Court File No. 390/22

ONTARIO

SUPERIOR COURT OF JUSTICE

(Toronto Divisional Court)

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

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

B E T W E E N :

DEMOCRACY WATCH

Applicant

- and -

ONTARIO INTEGRITY COMMISSIONER

Respondent

NOTICE OF APPLICATION TO DIVISIONAL COURT FOR JUDICIAL REVIEW

TO THE RESPONDENT:

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

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

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

it on the applicant, and file it, with proof of service, in the office of the Divisional Court, and you or your lawyer must appear at the hearing.

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

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

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

Date: July 12, 2022

Issued by _____
Registrar

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

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

AND TO: **ATTORNEY GENERAL OF ONTARIO**
Crown Law Office – Civil
720 Bay Street, 8th Floor
Toronto, ON M7A 2S9

APPLICATION

1. The Applicant makes application for:

a. An Order in the nature of *certiorari*, quashing the "Issue: Failure to register and placing public office holders in a conflict of interest" decision (the "Decision") of the Ontario Integrity Commissioner (the "Commissioner") on page 57 of the Commissioner's 2021-2022 Annual Report;

b. In the alternative to (a), an Order in the nature of *certiorari*, quashing the Commissioner's Decision and remitting the matter back to the Commissioner in accordance with the Directions of this Court;

c. An Order granting public interest standing to the Applicant, if required; and

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

2. The grounds for the application are:

A. Legislative Context

a. The *Members Integrity Act*, S.O. 1994, c. 38 (the "*MIA*"), s. 23, provides for the appointment of an Integrity Commissioner. Ontario's Office of the Integrity Commissioner, which is independent of the Government of Ontario, was established to maintain high standards of ethical conduct in the Ontario Public Service.

b. Under ss. 1(1) and s. 10 of the *Lobbyists Registration Act, 1998*, S.O. 1998, c. 27, Sched. (the "*LRA*"), the Integrity Commissioner is designated as the Registrar for lobbyists who lobby provincial public office holders. Under ss. 1(1) of the *LRA*, "Public officer holder" is defined as a minister, officer or employee of the Crown; a member of the Legislative Assembly ("MPPs") and their staff; an appointee of the Crown other than judges and justices of the peace; an officer, director or

employee of any agency, board or commission of the Crown; and members of the Ontario Provincial Police ("OPP").

c. Individuals, partnerships and organizations who meet the conditions specified in the *LRA* and its regulations are required to register and disclose their lobbying accurately in the Registry maintained by the Registrar under s. 11 of the *LRA*.

d. The requirements for individuals to register as a "consultant lobbyist" and disclose their lobbying activities are set out in s. 4 of the *LRA*, with reference to the definitions of "client" and "consultant lobbyist" and "lobby" and "payment" in ss. 1(1) of the *LRA*.

e. These requirements essentially cover people who are paid by clients to communicate "in an attempt to influence" with a public office holder or to arrange a meeting with a public office holder. A consultant lobbyist must register within 10 days after "commencing a performance of an undertaking" to lobby.

f. The requirements for a person (including a corporation) or a partnership to register their lobbying activities are set out in s. 5 of the *LRA*, with reference to the definitions of "lobby" in ss. 1(1) of the *LRA*. Essentially, the senior officer is required to register the corporation or partnership if its directors, employees, and compensated board officers (i.e. in-house lobbyists) communicate "in an attempt to influence" a public office holder individually or collectively for more than 50 hours in a year.

g. The senior officer is required to register within two months after the 50-hour threshold has been reached, and to list all in-house lobbyists in the registration and their current and prospective lobbying activities; to update the registration within 30 days if any changes in lobbying activities occur; and to update the registration every six months after the first registration within 30 days after the six-month period has commenced.

h. The requirements for an organization to register its lobbying activities are set out in s. 6 of the *LRA*, with reference to the definitions of "lobby" and "organization" in ss. 1(1) of the *LRA*. The requirements are essentially the same as those summarized above for corporations and partnerships under s. 5 of the *LRA*.

i. Under ss. 3.4(1)–(2) of the *LRA*, a registered lobbyist, whether consultant or in-house, is prohibited from lobbying a public office holder if the lobbyist's lobbying would "knowingly place the public office holder in a position of real or potential conflict of interest".

j. The office holder's position of "conflict of interest" is defined in ss. 3.4(3)–(4) of the *LRA* as when the office holder "engages in an activity that is prohibited by section 2, 3 or 4 or subsection 6(1)" of the *MIA*. Pursuant to these provisions, office holders are prohibited from making or participating in (s. 2) or attempting to influence (s. 4) a decision, or using or communicating insider information (s. 3), when the office holder "knows or should reasonably know" doing these things is an opportunity "to further the member's private interest or improperly to further another person's private interest" (all three sections).

k. Under ss. 6(1) of the *MIA*, a public office holder "shall not accept a fee, gift or personal benefit that is connected directly or indirectly with the performance of his or her duties of office."

