

INVESTIGATION REPORT 15-13

LOBBYIST: Dave Kennedy

December 23, 2015

SUMMARY: A consultant lobbyist filed a return to register as a lobbyist on behalf of a client after the deadline required by the *Lobbyists Registration Act* (“LRA”). The lobbyist was found to be in contravention of section 3(1) of the LRA and an administrative penalty of \$700 was imposed. The lobbyist also entered an inaccurate undertaking start date into his return, contrary to s. 4(1) of the LRA and certified under s. 5(1) of the LRA that the information was true. An administrative penalty was not imposed for this contravention.

Statutes Considered: *Lobbyists Registration Act*, S.B.C. 2001, c. 42.

INTRODUCTION

[1] This report concerns an investigation commenced under s. 7.1 of the LRA. This section gives the Registrar of Lobbyists (“Registrar”) the authority to conduct an investigation to determine whether there is or has been compliance by any person with the LRA or its regulations. If, after an investigation under s. 7.1, the Registrar or her delegate believes that the person under investigation has not complied with a provision of the LRA or its regulations, s. 7.2 of the LRA requires her to give notice of the alleged contravention and the reasons for her belief that the contravention has occurred. Prior to making a determination under s. 7.2(2), the Registrar must, under s. 7.2(1)(b), give the person under investigation a reasonable opportunity to be heard respecting the alleged contravention.

[2] The LRA recognizes two types of lobbyists. This report focuses on “consultant lobbyists,” individuals who undertake to lobby for payment on behalf of a client.

[3] This report and determination are issued under the authority delegated to me by the Registrar under s. 7(4)(d) of the LRA.

ISSUES UNDER CONSIDERATION

[4] The questions for consideration are:

- (a) whether the lobbyist, who registered an undertaking under Registration ID 23820463 to lobby as a consultant on behalf of TransCanada Pipelines Ltd. (“TransCanada”), complied with s. 3(1) of the LRA,

- (b) whether the lobbyist entered inaccurate information into his return contrary to s. 4(1)(b) of the LRA; and
- (c) if the lobbyist did not comply with the requirements of the LRA, what, if any, administrative penalty is appropriate under the circumstances?

RELEVANT SECTIONS OF THE LRA

"client" means a person or organization on whose behalf a consultant lobbyist undertakes to lobby;

"consultant lobbyist" means an individual who, for payment, undertakes to lobby on behalf of a client;

"lobby" subject to section 2 (2), means,

- (a) in relation to a lobbyist, to communicate with a public office holder in an attempt to influence
 - (i) the development of any legislative proposal by the government of British Columbia, a Provincial entity or a member of the Legislative Assembly,
 - (ii) the introduction, amendment, passage or defeat of any Bill or resolution in or before the Legislative Assembly,
 - (iii) the development or enactment of any regulation, including the enactment of a regulation for the purposes of amending or repealing a regulation,
 - (iv) the development, establishment, amendment or termination of any program, policy, directive or guideline of the government of British Columbia or a Provincial entity,
 - (v) the awarding, amendment or termination of any contract, grant or financial benefit by or on behalf of the government of British Columbia or a Provincial entity,
 - (vi) a decision by the Executive Council or a member of the Executive Council to transfer from the Crown for consideration all or part of, or any interest in or asset of, any business, enterprise or institution that provides goods or services to the Crown, a Provincial entity or the public, or
 - (vii) a decision by the Executive Council or a member of the Executive Council to have the private sector instead of the Crown provide goods or services to the government of British Columbia or a Provincial entity,
- (b) in relation to a consultant lobbyist only, to arrange a meeting between a public office holder and any other individual

"undertaking" means an undertaking by a consultant lobbyist to lobby on behalf of a client, but does not include an undertaking by an employee to do anything...

Requirement to file return

3(1) Within 10 days after entering into an undertaking to lobby on behalf of a client, a consultant lobbyist must file with the registrar a return in the prescribed form and containing the information required by section 4.

Form and content of return

4(1) Each return filed under section 3 must include the following information, as applicable:

(b) if the return is filed by a consultant lobbyist,...

(ii) the date on which the undertaking with the client was entered into and is scheduled to terminate,

Certification of documents and date of receipt

5(1) An individual who submits a document, including a return, to the registrar under this Act must certify,

(a) on the document, or

(b) in the manner specified by the registrar, if the document is submitted in electronic or other form under section 6,

that, to the best of the individual's knowledge and belief, the information contained in the document is true.

BACKGROUND

[5] On May 31, 2015, the lobbyist registered with the Office of the Registrar of Lobbyists (“ORL”) as a consultant lobbyist for TransCanada Pipelines Ltd. under Registration ID 23820463. The undertaking start date in the return filed by the lobbyist was April 1, 2015.

[6] The ORL received an automatic system alert that the registration filed by the lobbyist appeared to contravene the required timelines stipulated in the LRA. Section 3(1) of the LRA requires a consultant lobbyist to file a return within 10 days after entering into an undertaking to lobby on behalf of a client.

