apply to all future OIC enforcement decisions.

17. As a result, these nine Applications raise serious issues of public importance concerning the proper enforcement of the *LRA* in hundreds of situations annually—all of which concern the integrity, transparency, and public accountability of government decision-making processes.

18. The OIC attempts to devalue the importance of the impugned decisions by likening them to private regulatory decisions. That characterization is not accurate. The fact is that all nine impugned decisions are justiciable because the OIC exercised his statutory powers to conduct an investigation (per s. 17.1) in each of the nine situations.

19. After concluding these investigation, the OIC explicitly exercised a statutory power by making a final decision (under s. 17.5, s. 17.6 and/or s. 17.9) concerning the legal rights and duties of the lobbyists involved. As required under ss. 17.12(b), the OIC then published the nine final decisions on concluded investigations in his Annual Report.

[4] Affidavit of Duff Conacher, Applicant's Motion Record for Production of the Respondent's Record of Proceedings (hereinafter "AMR"), Tab 3, para. 4, Exhibit A, p. 45 and 49.

C. The OIC's Final Decisions at Issue in the Present Nine Applications

20. For ease of reference, the Applicant has created a document numbering the decisions in the Annual Report.[5] The numbers and corresponding Court file numbers are as follows:

Court File Number	Decision # and page # in document created from section of the Annual Report
632/20	6 (p. 52)
633/20	7 (p. 52)
634/20	10 (p. 53)
644/20	5 (p. 51)
645/20	14 (p. 54)
646/20	17 (p. 55)
647/20	23 (p. 56)
648/20	13 (pp. 53-54)
660/20	20 (p. 55)

21. Decisions 6, 7 and 10 are decisions by the OIC that each found a lobbyist or lobbyists did not violate s. 3.4 of the *LRA*, which prohibits a lobbyist from knowingly placing a public office holder in a real or potential conflict of interest as defined in the *MIA*.

22. Decisions 5, 13, 14, 17, 20 and 23 are decisions by the OIC that each found a lobbyist in violation of the *LRA*. Despite conducting these investigations and finding the aforesaid violations of the *LRA*, the OIC decided not to penalize any of the lobbyists.

[5] Affidavit of Duff Conacher, AMR, Tab 2, para. 6, Exhibit B.

23. Decisions 5 and 14 contain the words "the investigation was ceased" and Decision 20 contains the words "The Commissioner ceased the investigation". However, the OIC's Annual Report states that he ***found*** a violation of the *LRA* in all three of these decisions.

24. Significantly, all nine of the impugned decisions use the language of finality: they state that "The Commissioner investigated" and "The Commissioner found". Decisions 6 and 10 also say "The Commissioner determined".

PART III: ISSUES AND THE LAW

25. The issues before the Court are as follows:

    A. Are the issues raised in the nine Applications justiciable and reviewable? Yes

    B. Does the Democracy Watch have public interest standing? Yes

    C. Are the nine Applications timely? Yes

A. The issues raised in the nine applications are justiciable

i. Applicable legal principles

26. Whether these Applications are justiciable depends on whether the OIC was exercising a statutory power of decision, which the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1 ("*JRPA*") defines as, *inter alia*, "a power or right conferred by or under a statute to

make a decision deciding or prescribing, (a) the legal rights, powers, privileges, immunities, duties or liabilities of any person or party".[6]

27. The specific powers conferred by the *LRA* have not yet been judicially considered, but there is instructive jurisprudence from provincial and federal courts.

28. In *Essensa*, this Court scrutinized the powers of the Chief Electoral Officer to conduct investigations of political parties' compliance with the *Elections Act* and drew a distinction between the exercise of powers that did or *could have had bearing* on the applicant's legal rights and privileges with those that could not.[7] The Court ruled that it was concerned with the latter, and this was upheld by the Court of Appeal, which likened the exercise of discretion to a Crown Attorney declining to pursue a prosecution.[8]

29. The OIC has gone to great lengths in its factum to equate the powers exercised in the nine impugned decisions with the exercise of prosecutorial discretion not to proceed with a matter, relying heavily upon *Essensa* and the *Essensa Appeal* as well as *Democracy Watch v. Ontario Integrity Commissioner*.[9] However, the factual circumstances in these decisions are readily distinguishable from the present nine Applications.

30. In *DW v. OIC*, the applicant sought review of the OIC's decision (in his capacity under the *Public Service of Ontario Act, 2006*) not to make various determinations. The Court found the applicant, as a third party, could not request an inquiry under the legislation and so could not seek judicial review of the OIC's decision not to conduct an inquiry.

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[6] *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, s. 1.
[7] *PC Ontario Fund v. Essensa*, 2011 ONSC 2641, at para. 25. ["*Essensa*"]
[8] *PC Ontario Fund v. Essensa*, 2012 ONCA 453, at para. 12. ["*Essensa Appeal*"]
[9] *Democracy Watch v. Ontario Integrity Commissioner*, 2020 ONSC 6081. ["*DW v. OIC*"]

31. The Court also noted that the OIC's powers were being exercised in an employment (rather than public law) context, and that the OIC could not impose any penalties but could only make recommendations to the inquiry subject's supervisor—meaning there was no exercise of a statutory power as defined in the *JRPA*.

32. Similarly, in *Essensa*, the applicant sought review of the Chief Electoral Officer's decision not to refer a matter to the Attorney General. The Chief Electoral Officer's powers did not include any power to impose a penalty after an investigation, but were limited to reporting contraventions found in an investigation to the Attorney General.

33. In direct contrast, in these Applications, the OIC was the sole investigator and decision-maker—including on matters of penalty that directly affect or could affect the lobbyists' legal rights, duties, and/or privileges. The Applicant does not bring the instant Applications to challenge any of the OIC's 306 decisions from 2019–20 *not to investigate* various instances of potential noncompliance with the *LRA*.

34. The OIC's lengthy argument concerning exercises of discretion to not investigate, not complete an investigation, and/or refer or not refer a matter to another enforcement body are not relevant because they address entirely different situations than these Applications.

ii. The OIC has exercised his statutory powers

35. In each of the nine impugned decisions, the OIC exercised his statutory power under s. 17.1 of the *LRA* to investigate various lobbyists; the OIC carried out and concluded each of these investigations, made findings regarding whether the lobbyists had complied with the *LRA*, and made decisions under the powers granted by the *LRA* (including whether to issue a notice of violation and to impose a penalty). The OIC then published each of the

nine decisions in his Annual Report, in compliance with ss. 17.12(b)—which requires that a summary of "each investigated concluded" during the fiscal year be reported.

36. If an investigation has been initiated, concluded, and reported upon pursuant to statutory powers, then that investigation is reviewable. That is so even if the investigator finds and reports that there was no wrongdoing.

37. This point was made succinctly by the Federal Court (the "FC") in *Democracy Watch v. Canada (Attorney General)*, 2021 FC 63. In that case, the federal Lobbying Commissioner investigated the activities of two lobbyists, concluded they had not violated the *Lobbyists' Code of Conduct*, and tabled two reports before Parliament.