l. The Commissioner's enforcement regime in his role as Registrar for provincial lobbyists is set out in s. 17.1–17.12 of the *LRA*. The Commissioner may investigate within two years of becoming aware of a violation and can stop an investigation for various reasons (s. 17.1) and the *Statutory Powers and Procedures Act*, R.S.O. 1990, c. S.22 does not apply to investigations (s. 17.11). The Commissioner can refer a matter to be investigated to the OPP (s. 17.2); the Commissioner may suspend an investigation if criminal charges have been laid and then re-commence the investigation after the criminal trial has concluded (s. 17.3).

m. The Commissioner has powers to require disclosure of evidence during an investigation (s. 17.4), and must give written notice and an opportunity to be heard to anyone the Commissioner concludes has violated the law (s. 17.5) as well as an opportunity for such persons to seek re-consideration by the Commissioner and/or to apply to court for judicial review (s. 17.6–17.8).

n. The Commissioner may penalize a lobbyist for a violation, taking into account the public interest and "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 [the *LRA*]", but may not disclose the investigation, ruling or penalty publicly until the time for applying for judicial review of the ruling has passed (s. 17.9–17.10).

o. The Commissioner's rulings on "each investigation concluded" are required to be disclosed in the Commissioner's Annual Report (s. 17.12).

p. The Commissioner may impose a penalty for non-compliance of: (i) a prohibition on "lobbying for a period of not more than two years"; and/or (ii) publication, including in the Registry, of the lobbyist's name, a description of the non-compliance, and any other information the Commissioner "considers necessary to explain the finding of non-compliance" (s. 17.9).

B. The Integrity Commissioner's Decision at Issue in this Application

a. In June 2022, the Commissioner issued the Commissioner's Annual Report for fiscal year 2021–22 (the "Report"). The four-paragraph Decision at issue in this proceeding is the "Issue: Failure to register and placing public office holders in a conflict of interest" decision on page 57 of the Report.

b. The situation the Decision addresses involved a lobbyist who "held a senior and strategic role on a political campaign for a candidate" and then, after being hired as a consultant lobbyist by several private-sector clients, lobbied the politician soon after they were elected to office—which the Commissioner found was "contrary to

the conflict of interest restrictions in the" *LRA* (ss. 3.4(1)). The Commissioner also found that, after his lobbying activities changed, the lobbyist did not update several registrations within 30 days as required by the *LRA*.

c. The Commissioner explicitly concluded that the multiple violations of the *LRA* "weighed in favour of imposing a penalty"—but the Commissioner then did not impose any penalty because the lobbyist "did not have any previous incident of non-compliance and that a penalty was not required to protect the public interest."

C. The Commissioner's Decision is Unreasonable

a. The Commissioner's Decision is unreasonable in its own right, but it is all the more so when considered in light of the Commissioner's prior determinations in highly analogous situations to impose the penalty of naming the relevant lobbyists.

b. The Decision fails to accord with the principle that consistency in penalization is required—as is fulfilling the values underlying the Commissioner's grant of discretion under the *LRA*. It appears the Commissioner unreasonably gave no consideration whatsoever to previous penalties, the importance of consistency, and the *LRA*'s main mandate of requiring transparent and ethical lobbying.

c. In the Commissioner's Annual Report for fiscal year 2018–19, the Commissioner published three rulings, each concerning a lobbyist the Commissioner found had violated the *LRA* by failing to register their lobbying. The Commissioner imposed the penalty of publication of the lobbyist's name on the Compliance and Penalties page of the Commissioner's website, along with a brief description of the non-compliance.

d. In the first of the three rulings in 2018–19 (on page 55), the lobbyist failed to register for 274 days, and there is nothing in the decision that indicates the Commissioner considered any mitigating factors. (However, in publication of the lobbyist's name on the Commissioner's website, the Commissioner stated that the

lobbyist "co-operated fully with the investigation and had no previous incidents of non-compliance or convictions.")

e. In the second ruling (page 55–56), the lobbyist failed to register for 687 days but the Commissioner considered many mitigating factors, including the "lobbyist's cooperation with the investigation and that the non-compliance was not intentional".

f. In the third ruling (page 56), the lobbyist failed to register for 822 days but the Commissioner "considered that the delay was inadvertent, that the lobbyist had come forward to file a registration, that he was remorseful, had changed his office's registration practices to ensure future compliance and that he had no previous history of non-compliance."

g. In the Commissioner's Annual Report for fiscal year 2019–20, on page 50, is a decision entitled "Issue: Failure to register". In that ruling, the Commissioner found that a consultant lobbyist had lobbied public office holders for 395 days without registering as required under the *LRA*. The Commissioner also found

> that the non-compliance was significant and contrary to the public interest, but he also observed that the failure to register was inadvertent and that the lobbyist did not have a history of non-compliance. Considering these mitigating factors, the Commissioner confined the penalty to the publication of the lobbyist's name and a brief description of the non-compliance.

