

Court File No.

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 26, 2020.

B E T W E E N :

DEMOCRACY WATCH

Applicant

- and -

ONTARIO INTEGRITY COMMISSIONER

Respondent

NOTICE OF APPLICATION TO DIVISIONAL COURT FOR JUDICIAL REVIEW

TO THE RESPONDENT:

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

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

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

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

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

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

Date: _____

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

APPLICATION

1. The Applicant makes application for:

- a. An Order in the nature of *certiorari*, quashing the second “Issue: Late to register” decision (the “Decision”) of the Ontario Integrity Commissioner (the “Commissioner”) on page 51 of the Commissioner’s 2019–20 Annual Report;
- b. In the alternative to (a), an Order in the nature of *certiorari*, quashing the Commissioner’s Decision and remitting the matter back to the Commissioner in accordance with the Directions of this Court;
- c. An Order granting public interest standing to the Applicant, if required;
- d. An Order consolidating this Application with the other six Applications challenging decisions of the Commissioner that have been filed concurrently with this Application; and
- e. Such further and other relief as this Honourable Court may deem just.

2. The grounds for the application are:

A. Legislative Context

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

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

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

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

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

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

- j. The Commissioner may penalize a lobbyist for a violation, taking into account 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 (sections 17.9 and 17.10). The Commissioner’s rulings on fully completed investigations are required to be disclosed in the Commissioner’s Annual Report (section 17.12).
- k. The Commissioner may impose a penalty for non-compliance of: 1. a prohibition on “lobbying for a period of not more than two years” and/or 2. 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” (section 17.9).

B. The Integrity Commissioner’s Decision

- a. On June 26, 2020, the Integrity Commissioner issued the Commissioner’s Annual Report for fiscal year 2019–20. The one-paragraph Decision at issue in this proceeding is the second “Issue: Late to register” decision on page 51 of the Annual Report.
- b. The situation the Decision addresses involved a lobbyist who failed to register her lobbying for a client for a number of years. The Commissioner did not impose any penalty because he found that the non-compliance was inadvertent because the lobbyist thought her client had registered her as an in-house lobbyist, and the lobbyist addressed the non-compliance quickly by registering when notified by the Commissioner of the requirement to do so, and the lobbyist cooperated fully with the investigation.

C. Applicant's Legal Position

- a. In the Commissioner's Annual Report for fiscal year 2018-2019, the Commissioner published three rulings, each concerning a lobbyist the Commissioner found violated the *LRA* by failing to register their lobbying ("three Public Penalty Decisions 2018-2019"). 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.
- b. In the first of the three rulings (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 "co-operated fully with the investigation and had no previous incidents of non-compliance or convictions." 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". 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."
- c. In the Commissioner's Annual Report for fiscal year 2019–20, on page 50, is a decision entitled "Issue: Failure to register" ("Public Penalty Decision 2019-2020"). 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."

- d. While the Commissioner did not impose a prohibition on lobbying of any length of time as a penalty for the serious violations of the LRA by these four lobbyists, he did publish the lobbyists' names (2018-2019: Amara Possian; Marc Kealey; Michael McCarthy; 2019-2020: Lawrence Gold) on the "Compliance and Penalties" page of the Commissioner's website, and in the Registry. Mr. Gold was the only lobbyist penalized by the Commissioner in 2019-2020, even though the Commissioner found nine lobbyists in violation of the *LRA*.
- e. *A Guide to the Lobbyists Registration Act* which was published by the Commissioner in July 2016 and is available on the Commissioner's website, along with other Interpretation Bulletins concerning requirements to register lobbying which have been available on the Commissioner's website since 2011, all 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*.
- f. Unlike in the Public Penalty Decision 2019-2020, and in the three Public Penalty Decisions 2018-2019, 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* for years and the mitigating factors were similar to those in the Public Penalty Decision 2019-2020 and the three Public Penalty Decisions 2018-2019.
- g. The Commissioner's Decision was an unreasonable exercise of the Commissioner's discretion concerning imposing penalties under section 17.9 of the *LRA*. 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 their serious non-compliance, especially given that the mitigating factors are also similar.
- h. According to statistics on pages 49–50 of the Commissioner's Annual Report, the Commissioner undertook 251 Compliance Reviews in 2019–20, closing 55 of those reviews at the initial stage and resolving 167 reviews through an informal process,

presumably based on the Commissioner's interpretations of various provisions of the *LRA* and its regulations, including the information in the Commissioner's statements in the *Guidance* and *Bulletin*.

- i. No other information is provided in the Annual Report about the Commissioner's decisions to close 55 reviews at the initial stage or resolve 167 reviews through informal processes. The Commissioner only fully investigated and issued a public decision on 29 of the 251 situations that were reviewed, resulting in the 24 decisions published in the Annual Report (some of the decisions covered the activities of more than one lobbyist).
- j. In addition, according to information on page 45 of the Commissioner's Annual Report, the Commissioner issued 84 Advisory Opinions during the 2019–20 fiscal year, also presumably based on the Commissioner's interpretations of the *LRA* and its regulations, including the Commissioner's statements in the *Guidance* and *Bulletin*.
- k. As a result, the public has no information concerning how and why the Commissioner made 335 *LRA* enforcement decisions during the 2019–20 fiscal year, including whether the Commissioner decided in any of those 335 situations that the Commissioner reviewed to conclude that the lobbyist had not violated section 3.4 of the *LRA*.
- l. The Integrity Commissioner exercises quasi-judicial functions, including conducting investigations, ascertaining the existence of facts, and drawing legal conclusions with respect to compliance with the *LRA* and the *MIA*.
- m. When the Commissioner rendered the Decision, the Commissioner was in the final months of his first five-year term, and knew that he could be approved for a second five-year term appointment under sections 23 and 23.1 of the *MIA* only if MPPs in the Legislative Assembly agreed unanimously to re-appoint him.
- n. The Commissioner, therefore, had an incentive to decide to find all lobbyists innocent who were alleged to have violated the *LRA* if they were affiliated in any

way with ministers, party leaders or MPPs from any party, including being a supporter of any elected official. If the Commissioner ruled that the lobbyists violated the *LRA*, ministers, party leaders and MPPs may not agree to his re-appointment.

- o. As a result of this structural aspect of the Commissioner's position, offering to the Commissioner the possibility of re-appointment, with the offer conditional on the unanimous approval of the office holders whose decisions and actions the Commissioner oversees, there was a reasonable apprehension of bias on the part of the Commissioner when he rendered the Decision.
- p. Transparency of quasi-judicial processes is a quasi-constitutional principle.
- q. A core tenet of democracy is that public officials must be held accountable to the public for their conduct in the course of exercising their duties.
- r. Discretion conferred by statute must be exercised in a manner that is within a reasonable interpretation of the legislature's intent, in accordance with the principles of the rule of law, and in compliance with the *Canadian Charter of Rights and Freedoms*.

D. Public Interest Standing

- a. The Applicant is a national non-profit, non-partisan organization, which advocates for democratic reform, government accountability, and corporate responsibility.
- b. The Applicant should be granted public interest standing, if necessary, because:
 - i. Ensuring the transparency and accountability of quasi-judicial processes, and the accountability of lobbyists in their relationships with public officials, are serious issues;
 - ii. The Applicant has a genuine interest and real stake in this issue; and
 - iii. 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, 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: December 23, 2020

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For the Applicant Democracy Watch