38. The FC was dubious of the Attorney General's argument (premised in part on caselaw finding a decision not to investigate is not justiciable) that this matter was unreviewable. The FC stated that, in this case, "not only were investigations undertaken, but two Reports were prepared and tabled with Parliament." [10]

39. The FC continued to make the point—pertinently for these Applications—that "just because a decision not to investigate a complaint is not reviewable, does not mean investigative decisions themselves are not reviewable." [11]

40. Similarly, in *Harrison*, this Court reviewed an investigation completed by the Complaints Committee of the Association of Professional Engineers of Ontario that had found "no evidence of professional misconduct of a significant nature".[12]

[10] *Democracy Watch v. Canada (Attorney General)*, 2021 FC 613, at paras. 30–32. ["*DW v. AGC, 2021*"]
[11] Ibid, at para. 37.
[12] *Harrison v. Association of Professional Engineers of Ontario*, 2017 ONSC 2569, at para 1. ["*Harrison*"]

41. The investigator in *Harrison* had a statutory obligation to investigate complaints and render written decisions. Once the OIC exercises his power to initiate an investigation, he is in no different a position than an investigator who has a statutory obligation to investigate—the investigation will conclude in some manner, and s. 17.12 of the *LRA* requires the OIC to report concluded investigations.

42. The OIC claims that he "ceased" the investigations that led to final decisions 5, 14 and 20, and "discontinued" the investigations that led to final decisions 6, 7 and 10; the OIC argues that these investigations were, therefore, not concluded.[13] But the OIC does not have the statutory power under the *LRA* to "discontinue" an investigation, except to refer the matter to another person or entity for enforcement (s. 17.2) or to "suspend" an investigation if another law enforcement process has begun against the lobbyist (s. 17.3).

43. There is no reason to continue an investigation after the potential violation being investigated has either been substantiated or not. This does not mean that the investigation was "ceased" or "discontinued"—it means it was concluded and a final decision was made about whether a violation occurred. This is reflected in the language of the Annual Report, which states that the OIC "found" in these six investigations that the relevant lobbyists either had or had not violated the *LRA*.

44. All six investigations were clearly concluded because s. 17.12 requires "each investigation **concluded** or resumed, and of each matter referred" to be reported in the Annual Report and all six of these investigations were so reported. [Emphasis added]

[13] Affidavit of Ephry Mudryk, RMR, Tab 2, para. 2, Exhibit A, pp. 12 and 14-15 (pp. 2 and 4-5 of the letter).

45. Referral means matters referred to another person or body under s. 17.2, and ss. 17.3(2) provides for resumption after an OIC investigation is suspended while a criminal investigation takes place. Neither accurately describes the six ceased/discontinued investigations, so they all must have been concluded investigations.

46. Additionally, once an investigation is commenced, the lobbyist is open to penalty imposed by the OIC, and so the investigation ***could*** directly affect the lobbyist's legal rights and privileges to continue lobbying. However, by initiating investigations and concluding them without imposing penalties, the OIC still decided and prescribed the legal rights, duties, and/or privileges of the lobbyists involved by adjudicating and delineating their proper scope.

47. In Decisions 6, 7, 10, 13 and 20, the OIC decided what actions a lobbyist has the legal right to engage in without placing a public office holder in a real or potential conflict of interest in violation of *LRA* s. 3.4 (or, in other words, what legal duty a lobbyist has under s. 3.4 to avoid placing an office holder in a conflict of interest).[14] While Decisions 6, 7, and 10 all found no violation, the OIC's decisions delineated the acceptable scope of the lobbyists' legal right to engage in lobbying and other actions without violating the *LRA*.

48. In Decisions 5 and 14, the OIC addressed and determined the legal duty of a consultant lobbyist to register their lobbying under section 4 of the *LRA*, while Decisions 17 and 23 addressed and determined the legal duty of an in-house lobbyist to register their lobbying under section 6 of the *LRA*.[15]

[14] Affidavit of Ephry Mudryk, RMR, Tab 2, para. 2, Exhibit A, pp. 14-15 (pp. 4-5 of the letter).
[15] Ibid.

49. Decisions 5, 13, 14, 17, 20 and 23 all found violations of the *LRA* but did not impose a penalty. In so doing, the OIC delineated the scope of the lobbyists' legal duties and made clear that they had failed to comply with those duties. The OIC also determined the legal privilege of a lobbyist to violate the *LRA* but retain the legal privilege of lobbying without the public being notified of the violation.

50. The OIC published another decision in the Report in which he found a lobbyist violated the *LRA*—the only decision in 2019–20 in which the OIC also decided to penalize the lobbyist, only by publishing the lobbyist's name (Lawrence Gold) and a description of his violation on the "Compliance and Penalties" page of the OIC website.[16]

51. Exactly as with four of the other six lobbyists the OIC found guilty of violating the *LRA*, Mr. Gold failed to register his lobbying as required by the *LRA* for a significant period of time, failed to do so inadvertently, had no history of non-compliance, and cooperated with the investigation. Mr. Gold's legal rights, duties, and lobbying privileges were unquestionably determined by an exercise of the OIC's statutory power of decision.

52. Just as clearly, the legal rights, duties, and privileges of the six other lobbyists the OIC found violated the *LRA* in decisions 5, 13, 14, 17, 20 and 23—all of whom the OIC decided not to penalize in any way—were determined by the OIC in an exercise of his statutory power of decision, in that the OIC determined these six lobbyists could retain their legal right to lobby notwithstanding their violations.

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[16] Affidavit of Duff Conacher, AMR, Tab 2, Exhibit B, p. 50, Decision 1; "Compliance and Penalties," Office of the Integrity Commissioner of Ontario website, online: http://www.oico.on.ca/home/lobbyists-registration/compliance-penalties, Penalties (Published Non-compliance) section, 2019-2020 subsection, "Lawrence Gold, Consultant Lobbyist" decision."

iii. Conclusion on exercise of statutory powers

53. In each impugned decision, the OIC exercised specific statutory powers conferred by the *LRA* to investigate, make findings, and conclude the investigation; he then discharged his statutory obligation to publish a report on each of his conclusions.

54. In each scenario, the OIC was the sole investigator and decision-maker. Each investigation exposed the lobbyist to potential penalties determined solely by the OIC.

55. By exercising these powers, the OIC made decisions under the *LRA* to investigate and conclude investigations. Such actual exercises of power have nothing whatsoever in common with decisions not to exercise an investigatory power, which the OIC heavily relies upon in an attempt to escape judicial scrutiny.

56. Regardless of whether the OIC imposed a penalty, the conclusions in each investigation affected the respective lobbyist's legal rights, duties, and/or privileges, in that their lawful scope was adjudicated upon and delineated. Accordingly, each of the nine decisions is justiciable and reviewable by this Honourable Court.

iv. Structural bias of the OIC

57. When the OIC made the nine impugned decisions, he was in the final year of his first five-year appointment and knew that he could only be reappointed by unanimous approval of the Members of the Legislative Assembly ("MPPs").[17]

58. The OIC had an incentive to be excessively lenient with lobbyists alleged and/or found to have violated the *LRA* by secretly lobbying public office holders or undertaking political activities that placed ministers, party leaders, or MPPs in a conflict of interest (which

[17] *Members' Integrity Act*, 1994, S.O. 1994, c. 38, s. 23 and 23.1.

would possibly cause the minister, leader or MPP to violate the *MIA*). If the OIC ruled that the lobbyists violated the *LRA* and then identified them and the politicians they were lobbying, this could lead MPPs to not agree to his re-appointment.