INVESTIGATION

[7] The ORL commenced an investigation under s. 7.1 of the LRA to determine whether the lobbyist had complied with s. 3(1) of the LRA.

[8] In a letter to the lobbyist dated June 3, 2015, ORL staff asked the lobbyist to explain in writing the discrepancy between the timelines for registration in the LRA and the date on which he completed and submitted his registration. The lobbyist was also asked to provide details of any meetings with public office holders and a copy of any written agreement between the lobbyist and his client.

[9] The lobbyist responded on June 16, 2015 and provided two written agreements. He advised that he was “first contracted as a consultant lobbyist for TransCanada Pipelines Ltd. pursuant to a Work Authorization for a term from May 15, 2012 to August 31, 2012.” The lobbyist also stated that he entered into a new contract “on behalf of TransCanada for lobbying work on November 27, 2012 for an initial term of December 1, 2012 to December 31, 2013.” The agreements provided by the lobbyist confirmed these details. The later contract was extended until December 31, 2015.

[10] The lobbyist explained that TransCanada had entered him as an in-house lobbyist on their registrations for the period of November 2012 until March 2015. After TransCanada’s registration expired, the lobbyist was asked by his client to “register individually as a consultant lobbyist.”

[11] On October 14, 2015 I sent, pursuant to s. 7.2(1) of the LRA, a notice to the lobbyist setting out the basis for the allegation that the lobbyist had not complied with s. 3(1) for failing to file within the timeline as stipulated in the LRA and s. 4(1) for providing an incorrect undertaking start date. The lobbyist was given an opportunity to correct the undertaking start date if he believed it was inaccurate. The lobbyist updated the undertaking start date to November 27, 2012 to reflect his undertaking with his client.

[12] The lobbyist responded to the s. 7.2(1) LRA notice on November 3, 2015. The lobbyist explained that he did file his registration “more than 10 days after the expiry of my previous TransCanada registration on April 14, 2015.” The lobbyist believes his registration should be considered to be only six weeks late rather than two and a half years as his client had included him as an in-house lobbyist on their registrations and had reported his lobbying activities. Therefore, he believes that his “registrations in the in-house lobbyist category complied with the spirit of the LRA” and did not undermine the transparency of the Registry.

DISCUSSION

[13] The lobbyist is correct in his assertion that some broad public searches bring up his name and lobbying activities. However, if the public were to search the ORL registry for consultant lobbyists who had an undertaking to lobby on behalf of TransCanada, his lobbying activities would not be identified. Furthermore, having the client include the lobbyist in their registration does not negate the fact that the lobbyist himself was required to register as a consultant lobbyist within 10 days of his undertaking to lobby, as per s. 3(1) of the LRA.

FINDING

[14] Based on the evidence, I find that the lobbyist did not comply with s. 3(1) of the LRA when he failed to file a return within 10 days after entering into an undertaking to lobby on behalf of a client. The lobbyist was also in contravention of s. 4(1) for filing an incorrect undertaking start date.

ADMINISTRATIVE PENALTY

[15] Section 7.2(2) of the LRA provides that if, after giving a person under investigation a reasonable opportunity to be heard respecting an alleged contravention, the Registrar determines that the person has not complied with a prescribed provision of this Act or the regulations, the Registrar must inform the person of the Registrar's determination that there has been a contravention and may impose an administrative penalty of not more than \$25,000. Such person must be given notice of the contravention determination and, if a penalty is imposed, "the amount, the reason for the amount and the date by which the penalty must be paid" (LRA s. 7.2(2)(c)(ii)).

[16] Section 7.2 of the LRA confers a broad discretion on the Registrar to impose administrative penalties. To provide a measure of structure in the exercise of that discretion, the Office has published "Policies and Procedures" (the "Policy"), whose purpose is to advise members of the public and those engaged in lobbying about what will guide the ORL in exercising its duties under the LRA and the regulations. As the Policy document makes clear, its purpose is to structure discretion. It does not fetter discretion. It is not law. I have approached the Policy as a document intended to provide a principled guide to the exercise of my discretion to determine a penalty.

[17] The Policy document seeks to operate in a principled fashion by setting out firstly, a general financial range for particular infractions (depending on whether it is a first, second or third infraction of that nature), secondly, a list of factors that will be taken into account in determining the amount of the administrative penalty and, finally a clear statement that the Policy "does not fetter the ORL's ability to conclude that no administrative penalty is appropriate in the circumstances, or to fashion a remedy on either side of the range set out in the general policy, in special circumstances."

[18] I should state at the outset that I have considered and rejected the view that this might be a case where "no penalty" is appropriate. The current LRA provisions have now been in place for five years. The lobbyist should be aware of his obligations under the LRA. The contravention in this case is clear. A penalty is necessary for both specific and general deterrence.

[19] In deciding the appropriate administrative penalty within that range, I have taken the following factors into account:

- previous enforcement actions for contraventions by this person,
- the gravity and magnitude of the contravention,
- whether the contravention was deliberate,
- whether the registrant derived any economic benefit from the contravention,
- any effort the registrant made to report or correct the contravention, and
- whether a penalty is necessary for specific and general deterrence.

