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/
Moving Party

- and -

ONTARIO INTEGRITY COMMISSIONER

Respondent/
Responding Party

FACTUM OF THE APPLICANT
(Motion for production of the Respondent's records of proceedings)

Date: May 24, 2021

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PART I: OVERVIEW

1. The Applicant moves for an order that the Respondent Ontario Integrity Commissioner (the "OIC") file in this Honourable Court the records of proceedings for each of the nine decisions at issue in these nine applications for judicial review[1]

2. The OIC, in the role of registrar, exercised a statutory power of decision under the *Lobbyists Registration Act*, 1998, S.O. 1998, c. 27, Sched. (the "*LRA*"), by conducting an investigation and explicitly making a finding in each of the nine situations that are the subject of these nine applications for judicial review.

3. The Applicant / Moving Party has commenced separate applications for judicial review with respect to each of the nine decisions. Section 10 of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1 ("*JRPA*") clearly requires that the OIC produce a record of proceedings for each of the nine findings. Section 17.10(3)(c) of the *LRA* makes clear that such a record can be (and is expected to be) filed by the OIC without the OIC violating any of the confidentiality provisions of the *LRA*.

PART II: THE FACTS

4. According to the OIC's Annual Report for 2019–20 (the "Report"), the OIC undertook 251 Compliance Reviews in 2019–20, closing 55 of those reviews at the initial stage and resolving 167 reviews through an informal process. No other information is provided in the

[1] Notice of Motion, Motion Record of the Applicant / Moving Party (hereinafter "AMR"), Tab 1, paras. 1-2.

Annual Report about the Respondent OIC's decisions to close 55 reviews at the initial stage or resolve 167 reviews through informal processes. [2]

5. The OIC only fully investigated and issued a public decision in 29 of the 251 situations that were reviewed, resulting in the 24 decisions published in the Report (some of the decisions covered the activities of more than one lobbyist). In addition, according to information on page 45 of the Report, the OIC issued 84 Advisory Opinions during the 2019–20 fiscal year.[3] As a result, the public has no information concerning how the OIC made 335 *LRA* enforcement decisions during the 2019–20 fiscal year, including how the OIC decided that the lobbyist(s) involved in any of those 335 situations had not violated the *LRA*.

6. As required by ss. 17.12(b) of the *LRA*, the Report included 24 summaries of the decisions made by the OIC arising from investigations conducted during the year. Each summary is only one paragraph in length.[4] On December 21 and 23, 2020, the Applicant filed nine applications for judicial review, which collectively pertain to nine of the 24 decisions.[5]

7. The OIC did not number the summaries of his decisions in his Report or catalogue them in any way; the decisions are all undated, and several of the decisions have the same or similar titles.[6] For ease of reference (both the Court's and the parties'), the Applicant created a document with numbers added to all 24 of the decisions in pages 50–56 of the Report.[7] In

[2] Affidavit of Duff Conacher, AMR, Tab 3, para. 4, Exhibit A, p. 49.
[3] Affidavit of Duff Conacher, AMR, Tab 3, para. 4, Exhibit A, p. 45.
[4] Affidavit of Duff Conacher, AMR, Tab 2, para. 5, Exhibit A, pp. 50-56.
[5] Affidavit of Duff Conacher, AMR, Tab 2, para. 2–3.
[6] Affidavit of Duff Conacher, AMR, Tab 2, para. 5, Exhibit A.
[7] Affidavit of Duff Conacher, AMR, Tab 2, para. 6, Exhibit B.

this document, from the 24 decisions in the Report, the numbers of the decisions at issue in the present nine applications, and their corresponding Court file numbers, are as follows:

Court File Number	Decision # and page # in document created from section of OIC 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)

8. 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 provisions of the *Members' Integrity Act, 1994*. 2014, c. 13, Sched. 8, s. 5.