59. The Applicant submits that the OIC exercised his statutory powers in an unreasonably lenient manner for exactly this reason in the nine impugned decisions. At the very minimum, this structural aspect of the OIC's position and appointment creates a reasonable apprehension of bias on the part of the OIC when he made the nine decisions.

60. Public confidence in our legal system "is rooted in the fundamental belief that those who adjudicate in law must always do so without bias or prejudice and must be perceived to do so."[18] If a decision or the process leading up to the issuance of the decision is tainted by a reasonable apprehension of bias, the remedy is to set aside or quash the decision.[19]

61. In *Valente*, the Supreme Court observed that security of tenure, whether until an age of retirement or for a fixed term, is essential to secure against interference by the executive or other appointing authority in a discretionary or arbitrary manner, and that longer, fixed-term appointments afford a higher degree of independence.[20]

62. The protections of administrative tribunal independence from the executive and legislative branches mirror the "individual" and "institutional" aspects of the constitutional guarantee of judicial independence because some tribunals "have a second, different and equally important role" beyond adjudicating individual cases—"namely as

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[18] *Wewaykum Indian Band v. Canada*, 2003 SCC 45, at para. 57.
[19] *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, 1992 CanLII 84 (SCC).
[20] *Valente v The Queen*, 1985 CanLII 25 (SCC), at para. 27. ["*Valente*"]

protector of the Constitution and the fundamental values embodied in it – rule of law, fundamental justice, equality, preservation of the democratic process".[21]

63. The Supreme Court has ruled that the appointment process must be taken into account when assessing whether there is a reasonable apprehension of bias on the part of an administrative tribunal.[22] In *Valente*, the Supreme Court also addressed the issue of reappointments, making it clear that the conditions of a reappointment are connected to the issue of security of tenure, and therefore to judicial independence.[23]

64. In the context of considering short-term contracts and police independence, the Quebec Court of Appeal noted that the impending expiration of a police chief's appointment "is a sword of Damocles that ill accommodates the independence desired", and instead creates "strong odds that a complacency as culpable as it is understandable will soon come to the aid of the mayor's son who persists in running red lights!"[24]

65. These principles were echoed by Mary Dawson, who was re-appointed by federal order-in-Council for three successive six-month terms as Conflict of Interest and Ethics Commissioner. Commissioner Dawson publicly stated that:

> *"[w]ithout the possibility of reappointment, there would not be any suggestion that the Commissioner might be in a conflict of interest when making determinations about the government. Repeated use of the interim appointments for the same position can also create perceptions of a lack of independence and becomes problematic."*[25]

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[21] *The Queen v. Beauregard*, 1986 CanLII 24 (SCC), at paras. 23-24.
[22] *Canadian Pacific Ltd. v. Matsqui Indian Band*, 1995 CanLII 145 (SCC), at paras. 73-85, 92-94, 98-100, and 116-123 (esp. paras. 95, 98-100, and 120-121).
[23] *Valente*, at paras. 32 and 34-37.
[24] *Gagnon c. Chambly (Ville)*, 1997 CanLII 10736 (QC CA), at para. 20. (reversed but not on this ground)
[25] Office of the Conflict of Interest and Ethics Commissioner, "The Relationship Between Parliament and the Agents of Parliament," (March 31, 2017). Applicant's Book of Unreported Authorities, Tab 1.

66. The Supreme Court and other courts have upheld the constitutionally protected independence of police officers from the executive/government because their role in law enforcement means they must be protected from political direction or interference.[26] For similar reasons, the OIC in his capacity as Registrar under the *LRA* must have constitutionally protected independence.

67. The Supreme Court's decision in *Ocean Port* did not give *carte blanche* to the executive or the legislature to administer a tribunal in a manner that raises a reasonable apprehension of bias; rather, it acknowledged that the legislature may enact statutory procedures that differ from the common-law rules of procedural fairness. However, express statutory language is required to oust any such rule and, absent such language, the legislature is presumed to have intended for a tribunal to comport with the principles of natural justice.[27]

68. Since *Ocean Port*, the courts have extended constitutional protection for judicial independence and established constitutional "administrative independence" requirements for tribunals that approach the constitutional role of the courts—which the OIC does.[28]

69. The OIC fulfills all of the criteria set out in *Ocean Port*[29] of a law enforcement position/tribunal that merits independence: the OIC does not operate as part of the executive or exercise an executive power; instead, the OIC operates as an adjudicative tribunal investigating and making decisions concerning alleged violations of the *LRA*; the OIC interprets and enforces the law (i.e. the *LRA*), which aims to ensure government

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[26] *R. v. Campbell*, 1999 CanLII 676 (SCC), at paras. 29-34, esp. para. 33, citing several other cases, and referenced in *Wells v. Newfoundland*, 1999 CanLII 657 (SCC), at para. 32.
[27] *Ocean Port Hotel Ltd v. British Columbia*, 2001 SCC 52, at para. 21 ["*Ocean Port*"].
[28] *Bell Canada v. Canadian Telephone Employees Association*, 2003 SCC 36, at para. 21; *McKenzie v. Minister of Public Safety and Solicitor General et al.*, 2006 BCSC 1372, at paras. 144-152; and *Walter v. British Columbia*, 2019 BCCA 221, at paras. 94-97, 110 and 113.
[29] *Ocean Port*, at paras. 20, 24, 28, 32-33.

integrity and public confidence in government—thereby making the OIC a defender of the constitutional principles of rule of law and democracy (which is a "constitutional constraint" per *Ocean Port*). The OIC also has judicial-type powers of subpoena (s. 17.4 of the *LRA*), is required to use court-like procedures (s. 17.5 and 17.6), makes public decisions (ss. 17.12(b)), and imposes penalties in a judicial manner (s. 17.9).

70. The *LRA* gives no indication, let alone an express indication, that the legislature intended to exempt the OIC from the requirement to avoid appearing biased when exercising his powers. Instead, s. 16 of the *LRA* expressly authorizes the OIC to delegate his powers. This suggests that the legislature provided a mechanism for the OIC to remove himself when his personal participation in a matter raises a reasonable apprehension of bias.

71. The New Brunswick Court of Appeal twice held that Ministers or Members of the Legislative Assembly should not be permitted to represent a claimant before a tribunal because the tribunal's members owe their re-appointment to Cabinet.[30] And in *MacBain*, the FC held the "offensive portion" of the relevant statutory human rights scheme was that the tribunal was appointed by the Commissioner who "is also the prosecutor."[31]

72. In the instant Applications, the offensive portion is the requirement under ss. 23(3) of *MIA* that the OIC have unanimous support from MPPs to be reappointed; the OIC enforces the *MIA* and the *LRA* that apply to MPPs and their relations with lobbyists, meaning the MPPs appoint the decision-maker for matters in which they have an interest. Any reasonable, informed person would find this gives rise to the appearance of bias.

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[30] *Chipman Wood Products (1973) Ltd. v. Thompson*, 1996 CanLII 12488 (NB CA); *Fundy Linen Service Inc. v. New Brunswick (Workplace Health, Safety & Compensation Commission)*, 2009 NBCA 13.
[31] *MacBain v. Lederman*, 1985 CanLII 3160 (FCA), at para. 38. ["*McBain*"]

73. For instance, the Federal Court of Appeal (the "FCA") concluded the federal Governor in Council's role in the statutory scheme for appointing the federal Conflict of Interest and Ethics Commissioner and the federal Commissioner of Lobbying was tainted by bias. (The Court ruled, incorrectly in the Applicant's view, that this was permissible with reference to *Ocean Port*).[32]

74. The OIC's reappointment process under the *MIA* similarly creates a reasonable apprehension of bias whenever the OIC is making a decision involving lobbyists' relationship to MPPs close to the time of the OIC's reappointment. A reasonable, properly informed person would think it more likely than not that the OIC, whether consciously or unconsciously, would not decide the situation fairly.