h. In the Commissioner's Annual Report for fiscal year 2020–21, on page 50, is a decision entitled "Issue: Failure to register and failure to provide information in a registration". In that ruling, the Commissioner found that a consultant lobbyist had lobbied public office holders for "approximately six months" without registering as required under the *LRA* and had failed to provide required information in other registration, even when requested by the Commissioner. The Commissioner also found that the lobbyist "had no previous incidents of non-compliance with the Act and the investigation arose because he attempted to comply with the Act. In

addition, the lobbyist had implemented new systems in his office to ensure future compliance with the Act."

i. As a result of each aforesaid serious violations of the *LRA*, the Commissioner imposed the penalty of publishing the lobbyists' names (Amara Possian, Marc Kealey, and Michael McCarthy in 2018–19; Lawrence Gold in 2019–20; and Amir Farahi in 2020–21) on the "Compliance and Penalties" page of the Commissioner's website and in the Registry.

j. In July 2016, the Commissioner published *A Guide to the Lobbyists Registration Act*, which is available on the Commissioner's website alongside Interpretation Bulletins concerning requirements to register lobbying that have been available on the website since 2011. All of these publications state that lobbyists should always contact the Commissioner's office to obtain advice concerning whether their activities require registration or otherwise comply with the *LRA*.

k. In the Decision at issue in this proceeding, the Commissioner decided not to impose any penalty—not even publication of the lobbyist's name—even though the lobbyist violated the *LRA* multiple times and the mitigating factors were similar to those considered in the penalty decision from 2019–20 and the three penalty decisions from 2018–19.

l. The Commissioner's Decision was an unreasonable exercise of the Commissioner's discretion concerning imposing penalties under s. 17.9 of the *LRA*; it fails to accord with the principles of that there should be consistency in penalization and that discretion must be exercised in a manner that fulfills the values underlying the grant of discretion.

m. It is unreasonable for the Commissioner to impose the penalty of publicly identifying some lobbyists for their serious non-compliance and then decide not to impose any penalty on other lobbyists for the same serious non-compliance, especially given that the mitigating factors were also the same or highly similar.

n. According to statistics on pages 56 of the Commissioner's Report, the Commissioner undertook 206 Compliance Reviews in 2021–22, closed 56 of those reviews at the initial stage, and resolved 128 reviews through an informal process.

o. No other information is provided in the Report about the Commissioner's decisions to close 56 reviews at the initial stage or resolve 128 reviews through informal processes. The Commissioner only concluded his investigation and issued a public decision in six of the 206 situations that were reviewed, resulting in the five decisions published in the Report (one of the decisions covered the activities of a lobbyist involved in two situations). In addition, according to information on page 50 of the Report, the Commissioner issued 65 Advisory Opinions during the 2021–22 fiscal year.

p. As a result, the public has no information concerning how and why the Commissioner made 265 of the 271 *LRA* enforcement decisions during the 2021–22 fiscal year.

q. The Integrity Commissioner exercises quasi-judicial functions, including conducting investigations, ascertaining the existence of facts, and drawing legal conclusions with respect to compliance with the *LRA* and the *MIA*.

r. Transparency of quasi-judicial processes is a quasi-constitutional principle.

s. A core tenet of democracy is that public officials must be held accountable to the public for their conduct in the course of exercising their duties.

t. Discretion conferred by statute must be exercised in a manner accords with a reasonable interpretation of the legislature's intent, in accordance with the principles of the rule of law, and in compliance with the *Canadian Charter of Rights and Freedoms*.

D. Public Interest Standing

a. The Applicant is a national non-profit, non-partisan organization that has long advocated for democratic reform, government accountability, and corporate responsibility.

b. The Applicant should be granted public interest standing, if necessary, because:

   i. Ensuring the transparency and accountability of quasi-judicial tribunals that enforce laws designed to uphold the constitutional principles of democracy and the rule of law, and ensuring that lobbyists are transparent and ethical in their relationships with public officials, are serious issues that are fundamental to government integrity;

   ii. The Commissioner's final decision in this matter is justiciable, and it is reviewable by this Honourable Court;

   iii. The Applicant has a genuine interest and real stake in this issue; and

   iv. In all the circumstances, this application is a reasonable and effective means to bring the issue before the courts.

c. The Applicant does not seek costs of this application, and requests that costs not be awarded against it.

E. Statutory and Other Reliance

a. Sections 2, 5, 6(1) and 9(2) of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1.

b. Rules 1.04, 2.03, 3.02, 6, 14.05, 38, and 68 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

c. Sections 1, 3, 3.4, 4–6, and 17.1–17.12 of the *Lobbyists Registration Act, 1998*, S.O. 1998, c. 27, Sched.;

d. Such further and other grounds as counsel may advise and this Honourable Court may permit.

3. **The following documentary evidence will be used at the hearing of the application:**

   a. The Affidavit of Duff Conacher, to be sworn, and the exhibits thereto; and

   b. Such further and other evidence as counsel may advise and this Honourable Court may permit.

Date: July 12, 2022

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