9. Decisions 5, 13, 14, 17, 20 and 23 are decisions by the OIC that each found a lobbyist in violation of the *LRA*, as follows:

i. Decisions 5 and 14 each found a lobbyist in violation for "a number of years" of the deadline in the *LRA* for registering as a lobbyist.

ii. Decision 17 found a lobbyist in violation for "up to 300 days" of the deadline in the *LRA* for updating the lobbyist's registration.

iii. Decision 23 found a lobbyist in violation for "more than 400 days" of the requirement in the *LRA* to register the lobbyist's lobbying.

iv. Decisions 13 and 20 each found a lobbyist in violation of the s. 3.4 conflict of interest provision of the *LRA*.

10. Despite conducting these investigations and finding the aforesaid violations of the *LRA*, the OIC decided not to penalize any of the lobbyists involved.

11. Significantly, all nine of the decisions at issue in the present applications contain the words "The Commissioner investigated" and "The Commissioner found". Decisions 6 and 10 also contain the words "The Commissioner determined". Of the six decisions in which the OIC found that a lobbyist had violated the *LRA*:

i. Decisions 5 and 14 contain the words "The Commissioner found non-compliance".

ii. Decision 13 contains the words "The Commissioner found that the consultant lobbyist failed to comply to with the Act" and "The Commissioner concluded that this was a serious breach of the Act."

iii. Decision 17 contains the words "The Commissioner found that the non-compliance was significant".

iv. Decision 20 contains the words "The Commissioner found that an in-house lobbyist […] failed to comply with the Act".

v. Decision 23 contains the words "The Commissioner found that the senior officer had not complied with the Act" and that the officer's failure to register the organization's lobbying was "a serious delay and contrary to the public interest."

12. Decisions 5 and 14 contain the words "the investigation was ceased" and Decision 20 contains the words "The Commissioner ceased the investigation". These are the only three of the nine decisions at issue in which the OIC explicitly indicates that he ceased the investigation. However, as noted above, the OIC ***found*** a violation of the *LRA* in all three of these decisions.

13. On March 15, 2021, OIC's counsel sent Applicant's counsel a letter, which is included in the OIC's Motion Record (the "Letter"), containing hearsay evidence concerning the OIC's nine decisions at issue in these Applications.[8] In particular, the Letter claims that the OIC "discontinued" the investigations resulting in decisions 6, 7 and 10, and "ceased" the investigations resulting in decisions 5, 14 and 20.[9] However, as noted above, each of these six decisions contain the words "The Commissioner found" either that a violation had not occurred (decisions 6, 7 and 10) or that a violation had occurred (decisions 5, 14, and 20).

[8] Affidavit of Ephry Mudryk, Respondent / Responding Party Motion Record (hereinafter "RMR"), Tab 2, para. 2, Exhibit A.
[9] Affidavit of Ephry Mudryk, RMR, Tab 2, para. 2, Exhibit A, pp. 12 and 14-15 (pp. 2 and 4-5 of the letter).

PART III: ISSUES AND THE LAW

14. The issues before the Court are as follows:

    i. Is the OIC required to produce a record of proceedings for each of the nine decisions?

    ii. In the alternative, can the Respondent OIC be compelled to produce a record of each of the nine decisions under clause 17.10(3)(c) of the *LRA*?

    iii. Can a record of each of the nine decisions be produced by the OIC without violating the confidentiality provisions of the *LRA*?

A. The Respondent is required by the *JRPA* to produce a record of each decision

18. Determining whether the OIC is required to file record of proceedings depends on whether the OIC was exercising a statutory power of decision in the nine matters the Applicant seeks to have judicially reviewed. This determination, in turn, is an exercise in statutory interpretation based on the relevant provisions of the *JRPA* and *LRA*.

19. When the modern approach to statutory interpretation is applied, it is evident that the OIC was exercising a statutory power of decision in each and every one of the nine matters at issue. The OIC must, therefore, file records of proceedings for these nine matters.

20. Section 10 of the *JRPA* uses mandatory language that requires a decision-maker to produce a record of proceedings on an application for judicial review:

> When notice of an application for judicial review of a decision made in the exercise or purported exercise of a statutory power of decision has been served on the person making the decision, **such person shall forthwith file in the court for use on the application the record of the proceedings in which the decision was made**. R.S.O. 1990, c. J.1, s. 10.
>
> [Emphasis added]

21. Section 1 of the *JRPA* defines "statutory power of decision" 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…".