75. The fact is that the OIC was unreasonably lenient to the lobbyists involved in the nine impugned decisions—even failing to impose the very minor penalty of being identified publicly on the lobbyists the OIC found to have violated the *LRA*. Any reasonable person would question whether this was done by the OIC in the hope of not alienating any MPPs, as it only takes a single MPP to thwart the possibility of the OIC keeping his job.

76. For all these reasons, there was a reasonable apprehension of bias on the part of the OIC when making the nine impugned decisions, further rendering them justiciable.

B. The Applicant has public interest standing

77. The Applicant meets all of the requirements for public interest standing. These Applications raise important justiciable issues (as stated above), the Applicant has a

[32] *Democracy Watch v. Canada (Attorney General)*, 2020 FCA 28, at para. 5.

genuine interest in the matter (as conceded by the OIC), and these Applications are a reasonable and effective way—in fact, they are the only realistic way—to bring these important issues before this Honourable Court.[33]

78. It is well established that, even if a specific member of the public is not directly affected by an administrative action, an entity can receive public interest standing to apply for judicial review of the decision. The Court is vested with the discretion to grant public interest standing, and this discretion is guided by applying the above factors in a purposive and flexible manner.[34]

79. In a series of cases involving similar administrative tribunal decisions to those at issue in the instant Applications, the FC and the FCA have granted public interest standing to Democracy Watch.[35] Most pertinently, the FC in *DW v. AGC, 2021* rejected a motion to quash two Democracy Watch applications for judicial review of final decisions by the federal Commissioner of Lobbying after concluding investigations; the Court allowed the applications to proceed with public interest standing granted to Democracy Watch.[36]

i. These Applications raise serious justiciable issues

80. This factor involves two requirements: justiciability and seriousness. Justiciability is linked to the "concern about the proper role of the courts and their constitutional

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[33] *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, at para. 37. ["*Downtown Eastside*"]
[34] *Downtown Eastside*, at para. 37.
[35] Affidavit of Duff Conacher, Applicant's Motion Record (Responding to Motion to Quash – hereinafter "AMR (Motion to Quash)"), Tab 1, para. 8 (e-k), p. 9. See especially *Democracy Watch v. Canada (Attorney General)*, 2018 FCA 194; *Democracy Watch v. Canada (Attorney General)*, 2018 FCA 195; *Democracy Watch v. Canada (Attorney General)*, 2019 FC 388; *Democracy Watch v. Canada (Attorney General)*, 2018 FC 1291.
[36] *Democracy Watch v. Canada (Attorney General)*, 2021 FC 613, at paras. 32-37, 47-48, 58, and 67-71.

relationship to the other branches of government."[37] A "serious issue" will exist where the question raised is a "substantial constitutional issue" or an "important one".[38]

81. As set out herein, the issues in these Applications raise serious justiciable issues concerning the OIC's final decisions on whether a lobbyist has violated the *LRA*, and whether the OIC is interpreting and applying the provisions of the *LRA*—including penalties—in a reasonable manner or in one that is arbitrary and unjustifiable.

82. The issues raised in these Applications concern the proper interpretation and application of key provisions in the *LRA* aimed at preventing secret, unethical lobbying in order to maintain government integrity, including enforcement and penalty measures to ensure lobbyists comply with these provisions. These are issues of broad public importance. As the Supreme Court of Canada has stated, maintaining government integrity is an "important goal" that is "crucial to the proper functioning of a democratic system."[39]

83. The reasons for the *LRA*'s disclosure and "no conflict of interest" provisions are obvious: those who seek to influence public office holders must do so in a transparent manner that avoids even potential conflicts or the appearance of conflict, which are as harmful to public confidence in elected office holders as actual conflicts. Consistent with such transparent public accountability, investigations into contraventions of the *LRA* must also be transparent and accountable.

84. The public has an undeniable interest in knowing who is influencing their elected officials and whether this is being done in an ethical manner—which the *LRA* requires.

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[37] *Downtown Eastside*, at paras. 39-40.
[38] *Downtown Eastside*, at para. 42.
[39] *R v. Hinchey*, 1996 CanLII 157 (SCC), at paras. 13 and 15.

These issues of public importance have not yet been adjudicated by the courts, and are well-suited to being determined by this Honourable Court on a judicial review.

85. The OIC endeavours to downplay the public importance of the matters at issue, likening them to the decision at issue in *Accettone*, which concerned a regulatory decision over a single funeral home's conditional license.

86. Such a decision has nothing in common with the OIC's decisions about the activities of multiple lobbyists—all of whom were required to publicly register their lobbying activities before seeking to influence elected officeholders, including members of the governing majority in the Legislative Assembly of Ontario.

87. The OIC's decisions delineate the acceptable scope of lobbying under the *LRA* for thousands of lobbyists seeking to influence decisions of the Provincial government that will affect every Ontario citizen in some manner. The OIC's decisions thus have exactly the "broad societal impact" and "legal concerns of broad significance or systemic issues" that the Court found were lacking in *Accettone*.[40]

88. The OIC further relies on *Accettone* to contend that the *LRA* limits the availability of judicial review to penalized lobbyists only, and so essentially ousts the availability of public interest standing by omission. But *Accettone* stands for no such proposition.

89. The Court in *Accettone* found that the applicant was not directly granted standing because, *inter alia*, the relevant legislation did not extend its statutory right of appeal to anyone "other than the applicant or licensee." Despite that finding, the Court gave lengthy consideration to the availability of public interest standing, with reference to the

[40] *Accettone Funeral Home Ltd. v. Ajax Crematorium and Visitation Centre and Bereavement Authority of Ontario*, 2021 ONSC 4081, at para. 49. ["*Accettone*"]

well-established factors—and without reference to the applicant's exclusion by omission from the statutory appeal mechanism.[41]

90. In *Democracy Watch v. Canada (Attorney General)*, 2018 FCA 194, the FCA stated that the correct interpretation of the federal *Conflict of Interest Act*, S.C. 2006, c. 9 is "an important question", and that ensuring "a parliamentary servant does not stray beyond its proper legislative mandate […] is clearly and eminently a judicial function."[42]

91. Democracy Watch was granted public interest standing in that matter, which found that the federal Conflict of Interest and Ethics Commissioner's annual Parliamentary reporting provisions under the *Conflict of Interest Act* (which are highly similar to their equivalents for the OIC under section 17.12 of the *LRA*), are inadequate remedies for disputes concerning the Ethics Commissioner's final decisions after investigations.[43]

92. Democracy Watch respectfully submits that the same result regarding public interest standing should follow in these Applications, which raise a justiciable issue of considerable and far-reaching public importance.

ii. The Applicant has a genuine interest in the issues of these Applications

93. In order to have public interest standing, an applicant must have at least a "genuine interest" in the proceedings. The Court will ask whether the applicant has a "real and continued interest" in the issue, as opposed to being a "mere busybody"; the Court will also consider the applicant's experience and expertise, and whether its involvement in the

[41] *Accettone*, at paras. 29 and 45–51.
[42] *Democracy Watch v. Canada (Attorney General)*, 2018 FCA 194, at para 18. ["*DW v. AGC, 2018*"]
[43] *Ibid*, at paras. 17–18, 22.

issue makes it an appropriate body to bring the case in the public interest.[44] The OIC concedes that Democracy Watch has a genuine interest in these Applications.