[20] There have been no previous enforcement actions for contraventions by the lobbyist. This is the first registration that the lobbyist has submitted to the Lobbyists Registry.

[21] This brings me to the gravity and magnitude of the contravention. In my view, the contravention was moderate in nature.

[22] The purpose of the LRA is to promote transparency in lobbying by requiring consultant lobbyists to disclose accurate, current and complete information about their lobbying activities. This is a solemn legal obligation. It reflects the legislative intent that while consultant lobbyists have a right to lobby, the public have a right to know about their intended activities as defined in s. 4 of the LRA, and to have that knowledge in a timely and transparent fashion. The 10 day time limit is not an optional or arbitrary administrative deadline. The failure to comply with the deadline is a contravention. The 10 day deadline is inextricably linked with the obligation to register itself, as it emphasizes the legislature's concern that the public have a right to know not only the substance of the information set out in s. 4, but to have that information provided in a timely manner. Failing to file a return in a timely manner undermines the ability of the public to know who is attempting to influence government at any point in time, thereby defeating the LRA's goal of transparency.

[23] The contravention in this case was more than two years in length. Moreover, during the period of contravention, actual lobbying took place without any public registration as a consultant lobbyist. However, as the lobbyist pointed out, there was at least some degree of transparency with him being incorrectly registered as an in-house lobbyist for TransCanada. Nonetheless, I must bear in mind that there was still a period of more than nine weeks, between March 25, 2015 and May 31, 2015, when the lobbyist was not registered as either an in-house or consultant lobbyist.

[24] In this case, ORL staff did not have to prompt the lobbyist to register; he registered on his own volition after his client advised him that he needed to register himself as a consultant lobbyist.

[25] The next factor I have considered is whether the contravention was deliberate. I accept, on balance, that the lobbyist believed that he was adequately registered by being included in his client's registration. The infraction was not "deliberate" in the sense that the lobbyist actively sought to avoid the LRA.

[26] The next factor to consider is whether the lobbyist derived any economic benefit from the contravention. I consider this a neutral factor. On one hand, the lobbyist gained an economic benefit when he received payment for lobbying when he had not filed the returns with the ORL. On the other hand, he did not obtain that payment *because* of the contravention.

[27] I have already addressed the next factor – "any effort the registrant made to report or correct the contravention." It is in the lobbyist's favour that he corrected his undertaking start date after being contacted by the ORL.

[28] As noted above, I have considered whether an administrative penalty is necessary for specific or general deterrence. In my view, the circumstances of this case call for an administrative penalty both to encourage this lobbyist to take his obligations under the LRA with the utmost seriousness as well as to remind all lobbyists of their legal obligations to be diligent in keeping their registrations current and accurate.

[29] The lobbyist was also found to be in contravention of s. 3(1) of the LRA for not filing a return for his short-term agreement with this same client immediately prior to the undertaking dated November 27, 2012 and he was willing to submit a return for this undertaking. The ORL did not see any benefit in the lobbyist filing a return because of the length of time that has elapsed and the fact that he has filed a return for the same client dating back to almost the same time period. In assigning an administrative penalty, I have determined that it would serve no useful purpose to impose a penalty for two separate instances of contraventions of s. 3(1) of the LRA.

[30] The ORL policies and procedures, which are intended only as a guide, suggest a range of penalties for contraventions of the LRA. The penalty for a late filing has a range of \$100 and \$5,000 for a first instance of non-compliance. The penalty in this case is intended to reflect the lobbyist's two and a half year delay in filing his return as a consultant lobbyist, while acknowledging there was at least some degree of transparency during the majority of that time. The suggested range of penalty for entering information that is not true into a return has a range of \$1,000 to \$7,500 for the first instance of non-compliance. As the lobbyist corrected the undertaking start date in a timely manner, I am not imposing an administrative penalty for this contravention.

[31] The lobbyist has submitted that his penalty should be in the lower range and for the reasons above; I agree.

CONCLUSION

1. Under s. 7.2(2) of the LRA, I find that the lobbyist contravened s. 3(1) of the LRA in respect of registering his undertaking on behalf of TransCanada Pipelines Ltd. The notice of alleged contravention has been substantiated.
2. I impose an administrative penalty of \$700.
3. The lobbyist must pay this penalty no later than February 3, 2016.

4. If the lobbyist requests reconsideration under s. 7.3 of the LRA, he is to do so within 30 days of receiving this decision by providing a letter in writing directed to the Registrar of Lobbyists at the following address, setting out the grounds on which reconsideration is requested:

Office of the Registrar of Lobbyists for British Columbia
PO Box 9038, Stn. Prov. Govt.
Victoria, BC V8W 9A4

Email: info@bcorl.ca

December 23, 2015

ORIGINAL SIGNED BY

Trevor Presley, Investigator and
Delegate of the Registrar of Lobbyists