22. The modern approach to statutory interpretation comprises the following well-established core principles:

    i. Words are to be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament".[10]

    ii. Statutory interpretation is not to be founded on words alone. The text "must be read and analyzed in light of a purposive analysis, a scheme analysis, the larger context in which the legislation was written and operates, and the intention of the legislature, which includes implied intention and the presumptions of legislative intent."[11]

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[10] *Oakville (Town) v Clublink Corporation ULC*, 2019 ONCA 826 at para 37, citing E.A. Driedger, *Construction of Statutes*, 2d ed (Toronto: Butterworths, 1983), at p. 87. ["*ClubLink*"]

[11] *Clublink*, at para 38, citing Ruth Sullivan, *Statutory Interpretation*, 3d ed (Toronto: Irwin Law, 2016) at p. 46.

iii. The text must be read harmoniously with the scheme and object of the statute. Contradictions or inconsistencies among parts of the same body of legislation should be avoided.[12]

iv. Every Ontario statute is deemed to be remedial and must "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit."[13]

23. The purpose of the *LRA* is clearly to regulate the activity of lobbyists in the Province of Ontario. The *LRA* aims to ensure transparent, ethical lobbying by requiring that all lobbyists comply with certain registration and reporting requirements and do not engage in prohibited activities—such as acting in a conflict of interest or placing a public office holder in such a conflict. The *LRA* provides a specific investigatory mechanism to determine whether lobbyists are compliant with the provisions of the *LRA* and to penalize those who are found to be noncompliant.

24. The reasons for the *LRA*'s registration and "no conflict" provisions are equally obvious. Those who seek to influence public office holders must do so in a transparent manner that avoids even the appearance of conflicts of interests, which are as harmful to public confidence in elected government office holders acting in actual conflict.

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[12] *Clublink*, at para 45; *Peel (Police) v Ontario (Special Investigations Unit)*, 2012 ONCA 292 at para 26, citing Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham, Ont: LexisNexis, 2008) at p. 223.
[13] *Interpretation Act*, R.S.O. 1990, c. I.11, s. 10; *Legislation Act, 2006*, SO 2006, c 21, Sch F, s. 64(1).

25. In sum, the public has an interest in knowing who is seeking to influence their elected officials and whether they are doing so free from any conflict of interest on the part of both the lobbyist and the elected official. Protecting the public's interest, and the public interest, is the purpose (or at least one of the primary purposes) of the *LRA*. It follows that, if there is to be such transparency, investigations into contraventions of the *LRA* must also be transparent and accountable.

26. The specific statute and statutory powers at issue in this motion do not appear to have been judicially considered. However, there is more general appellate guidance on the issue. In *Endicott*, the Court of Appeal considered investigatory powers under the *Police Services Act* and drew a distinction between permissive language (i.e. "may") granting discretion over whether to commence an investigation and mandatory language (i.e. "shall") requiring steps to be taken in an investigation.[14]

27. Similarly, in *Essensa*, this Court scrutinized the powers of the Chief Electoral Officer to conduct investigations of political parties' compliance with the *Elections Act*. This Court 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, and ruled that it was concerned with the latter.[15] This decision was upheld by the Court of Appeal, which likened the exercise of discretion to a Crown Attorney declining to pursue a prosecution—the exact analogy used by the OIC in its motion record to describe its impugned decisions.[16]

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[14] *Endicott v. Ontario (Independent Police Review Office)*, 2014 ONCA 363, at paras 23–27. ["*Endicott*"]
[15] *PC Ontario Fund v. Essensa*, 2011 ONSC 2641, at para 25. ["*Essensa*"]
[16] *PC Ontario Fund v. Essensa*, 2012 ONCA 453, at para 12. ["*Essensa Appeal*"]

28. However, the powers of the Chief Electoral Officer under scrutiny in *Essensa* were limited to reporting contraventions found during its investigations to the Attorney General and did not include any power to impose a penalty after concluding an investigation. Additionally, the applicant was seeking judicial review of a decision to investigate its complaint.