94. Democracy Watch is an independent organization focused on government accountability that actively participates in legislative and policy-making processes as well as in judicial proceedings—including as an intervenor before the Supreme Court of Canada. Democracy Watch also regularly initiates proceedings with respect to the independence and rulings of federal and provincial ethics and lobbying bodies.[45]

95. In short, Democracy Watch has a longstanding genuine interest in these matters, as demonstrated by its strong "track record" and "degree of involvement" with the matters at issue.[46] Democracy Watch's considerable experience, expertise, and active participation in the issues make it an appropriate body to advance these Applications.

iii. The Applications are a reasonable and effective way of bringing the issues before the courts

96. This factor considers "whether the proposed suit is, in all of the circumstances, a reasonable and effective means of bringing the matter before the court"; it is closely linked to the principle of legality, as courts should consider whether granting standing is desirable from the point of view of ensuring lawful action by government actors.[47]

97. Courts will take a flexible and purposive approach to considering whether the proposed action is an economical use of judicial resources, the issues are presented in a context

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[44] *Downtown Eastside*, at para. 43.
[45] Affidavit of Duff Conacher, AMR (Motion to Quash), Tab 1, paras. 2-8 and Exhibit "A".
[46] *Sierra Club of Canada v Canada (Minister of Finance)*, 1998 CanLII 9124 (FC).
[47] *Downtown Eastside*, at para. 49.

suitable for judicial determination in an adversarial setting, and permitting the proposed action to go forward will serve the purpose of upholding the principle of legality.[48]

98. Notably, a situation where the individual directly affected by the decision is not likely to bring the issue before the Court weighs in favour of granting public interest standing: "even if it is the public office holders who are directly affected by the conflict of interest screens, it is unlikely that they will challenge them in court".[49]

99. The Applications are a reasonable and effective way of bringing the issues before the Court. Democracy Watch has the capacity, including the requisite resources and expertise, to bring forward the Applications; the public interest transcends those most directly affected, as the Applications concern unethical lobbying and maintaining government integrity; and the FCA in *DW. V AGC, 2018* rejected that parliamentary accountability provides sufficient alternative recourse in similar circumstances.[50]

100. These Applications each concern a finding of the OIC in his role as Registrar under the *LRA*. The OIC's nine impugned decisions ultimately found no fault in the lobbyists' actions or did not identify or penalize any of the lobbyists involved. There are no parties to the disputes that have applied or realistically would apply for judicial review of the decisions. It would be absurd to expect an individual who was found not to have violated the law or who has not been penalized for wrongdoing to apply for judicial review of such decisions.

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[48] *Downtown Eastside*, at para. 50.
[49] *DW v. AGC, 2018*, at para. 21.
[50] *Ibid*, at paras. 17–18 and 22.

101. The only way for these important issues to be determined is through judicial proceedings brought by organizations like Democracy Watch, whose interest is in seeing the *LRA* properly enforced in a manner that upholds the public interest, and the public's interest, in ensuring its elected officials are being lobbied in a transparent and ethical manner.

102. The OIC claims that allowing these nine applications to proceed would unduly burden the OIC "by the need to defend their every decision in court".[51] This is an exaggerated and untenable concern. The nine impugned decisions make up only 2.7% of the 335 enforcement decisions made by the OIC in fiscal year 2019–20.

103. The OIC also claims that allowing the nine Applications to proceed would prejudice the lobbyists involved in the nine decisions.[52] This concern is also exaggerated.

104. First, none of the lobbyists will be publicly identified in the process of judicial review, and so they will not have their conduct "examined in a public arena" in any meaningful sense—they will remain nameless while the OIC's conduct, including its interpretation and application of the *LRA*, undergoes judicial scrutiny.

105. Judicial review of the OIC's decisions is clearly contemplated by, *inter alia*, s. 17.8 and ss. 17.10(3)(c) of the *LRA*. However, under ss. 17.9(1)(2)(i) and 17.6(4), the OIC is only allowed to make the name of the lobbyist public if he finds the lobbyist has violated the *LRA* and decides to penalize the lobbyist by making his/her name public.

106. The lobbyist cannot be identified by name in a judicial review, regardless of who brings the proceeding. If a lobbyist applied for judicial review, it necessarily must proceed without naming the lobbyist; the object of the judicial review would otherwise be

[51] Factum of the OIC, at para 77.
[52] Factum of the OIC, at paras 57–60.

defeated if the decision to name the lobbyist were quashed but they had already been fully named and publicly identified in the proceeding.

107. However, all of the other information concerning the situation that does not identify the lobbyist, including information about the OIC's investigation and the basis of the OIC's decision, would be made public. The instant Applications can also proceed in this Honourable Court with disclosure of all the information concerning each of the OIC's investigations and decisions except information that would identify the lobbyist.

108. The OIC challenges the effectiveness of ordering a redacted Record of Proceedings and states that this has no basis in law. While the Applicant maintains that redaction would be effective, there are other judicially recognized options available to ensure confidentiality is protected in accordance with the *LRA*. For instance, this Court is experienced and comfortable with private records being filed under seal by the Information and Privacy Commissioner when its orders denying the release of records are challenged.[53] The same could be done in these Applications.

109. Secondly, in six of the impugned decisions, the OIC found that nine lobbyists violated the *LRA* but decided not to penalize any of them. However, OIC did penalize one other lobbyist in 2019–20 for violating the *LRA* in exactly the same way or in a similarly seriously as the lobbyists involved in the six situations; the penalty was to publicly identify that lobbyist.

110. Therefore, if this Honourable Court quashes these decisions not to penalize the lobbyists and remits the matters to the OIC, the greatest risk faced by these lobbyists is that the

[53] *Fuda v. Ontario (Information and Privacy Commissioner)*, 2003 CanLII 12661 (ON SCDC), at para. 4. ["*Fuda*"]

OIC will inform them under s. 17.9 of the *LRA* that he is going to penalize them by identifying them publicly, at which point they will have the right to file an application for judicial review challenging this decision.

111. As for the three decisions at issue in which the OIC found the lobbyists did not violate the *LRA*, the key issue is whether the OIC's interpretation and application of s. 3.4 of the *LRA* was reasonable. If this Honourable Court finds this was unreasonable, the greatest risk faced by these lobbyist is that the OIC will inform them under s. 17.6 that he has found them in noncompliance with s. 3.4, and they will have the right to file an application for judicial review challenging the OIC's decision.

112. The public interest in allowing these Applications to proceed so the proper enforcement of the *LRA*'s transparent and ethical lobbying requirements is ensured—which is crucial for maintaining government integrity, transparency, and accountability, as well as public confidence in government—clearly outweighs any interests the lobbyists involved in the decisions have in escaping accountability for their actions.

iv. Conclusion on public interest standing

113. For all of the above reasons, the Applicant respectfully submits that it should be granted public interest standing to advance these Applications.

114. The Applications raise justiciable issues of serious and far-reaching public importance that go to the very heart of public confidence in government integrity. Democracy Watch has a longstanding and genuine interest in these matters, and its Applications are the only effective way of bringing them before this Honourable Court.

C. The Applications are timely

115. The Applicant filed all nine applications within six months of the nine impugned decisions being made public in the OIC's Annual Report. In asking for dismissal based solely on a filing period of six months, the OIC asks this Honourable Court to extend its approach to delay well beyond anything found in the jurisprudence.

116. The fact is that, when these Applications were filed, there was no statutory time limit for filing an application for judicial review (the changes to the *JRPA* imposing such a limit postdate the impugned decisions). While there was no operative statutory deadline for filing these Applications, the Court may take judicial notice of the extenuating circumstances created by the global COVID-19 pandemic that led to the suspensions of limitations and deadlines (as embodied in O. Reg. 73/20, which suspended limitation periods and procedural deadlines at the time the impugned decisions were publicized).

117. The OIC's position rests upon an excerpt from *De Pelham*, which cited several earlier cases in which the delay periods ranged from 11–22 months and was itself a decision concerning the significant delay period of 26 months.[54]

118. *De Pelham* also cited the *Bettes* decision, which states that "a delay of six months or more in commencing an application, and twelve or more months in perfecting it, **could be** serious enough alone to warrant the dismissal of the application."[55] [Emphasis added]

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[54] *De Pelham v. Human Rights Tribunal of Ontario*, 2011 ONSC 7006, at para. 14.
[55] *Bettes v. Boeing Canada DeHavilland Division*, 2000 Carswell Ont 6207, [2000] O.L.R.B. Rep. 409 (Div. Ct.), at paras. 6-7, Authorities, Tab 2. ["*Bettes*"].

119. For this proposition, the *Bettes* decision cited four earlier cases, which concerned delays of 7.5 months;[56] four months to file and another eight months to perfect;[57] and more than one year to perfect.[58] One of the *Bettes* cases is unreported and evidently cannot be located by either party, as the OIC has not placed that decision before the Court and the Applicant has been unable to locate same.

120. It is evident from the available cases cited in *Bettes* that something more than a filing period of six months is required to dismiss an application. While the application in *OPSEU* was filed after four months, it was not perfected for another eight months, bringing the cumulative delay period to one year. *OPSEU* does not stand for the proposition that a filing delay of six months, without more, can justify dismissal.

121. The delay period alleged the OIC is not comparable to the delay periods in *De Pelham* or any of the cases cited therein, which do not support the OIC's position in any event. The OIC has not proffered any authority to support dismissal of an application that was filed within six months of the decision being challenged.

122. These Applications were filed within six months of the impugned decisions being publicized, and within three months after emergency deadline suspensions expired. This does not even begin to approach the shortest delay period (one year) that resulted in dismissal of an application, as cited in the OIC's authorities. These Applications were filed in a timely manner and are not amenable to dismissal on the basis of delay.

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[56] *Wills and Ontario Council of Regents for Colleges of Applied Arts and Technology, Re,* 1978 CarswellOnt 2868, at para 9, Authorities, Tab 3. ["*Wills*"]
[57] *Ontario v. OPSEU*, 1983 CarswellOnt 2669, at para 8, Authorities, Tab 4. ["*OPSEU*"]
[58] *Patel v. Ontario (Labour Relations Board)*, 1998 CarswellOnt 5984, Authorities, Tab 5. ["*Patel*"]

PART IV: ORDER REQUESTED

123. The Applicant respectfully requests:

i. An order that the Respondent Ontario Integrity Commissioner file in the Court the records of proceedings for each of the nine decisions at issue this judicial review;

ii. An order dismissing the Respondent Ontario Integrity Commissioner's motion to quash these nine Applications; and

iii. Such further and other relief as this Honourable Court may deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 13th DAY OF JULY, 2021

Nick Papageorge / Wade Poziomka

ROSS & McBRIDE LLP

Lawyers for the Applicant

CERTIFICATE OF COUNSEL

I, Nick Papageorge, lawyer for the Applicant herein, certify that I estimated that 1 hour will be required for the oral argument of the Applicant on its motion for production (not including reply).

Nick Papageorge

Date: July 13th, 2021

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SCHEDULE "A"
LIST OF AUTHORITIES

1. *PC Ontario Fund v. Essensa*, 2011 ONSC 2641
2. *PC Ontario Fund v. Essensa*, 2012 ONCA 453
3. *Democracy Watch v. Ontario Integrity Commissioner*, 2020 ONSC 6081
4. *Democracy Watch v. Canada (Attorney General)*, 2021 FC 613
5. *Harrison v. Association of Professional Engineers of Ontario*, 2017 ONSC 2569
6. *Wewaykum Indian Band v. Canada*, 2003 SCC 45
7. *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, 1992 CanLII 84 (SCC)
8. *Valente v The Queen*, 1985 CanLII 25 (SCC)
9. *The Queen v. Beauregard*, 1986 CanLII 24 (SCC)
10. *Canadian Pacific Ltd. v. Matsqui Indian Band*, 1995 CanLII 145 (SCC)
11. *Gagnon c. Chambly (Ville)*, 1997 CanLII 10736 (QC CA)
12. *R. v. Campbell*, 1999 CanLII 676 (SCC)
13. *Wells v. Newfoundland*, 1999 CanLII 657 (SCC)
14. *Ocean Port Hotel Ltd v. British Columbia*, 2001 SCC 52
15. *Bell Canada v. Canadian Telephone Employees Association*, 2003 SCC 36
16. *McKenzie v. Minister of Public Safety and Solicitor General et al.*, 2006 BCSC 1372
17. *Walter v. British Columbia*, 2019 BCCA 221
18. *Chipman Wood Products (1973) Ltd. v. Thompson*, 1996 CanLII 12488 (NB CA)
19. *Fundy Linen Service Inc. v. New Brunswick (Workplace Health, Safety & Compensation Commission)*, 2009 NBCA 13
20. *MacBain v. Lederman*, 1985 CanLII 3160 (FCA)
21. *Democracy Watch v. Canada (Attorney General)*, 2020 FCA 28

22. *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45

23. *Democracy Watch v. Canada (Attorney General)*, 2018 FCA 194

24. *Democracy Watch v. Canada (Attorney General)*, 2018 FCA 195

25. *Democracy Watch v. Canada (Attorney General)*, 2019 FC 388

26. *Democracy Watch v. Canada (Attorney General)*, 2018 FC 1291

27. *R v. Hinchey*, 1996 CanLII 157 (SCC)

28. *Accettone Funeral Home Ltd. v. Ajax Crematorium and Visitation Centre and Bereavement Authority of Ontario*, 2021 ONSC 4081

29. *Sierra Club of Canada v Canada (Minister of Finance)*, 1998 CanLII 9124 (FC)

30. *Fuda v. Ontario (Information and Privacy Commissioner)*, 2003 CanLII 12661 (ON SCDC)

31. *De Pelham v. Human Rights Tribunal of Ontario*, 2011 ONSC 7006

32. *Bettes v. Boeing Canada DeHavilland Division*, 2000 CarswellOnt 6207

33. *Wills and Ontario Council of Regents for Colleges of Applied Arts and Technology, Re*, 1978 CarswellOnt 2868

34. *Ontario v. OPSEU*, 1983 CarswellOnt 2669

35. *Patel v. Ontario (Labour Relations Board)*, 1998 CarswellOnt 5984

SCHEDULE "B"
TEXT OF RELEVANT STATUTES AND REGULATORY AUTHORITIES

***Members' Integrity Act, 1994,* S.O. 1994, c. 38, s.23 and s. 23.1**

Commissioner

23 (1) There shall be an Integrity Commissioner who is an officer of the Assembly. 2018, c. 17, Sched. 24, s. 2.