29. The facts of this case are distinguishable. The Applicants do not seek to challenge any of the OIC's many decisions *not to investigate* various instances of potential noncompliance with the *LRA*. The Applicant acknowledges that the OIC has a broad discretion not to pursue an investigation. However, in all nine decisions at issue, the OIC decided to investigate the situation (under s. 17.1 of the *LRA*) and did, in fact, carry out said investigations. After investigating, the OIC made findings regarding whether the lobbyists had complied with the *LRA* and then made decisions under the powers granted by the *LRA* (including issuing a notice of violation and deciding whether to impose a penalty).

30. In so doing, the OIC was deciding or prescribing the legal rights, duties, and/or privileges of the lobbyists involved, and the OIC was bound by the statute to take certain notification steps vis-à-vis the lobbyists being investigated.

31. It is also clear from the statutory scheme that, once an investigation was commenced, the lobbyist was open to be penalized and prohibited from lobbying for a period up to two years by the OIC—in other words, the investigation *could have bearing* on the lobbyist's legal rights and privileges to continue lobbying.

32. The OIC's nine decisions in the Report do not mention the statutory provisions that were the statutory basis for the OIC to investigate the lobbyists for violating the *LRA*. However, with reference to the summaries in both the Report and Appendix A of the Letter,[17] it is clear that the OIC was deciding and/or prescribing the legal rights of the lobbyists being investigated:

    i. decisions 6, 7, 10, 13 and 20 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 s. 3.4 of the *LRA* (or, conversely, what legal duty a lobbyist has under s. 3.4 to avoid placing an office holder in a conflict of interest);

    ii. decisions 5 and 14 addressed and determined the legal duty of a consultant lobbyist to register their lobbying under s. 4 of the *LRA*;

    iii. decisions 17 and 23 addressed and determined the legal duty of an in-house lobbyist to register their lobbying under s. 6 of the *LRA*; and

    iv. decisions 5, 13, 14, 17, 20 and 23 determined and prescribed the legal right of a lobbyist to violate the *LRA* and, without being penalized, retain the legal privilege of lobbying (without the public being notified that the lobbyist had violated the *LRA*).

33. The OIC published another decision in the Report in which he found a lobbyist violated the *LRA*—the only decision in which the OIC also decided to penalize the lobbyist, if 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.[18] Exactly as with four of the other six

[17] Affidavit of Ephry Mudryk, RMR, Tab 2, para. 2, Exhibit A, pp. 14-15 (pp. 4-5 of the letter).
[18] 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-

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.

34. This lobbyist's legal rights, duties, and privileges were clearly determined by the OIC's decision as an exercise of the OIC's statutory power of decision. 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 privilege to lobby.

35. Additionally, in the chart in Appendix "A" of the Letter, each of the nine decisions is stated to have been exercised by the OIC under various statutory provisions of the *LRA*—in fact, counsel has helpfully set out exactly which statutory power was being exercised in each decision.[19]

36. Each and every one of the nine decisions at issue—when viewed within the context of the statutory scheme, and compared with each other and the additional decision in Mr. Gold's case—was an obvious exercise of "statutory power" as defined under s. 1 of the *JRPA*.

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penalties, Penalties (Published Non-compliance) section, 2019-2020 subsection, "Lawrence Gold, Consultant Lobbyist" decision.

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

Accordingly, the OIC is required, per s. 10 of the *JRPA*, to file the records of proceedings for the nine decisions at issue in this judicial review.

(i) The OIC's three final decisions at issue finding lobbyists did not violate the *LRA*

33. In decisions 6, 7 and 10, the OIC made a decision, after investigating, concerning the legal rights, duties¸ and/or privileges of the lobbyist or lobbyists under s. 3.4 of the *LRA*. In each of these three decisions, the OIC summarized his decision in the Report by stating "The Commissioner found" and/or "The Commissioner determined". In each of the three decisions, the OIC concluded that the lobbyist(s) involved had acted in ways that fell within their legal rights and duties under the *LRA*.

34. In the Letter, OIC's counsel claims that the OIC "discontinued" the investigations that resulted in decisions 6, 7 and 10.[20] However, the summaries of these three decisions in the Report state that, after investigating, the OIC ***found*** that the lobbyist(s) involved had not violated the *LRA*. None of the summaries of these three decisions contain the word "discontinued" or any other word indicating that the OIC did not complete the investigation and issue a final decision.

35. In fact, under the *LRA*, the OIC does not have the statutory power to "discontinue" an investigation except to refer the matter to another person or entity to be dealt with "as a matter of law enforcement or in accordance with a procedure established under another Act"

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

(s. 17.2); or to "suspend" an investigation if a criminal investigation is underway or a charge has been laid under the *LRA* or another statute against the lobbyist (s. 17.3).

36. Also, investigations into whether a violation of a law has occurred are typically concluded after the investigator has determined that the person being investigated has not violated the law. There is no reason to continue an investigation after a decision has been made that a violation has not occurred. However, that does mean that the investigator "discontinued" the investigation—it means they made a final decision after investigating.

37. For these reasons, the OIC's characterization of decisions 6, 7 and 10 as a decision to "discontinue" the investigation cannot reasonably be accepted. The OIC clearly completed the investigation in each of the three cases and then issued a final decision concerning the legal rights and/or duties of the lobbyists under the *LRA*.

38. A comparison of decisions 6, 7 and 10 with decision 13 shows clearly that decisions 6, 7 and 10 were exercises of the OIC's statutory power of decision. The Letter makes clear that decision 13 was an exercise of the OIC's statutory powers of decision under s. 17.5, 17.6 and 17.9 of the *LRA*.[21] In each of decisions 13, 17 and 20, the OIC found that the lobbyist violated the *LRA* but decided not to impose a penalty.

[21] Affidavit of Ephry Mudryk, RMR, Tab 2, para. 2, Exhibit A, p. 1 (p. 3 of the letter).

39. Decisions 6, 7 and 10 read very similarly to decision 13. All four say "The Commissioner investigated" the activities of consultant lobbyists "to determine" if the lobbyists had knowingly placed public office holders "in a real or potential conflict of interest" (which is a violation of s. 3.4 of the *LRA*). All four decisions summarize the facts and then say that "The Commissioner found"—i.e., the OIC made a determination concerning the legal rights, duties, and/or privileges of the lobbyist(s) involved.

40. The only difference is that in decisions 6, 7 and 10, the OIC found that the lobbyists' actions were permitted under their legal rights and duties in the *LRA*, while in decision 13 the OIC found that the lobbyist's actions were not permitted under their legal rights and duties in the *LRA*. As a result, it is clear that, like decision 13, each of decisions 6, 7 and 10 was an exercise of the OIC's statutory power of decision.

(ii) The OIC's six final decisions at issue finding lobbyists violated the *LRA*

41. In each of decisions 5, 13, 14, 17, 20 and 23, the OIC made a decision, after investigating, that found a lobbyist in violation of the *LRA*. The OIC then made a decision in each case not to penalize the lobbyist—decisions that affected the legal rights and privileges of the lobbyists involved as much as a decision to penalize them.

42. The possible penalties that the OIC can impose under s. 17.9 of the *LRA* are naming the lobbyist publicly or prohibiting the lobbyist from lobbying for up to two years. By not imposing any penalty, the OIC's six decisions at issue gave each lobbyist the legal right

and/or privilege to lobby even when in violation of the *LRA*, and to lobby without the public being notified that the lobbyist had violated the *LRA*.

43. In three of the above six situations (which resulted in decisions 5, 14 and 20 at issue in the present applications), the Letter[22] and the Report[23] state that the OIC "ceased the investigation." However, as noted above, the Report states in all three decisions that, after investigating, the OIC "found" a violation of the *LRA*; after that, each of the three decisions claim that the OIC "ceased" the investigation.

44. Again, it is expected that investigations into potential wrongdoing are stopped after the investigator determines that the person under investigation has violated the law. There is no reason to continue an investigation after the potential violation being investigated has been established. However, this does not mean that the investigation was "ceased"—it means it was concluded and a final decision was made.