Appointment

(2) The Assembly shall, by order, appoint the Commissioner. 2018, c. 17, Sched. 24, s. 2.

Selection by panel

(3) Unless decided otherwise by unanimous consent of the Assembly, an order shall be made under subsection (2) only if the person to be appointed has been selected by unanimous agreement of a panel composed of one member of the Assembly from each recognized party, chaired by the Speaker who is a non-voting member. 2018, c. 17, Sched. 24, s. 2.

Term of office

23.1 (1) The Commissioner shall hold office for a term of five years and may be reappointed for one further term of five years. 2018, c. 17, Sched. 24, s. 2.

Selection by panel

(2) Subsection 23 (3) applies with respect to a reappointment under subsection (1) of this section. 2018, c. 17, Sched. 24, s. 2.

Continuation in office

(3) By order of the Assembly, the Commissioner may continue to hold office after expiry of his or her term of office until a temporary Commissioner is appointed under section 23.5 or until a successor is appointed. 2018, c. 17, Sched. 24, s. 2.

Transition

(4) The Commissioner in office immediately before the day the *Restoring Trust, Transparency and Accountability Act, 2018* receives Royal Assent is deemed to be in the first term of his or her appointment and shall continue to hold office for the remainder of the term. 2018, c. 17, Sched. 24, s. 2.

***Judicial Review Procedure Act,* R.S.O. 1990, c. J.1, s. 1**

Definitions

1 In this Act, […]

"statutory power" means a power or right conferred by or under a statute,

(a) to make any regulation, rule, by-law or order, or to give any other direction having force as subordinate legislation,

(b) to exercise a statutory power of decision,

(c) to require any person or party to do or to refrain from doing any act or thing that, but for such requirement, such person or party would not be required by law to do or to refrain from doing,

(d) to do any act or thing that would, but for such power or right, be a breach of the legal rights of any person or party; ("compétence légale")

"statutory power of decision" means a power or right conferred by or under a statute to make a decision deciding or prescribing,

(a) the legal rights, powers, privileges, immunities, duties or liabilities of any person or party, or

(b) the eligibility of any person or party to receive, or to the continuation of, a benefit or licence, whether the person or party is legally entitled thereto or not,

and includes the powers of an inferior court. ("compétence légale de décision") R.S.O. 1990, c. J.1, s. 1; 2002, c. 17, Sched. F, Table; 2006, c. 19, Sched. C, s. 1 (1).

***Lobbyists Registration Act, 1998*, S.O. 1998, c. 27, Sched.**

s. 3.4, 10, 16, 17.1–17.6, 17.7–17.10, and 17.12

Lobbyists placing public office holders in conflict of interest

Consultant lobbyists

3.4 (1) No consultant lobbyist shall, in the course of lobbying a public office holder, knowingly place the public office holder in a position of real or potential conflict of interest as described in subsections (3) and (4). 2014, c. 13, Sched. 8, s. 5.

In-house lobbyists

(2) No in-house lobbyist (within the meaning of subsection 5 (7) or 6 (5)) shall, in the course of lobbying a public office holder, knowingly place the public office holder in a position of real or potential conflict of interest as described in subsections (3) and (4). 2014, c. 13, Sched. 8, s. 5.

Definition — conflict of interest, member of the Assembly

(3) A public office holder who is a member of the Legislative Assembly is in a position of conflict of interest if he or she engages in an activity that is prohibited by section 2, 3 or 4 or subsection 6 (1) of the *Members' Integrity Act, 1994*. 2014, c. 13, Sched. 8, s. 5.

Definition — conflict of interest, other persons

(4) A public office holder who is not a member of the Legislative Assembly is in a position of conflict of interest if he or she engages in an activity that would be prohibited by section 2, 3 or 4 or subsection 6 (1) of the *Members' Integrity Act, 1994* if he or she were a member of the Legislative Assembly. 2014, c. 13, Sched. 8, s. 5.

Registrar

10 The Integrity Commissioner is hereby appointed as registrar. 1998, c. 27, Sched., s. 10.

Delegation of powers

16 (1) The registrar may delegate in writing any of his or her powers or duties under this Act to a person employed in the registrar's office and may authorize him or her to delegate any of those powers or duties to another person employed in that office. 1998, c. 27, Sched., s. 16 (1).

(2) REPEALED: 2014, c. 13, Sched. 8, s. 12.

Conditions, etc.

(3) A delegation may be made subject to such conditions and restrictions as the person making the delegation considers appropriate. 1998, c. 27, Sched., s. 16 (3).

Investigation by registrar

17.1 (1) The registrar may conduct an investigation to determine if any person or persons have not complied with any provision of this Act or of the regulations. 2014, c. 13, Sched. 8, s. 13.

Time limit

(2) The registrar shall not commence an investigation into an alleged non-compliance with this Act or the regulations more than two years after the date when the registrar knew or should have known about the alleged non-compliance. 2014, c. 13, Sched. 8, s. 13.

Refusal or cease to investigate

(3) The registrar may refuse to conduct an investigation into any alleged non-compliance with this Act or the regulations or may cease such an investigation for any reason, including if the registrar believes that any of the following circumstances apply:

1. The matter could more appropriately be dealt with under another Act.

2. The matter is minor or trivial.

3. Dealing with the matter would serve no useful purpose because of the length of time that has elapsed since the matter arose. 2014, c. 13, Sched. 8, s. 13.

Referral instead of investigation

17.2 The registrar may, instead of commencing an investigation, or at any time during the course of an investigation, refer the matter to another person or body so that it may be dealt with as a matter of law enforcement or in accordance with a procedure established under another Act if the registrar is of the opinion that this would be more appropriate than conducting or continuing the investigation. 2014, c. 13, Sched. 8, s. 13.

Suspension of investigation in case of criminal investigation or charge laid

17.3 (1) The registrar may suspend an investigation if he or she discovers that,

(a) the subject matter of the investigation is also the subject matter of an investigation to determine whether an offence has been committed under this or any other Act of Ontario or of Canada; or

(b) a charge has been laid with respect to the alleged non-compliance. 2014, c. 13, Sched. 8, s. 13.

Resumption of suspended investigation

(2) The registrar may resume a suspended investigation at any time, whether or not the other investigation or charge described in clause (1) (a) or (b) has been finally disposed of, but before resuming a suspended investigation the registrar shall consider the following:

1. Whether the registrar's investigation may be concluded in a timely manner.

2. Whether the other investigation or charge will adequately deal with or has adequately dealt with the substance of the alleged non-compliance for the purposes of this Act. 2014, c. 13, Sched. 8, s. 13.

Registrar's powers on investigation

17.4 (1) In conducting an investigation, the registrar may,

(a) require any person to provide any information that he or she may have if, in the opinion of the registrar, the information is relevant to the investigation;

(b) require any person to produce any document or thing that may be in his or her possession or under his or her control if, in the opinion of the registrar, the document or thing is relevant to the investigation;

(c) specify a date that is reasonable in the circumstances by which the information, document or thing must be provided or produced. 2014, c. 13, Sched. 8, s. 13.