45. In the Letter, OIC's counsel cites an excerpt from the "informal resolution process" section on pp. 48–49 of the Report, which states that "the Commissioner may use the "informal resolution process" to resolve matters following an investigation."[24]

46. However, this is discordant with the statutory scheme of the *LRA*. If the OIC believes that a lobbyist has violated the *LRA*, s. 17.5 states that the OIC "shall" give a notice to the lobbyist

[22] Affidavit of Ephry Mudryk, RMR, Tab 2, para. 2, Exhibit A, pp. 12 and 14-15 (pp. 2 and 4-5 of the letter).
[23] Affidavit of Duff Conacher, AMR, Tab 2, para. 6, Exhibit B, pp. 51 and 54-55.
[24] Affidavit of Ephry Mudryk, RMR, Tab 2, para. 2, Exhibit A, pp. 12 (p. 2 of the letter).

of the alleged violation, the reasons the OIC has concluded the lobbyist violated the *LRA*, and shall give the lobbyist an opportunity to respond; s. 17.6 then states that if, after giving the notice and the opportunity to respond under s. 17.5, the OIC "finds" that the lobbyist violated the *LRA*, the OIC "shall" give the lobbyist a notice of the finding, any penalty imposed under the OIC's power in s. 17.9, and the reasons for the finding and any penalty.

47. The mandatory language in these provisions makes clear that the OIC does not have the option to use the "informal resolution process" to resolve a matter after an investigation if the OIC concludes that a lobbyist has violated the *LRA*. Rather, the OIC is required to issue the notices under s. 17.5 and 17.6.

48. The Letter claims that the OIC issued notices as required under s. 17.5 and 17.6 for decisions 13, 17 and 23, in which the OIC found that a lobbyist violated the *LRA*.

49. Subsection 17.1(3) allows the OIC to "cease" an investigation "for any reason", including:

    i. the matter could more appropriately be dealt with under another Act (which invokes the OIC's s. 17.2 power to refer the matter to another legal authority and s. 17.3 power to suspend an investigation if a criminal investigation is underway into the lobbyist or the lobbyist has been charged under another Act);

    ii. the "matter is minor or trivial" or;

    iii. dealing with the matter would serve no useful purpose given the length of time that has elapsed since the matter arose.

50. However, the OIC does not cite any of these reasons in his Report when he claims he "ceased" the investigations into the situation that resulted in decisions 5, 14 and 20 (again, after stating in each decision that he had "found" the lobbying in violation of the law). There is no indication that the situations occurred long ago or that other laws applied.

51. Subsection 4(1) of the *LRA* requires a consultant lobbyist to register their lobbying "not later than 10 days" after they start lobbying—10 days after, not a number of years after. The consultant lobbyists involved in the situations resulting in decisions 5 and 14 committed serious violations that were not "minor or trivial", as both failed to register their lobbying for "a number of years". The lobbyist involved in the situation that resulted in decision 20 also committed a serious violation by placing a public office holder in a real or potential conflict of interest.

52. The OIC's power under ss. 17.1(3) to cease an investigation must be interpreted taking into account the requirements that the OIC issue the notices under s. 17.5 and 17.6 to the lobbyist if the OIC concludes that the lobbyist has violated the *LRA*. The core provisions of the *LRA*, and the OIC's role and functions as registrar under the *LRA*, all have the clear and direct purposes of requiring transparency and integrity in lobbying, and of holding lobbyists accountable for failing to register and disclose their lobbying and for failing to lobby in an ethical manner.

53. A purposive, fair, large and liberal interpretation of these provisions that aligns with the objects of the *LRA* point to the inescapable conclusion that the OIC cannot exercise the ss. 17.1(3) power to cease an investigation when the OIC finds that a lobbyist has committed a significant, recent or ongoing violation of the *LRA*. Instead, the OIC is required to issue the notice under s. 17.5 and, after giving the lobbyist an opportunity to respond, to issue the notice under s. 17.6.

54. As a result, while the Letter claims that the OIC did not issue the s. 17.5 and 17.6 notices to the lobbyists involved in the situations that resulted in decisions 5, 14 and 20, and the Report and the Letter claim that he "ceased" those three investigations, all of the evidence on the record concerning the situations point to the clear conclusion that the OIC was required to issue the s. 17.5 and 17.6 notices in those three decisions, just as the OIC did in decisions 13, 17 and 23.

55. Therefore, the OIC's characterization of decisions 5, 14 and 20 as decisions to "cease" the investigation should not be accepted. Much like decisions 13, 17 and 23, the OIC clearly completed the investigation in each of the three situations; concluded under s. 17.5 and 17.6 that each lobbyist had violated the *LRA*; and made a subsequent final decision under s. 17.6 and 17.9 not to penalize each lobbyist for the violation.

(iii) The OIC exercised statutory powers of decision in all nine decisions

57. In assessing the claims made in the Letter that the OIC did not complete investigations or issue final decisions in six of the nine situations at issue in the present applications, this Honourable Court should also take into account that:

    i. the claims are being made in correspondence between counsel, not in an affidavit from the OIC;

    ii. the Letter only provides very basic information about each decision, and no evidence or details are provided to prove any of the claims made in the Letter;

    iii. the information in the Letter is being disclosed after the nine final, post-investigation decisions of the OIC have been made and publicly summarized in the Report;

    iv. several of the claims in the Letter conflict with the wording of the nine decisions in the Report;

    v. the Letter has been filed in response to applications for judicial review of those decisions, and;

    vi. the Letter has been filed in the context of the OIC refusing to disclose any details about his nine decisions, and in the context of the fact that the OIC disclosed nothing in his Report concerning how he made 335 other *LRA* enforcement decisions during the 2019–20 fiscal year (including how the OIC decided that the lobbyist(s) involved in any of those 335 situations had not violated the *LRA*).

58. All of the evidence on the record, including the OIC's own summaries in the Report, show clearly that the OIC (i) initiated an investigation under s. 17.1 of the *LRA* of a lobbyist's

actions in all nine situations; (ii) after investigating, ***found*** under s. 17.5 that the lobbyist's legal rights and/or duties under the *LRA* either permitted or prohibited the lobbyist's actions; (iii) made a subsequent decision under s. 17.6 and 17.9 concerning penalizing the lobbyist; and (iv) communicated his finding(s) to the lobbyist. In doing so, the OIC clearly exercised his statutory powers of decision in each of the nine situations.

59. For all of the aforesaid reasons, it is obvious that the OIC exercised a statutory power of decision as defined in the *JRPA* in each of the nine decisions at issue in this judicial review. The OIC must comply with s. 10 of the *JRPA* by filing with the Court the records of proceedings for each of the nine decisions.

B. The Respondent can be compelled under the *LRA* to produce a record of each decision

60. In the alternative, under ss. 17.10(3)(b) of the *LRA*, the OIC can be compelled to produce a record of proceeding "in an application for judicial review of a finding of or penalty imposed by the registrar"; ss. 17.10(3)(b) does not prohibit anyone from filing an application for judicial review, nor does it specify what exactly is a "finding" of the OIC in his role as registrar.

61. The OIC issues a "finding of non-compliance" under ss. 17.6(1)(a) of the *LRA*; s. 17.7 permits the lobbyist who is the subject of a "finding" to request that the OIC reconsider the finding; and s. 17.8 permits the lobbyist to file an application for judicial review of the finding. However, much like ss. 17.10(3)(b), none of these provisions preclude anyone from filing an application for judicial review of any finding by the OIC.

62. The nine applications at issue are each an application for judicial review of a finding of the OIC in his role as registrar under the *LRA*. For all the reasons set out in Section A of this factum, it is clear that the OIC made a finding or findings in each of the nine decisions at issue in these applications.

63. For this reason, this Honourable Court should conclude that the Respondent OIC made a finding or findings in each of the nine decisions at issue in the present applications and, if this Honourable Court decides that the Applicant has standing to proceed with the nine present applications for judicial review, should order the OIC under ss. 17.10(3)(b) of the *LRA* to file in the Court the records of proceedings for each of the nine decisions.