Same

(2) The registrar may summon any person who, in the registrar's opinion, is able to provide information that is relevant to the investigation, and may require him or her to attend in person or by electronic means and may examine him or her on oath or affirmation. 2014, c. 13, Sched. 8, s. 13.

Protection under *Canada Evidence Act*

(3) A person shall be informed by the registrar of his or her right to object to answer any question under section 5 of the *Canada Evidence Act*. 2014, c. 13, Sched. 8, s. 13.

Court order

(4) The registrar may apply to the Superior Court of Justice for an order directing a person to provide information, documents or things as required under subsection (1) or to attend and be examined pursuant to a summons issued under subsection (2). 2014, c. 13, Sched. 8, s. 13.

Privileges and right to counsel

(5) A person required to provide information or to produce a document or thing under subsection (1) and a person examined under subsection (2) may be represented by counsel and may claim any privilege to which the person is entitled in any court. 2014, c. 13, Sched. 8, s. 13.

Notice after investigation

17.5 (1) If, after conducting an investigation, the registrar believes that a person has not complied with a provision of this Act or of the regulations, the registrar shall,

(a) give a notice to the person setting out,

(i) the alleged non-compliance,

(ii) the reasons why the registrar believes there has been non-compliance, and

(iii) the fact that the person may exercise an opportunity to be heard under clause (b) and the steps by which the person may exercise that opportunity;

(b) give the person a reasonable opportunity to be heard respecting the alleged non-compliance and any penalty that could be imposed by the registrar under this Act. 2014, c. 13, Sched. 8, s. 13.

Same

(2) The notice must be in writing and delivered to the person personally, by email to the address provided by the person or by registered mail. 2014, c. 13, Sched. 8, s. 13.

Same

(3) Except as provided in this section, the registrar need not hold a hearing and no person or body has a right to be heard by the registrar. 2014, c. 13, Sched. 8, s. 13.

Registrar's finding of non-compliance

17.6 (1) If, after conducting an investigation and after giving a person that the registrar believed to have not complied with this Act or the regulations an opportunity to be heard, the registrar finds that the person has not complied with a provision of this Act or of the regulations, the registrar shall give a notice to the person setting out,

(a) the finding of non-compliance;

(b) any penalty imposed under section 17.9; and

(c) the reasons for the finding and for the imposition of any penalty. 2014, c. 13, Sched. 8, s. 13.

Notice

(2) The notice must also advise the person that he or she may ask for reconsideration and judicial review of the registrar's finding or of the penalty imposed, or both. 2014, c. 13, Sched. 8, s. 13.

Same

(3) The notice must be in writing and delivered to the person personally, by email to the address provided by the person or by registered mail. 2014, c. 13, Sched. 8, s. 13.

Judicial review

17.8 Within 60 days after receiving the notice of the registrar's finding under subsection 17.6 (1) or of the registrar's decision under subsection 17.7 (3), the person against whom the finding is made may make an application for judicial review of the registrar's finding or the penalty imposed, or both. 2014, c. 13, Sched. 8, s. 13.

Penalties

Registrar's powers after finding of non-compliance

17.9 (1) If the registrar's finding under section 17.6 is that a person has not complied with a provision of this Act or of the regulations, the registrar may, taking into account the gravity of the non-compliance, the number of previous incidents of non-compliance committed by the same person and the number of previous convictions against the same person for offences under this Act, and if the registrar is of the opinion that it is in the public interest to do so, do either or both of the following:

1. Prohibit the person against whom the finding is made from lobbying for a period of not more than two years.
2. Subject to subsection (4), make public the following information:
   i. The name of the person against whom the finding is made.
   ii. A description of the non-compliance.
   iii. Any other information that the registrar considers necessary to explain the finding of non-compliance. 2014, c. 13, Sched. 8, s. 13.

Registrar's powers after conviction

(2) If a person is convicted of an offence under this Act, the registrar may, taking into account the gravity of the offence, the number of previous convictions against the same person for offences under this Act and the number of previous incidents of non-compliance committed by the same person, and if the registrar is of the opinion that it is in the public interest to do so, do either or both of the things listed in subsection (1), with necessary modifications. 2014, c. 13, Sched. 8, s. 13.

Publication in registry

(3) If the registrar makes information public under subsection (1) or (2) as described in paragraph 2 of subsection (1), he or she shall also include the information described in subparagraphs 2 i and ii of subsection (1) in the registry established and maintained under section 11. 2014, c. 13, Sched. 8, s. 13.

Limitation

(4) The registrar shall not make any information public under subsection (1) until the time for making an application for judicial review under section 17.8 has expired and no application has been made. 2014, c. 13, Sched. 8, s. 13.

Delaying implementation of penalty

(5) A person who requests reconsideration under section 17.7, or makes an application for judicial review under section 17.8, of the registrar's finding against the person or the penalty imposed, or both, may at the same time apply in writing to the registrar to delay the implementation of the penalty, or any part of the penalty, until the matter has been finally disposed of, and upon receipt of such an application, the registrar may delay implementing the penalty until the matter has been finally disposed of if he or she is of the opinion that the delay would be just in the circumstances. 2014, c. 13, Sched. 8, s. 13.

Confidentiality

17.10 (1) Except as provided under this section, the registrar and anyone acting for or under the direction of the registrar shall not disclose to any person,

(a) whether the registrar is conducting an investigation under this Act; or

(b) any information, document or thing obtained in the course of conducting an investigation under this Act. 2014, c. 13, Sched. 8, s. 13.

Exceptions

(2) The registrar and any person acting for or under the registrar's direction shall not disclose to any person any information, document or thing obtained in the course of conducting an investigation under this Act except as necessary,

(a) to conduct an investigation under section 17.1;

(b) to refer a matter under section 17.2;

(c) to enforce a penalty imposed under section 17.9; or

(d) to comply with the requirements of section 17.12. 2014, c. 13, Sched. 8, s. 13.

Same

(3) The registrar and any person acting for or under the registrar's direction shall not give or be compelled to give evidence in any court or in any other proceeding in respect of information, documents or things obtained in the course of conducting an investigation under this Act except,

(a) in a prosecution for perjury;

(b) in a prosecution for an offence under this Act; or

(c) in an application for judicial review of a finding of or penalty imposed by the registrar. 2014, c. 13, Sched. 8, s. 13.

Annual report

17.12 The annual report of the Integrity Commissioner (who is appointed as registrar under section 10 of this Act) required by section 24 of the *Members' Integrity Act, 1994* shall include,

(a) the number of investigations conducted by the Commissioner under this Act during the year, including the number of those investigations that were commenced, concluded or resumed during the year and the number of matters that the Commissioner refused to investigate or referred to another person or body during the year;

(b) a description in summary form of each investigation concluded or resumed, and of each matter referred, during the year; and

(c) any other information relevant to the administration of this Act the public disclosure of which the Commissioner believes to be in the public interest. 2014, c. 13, Sched. 8, s. 13.

DEMOCRACY WATCH

and

Applicant

ONTARIO INTEGRITY COMMISSIONER

Respondents

Court File Nos. 632/20 633/20
634/20 644/20 645/20 646/20
647/20 648/20 660/20

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at: Toronto

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