C. <u>The Respondent can produce a record of proceedings for each of the nine decisions at issue without violating the confidentiality provisions of the *LRA*</u>

64. 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 s. 17(4) of the *LRA*, the OIC is only allowed to make the name of the lobbyist public if he finds the lobbyist in violation of the *LRA* and decides to penalize the lobbyist by making his/her name public.

65. Taking these provisions into account, the Applicant submits that, if this Honourable Court orders the OIC to file records of proceedings in all or any of the nine decisions at issue, the order should require the OIC to file a record that contains all the information concerning each of the OIC's investigations except information that would identify the lobbyist. This

would allow for full disclosure by the OIC that is reasonable and proportionate in the circumstances.

66. The only information that could identify a lobbyist is their name and address/contact information. Their lobbying firm's name and contact information (if they work for a firm) can be disclosed because it would remain unknown which lobbyist at the firm was the subject of the investigation. Information about which public office holders and government departments the lobbyist was lobbying could also be disclosed; so too could the issues that were the focus of their lobbying because, for most issues, there are many lobbyists lobbying the same office holders and government departments. As a result, disclosing all of this information would not allow anyone to identify the lobbyist.

67. Accordingly, ordering that records of proceeding be filed in which only the lobbyists' names and address/contact information are redacted strikes the appropriate balance between the disclosure required under the *JRPA* and the OIC's confidentiality obligations under the *LRA*.

PART IV: ORDER REQUESTED

68. 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; and

    ii. Such further and other relief as tis Honourable Court may deem just.

ALL OF WHICHIS RESPECTFULLY SUBMITTED

THIS 24th DAY OF MAY, 2021

Nick Papageorge
OF COUNSEL 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: May 24, 2021

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SCHEDULE "A"
LIST OF AUTHORITIES

1. *Oakville (Town) v. Clublink Corporation ULC*, 2019 ONCA 826
2. *Peel (Police) v. Ontario (Special Investigations Unit)*, 2012 ONCA 292
3. *Endicott v. Ontario (Independent Police Review Office)*, 2014 ONCA 363
4. *PC Ontario Fund v. Essensa*, 2011 ONSC 2641
5. *PC Ontario Fund v. Essensa*, 2012 ONCA 453

SCHEDULE "B"
TEXT OF RELEVANT STATUTES AND REGULATORY AUTHORITIES

***Interpretation Act*, R.S.O. 1990, c. I.11, s. 10**
All Acts remedial **10.** Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of any thing that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit. R.S.O. 1990, c. I.11, s. 10

***Legislation Act, 2006*, S.O. 2006, c. 21, Sched. F, s. 64(1)**
Rule of liberal interpretation **64** (1) An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects. 2006, c. 21, Sched. F, s. 64 (1).

***Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, s. 10**
Record to be filed in court **10** When notice of an application for judicial review of a decision made in the exercise or purported exercise of a statutory power of decision has been served on the person making the decision, such person shall forthwith file in the court for use on the application the record of the proceedings in which the decision was made. R.S.O. 1990, c. J.1, s. 10.

***Lobbyists Registration Act, 1998*, S.O. 1998, c. 27, Sched., s. 3.4, 4(1), 17.1–17.10 and 17.2**

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.

Duty to file return, consultant lobbyists

4 (1) A consultant lobbyist shall file a return with the registrar not later than 10 days after commencing performance of an undertaking. 1998, c. 27, Sched., s. 4 (1).

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.

Reconsideration of registrar's finding

17.7 (1) Within 15 days after receiving notice of the registrar's finding under subsection 17.6 (1), the person against whom the finding is made may request that the registrar reconsider the finding or the penalty imposed, or both. 2014, c. 13, Sched. 8, s. 13.

Same

(2) A request for reconsideration must be in writing and must identify the grounds on which the reconsideration is requested. 2014, c. 13, Sched. 8, s. 13.

Same

(3) If a person requests reconsideration of the registrar's finding or of the penalty imposed, or both, the registrar shall reconsider his or her finding or the penalty imposed, or both, and give the person a notice of his or her decision. 2014, c. 13, Sched. 8, s. 13.

Same

(4) 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.