

INVESTIGATION REPORT 16-08

LOBBYIST: Kevin Brown

October 11, 2016

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*. The lobbyist was found to be in contravention of section 3(1) of the LRA and an administrative penalty of \$700 was imposed.

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 *Lobbyists Registration Act* (“LRA”). This section gives the Registrar of Lobbyists (the “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 his 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 him to give notice of the alleged contravention and the reasons for his 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 to lobby as a consultant on behalf of Atlantic Power Williams Lake (“Atlantic Power”), complied with s. 3(1) of the LRA, and
- (b) if the lobbyist did not comply with the requirements of the LRA, what, if any, administrative penalty is appropriate in 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

"public office holder" means

- (a) a member of the Legislative Assembly and any person on the member's staff,
- (b) an officer or employee of the government of British Columbia,...

"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.

BACKGROUND

[5] On February 2, 2016, the lobbyist submitted a return to the Office of the Registrar of Lobbyists (“ORL”) as a consultant lobbyist for Atlantic Power under Registration ID 26334068. The lobbyist certified an undertaking start date of June 15, 2015 and an undertaking end date of January 18, 2016. Based on these dates it appeared the undertaking had started and terminated prior to the lobbyist filing his return.

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

[7] On February 3, 2016, ORL staff sent the lobbyist an email asking him to confirm whether or not the undertaking start and end dates were correct. If they were correct, the lobbyist was asked to explain why the registration was submitted well past the LRA timelines.

[8] The lobbyist responded on the same date and confirmed that the undertaking dates were correct and that his registration was late due to a lack of action on his part.

[9] The lobbyist’s registration, ID 26334068, terminated 30 days after the undertaking January 18, 2016 end date. On March 3, 2016, the lobbyist submitted a new return under Registration ID 26992453 for his ongoing lobbying undertaking with Atlantic Power.

INVESTIGATION

[10] 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.

[11] On March 14, 2016, ORL staff sent the lobbyist a compliance investigation letter asking the lobbyist to explain the discrepancy between the deadline in the LRA for submitting a registration and the date on which he registered. In addition, the lobbyist was asked to provide a copy of any written agreement to lobby or the date the lobbyist reached a verbal agreement with his client and to provide the details of any meetings arranged and attended with public office holders on behalf of his client.

[12] The lobbyist responded on April 8, 2016 and provided a copy of a Professional Services Agreement he entered with his client effective March 1, 2015.

[13] The lobbyist stated that the scope of his work initially focused on communication about the project and consultation with local governments, First Nations and community groups. He stated that he first contacted a public office holder in May 2015 to arrange a meeting with the public office holder. The meeting occurred in June 2015 and another meeting with public office holders occurred in July 2015. The lobbyist also contacted a public office holder in December 2015 to arrange a meeting with the public office holder.

[14] The lobbyist stated that the discrepancy between the timeline for registration and when he submitted a registration was due to the fact that he did not understand that contacting government officials to schedule meetings for a client to share information was lobbying and put him into conflict with the LRA. He further stated that he submitted a registration upon learning that the work he had undertaken could be considered lobbying under the LRA.

[15] The lobbyist also indicated that, upon further review, the undertaking start date should have been March 1, 2015. His original return, Registration ID 26334068, was terminated by the system as the undertaking end date had passed. Therefore, he was not able to make any revisions to that registration. The ORL determined that his active return, Registration ID 26992453, should be revised to accurately reflect the undertaking start date of his ongoing agreement with this client. Due to the fact that the lobbyist promptly reported the correct undertaking start date and corrected it on his active return, the ORL did not pursue an apparent contravention of s. 4(1) for submitting information that was not true.

[16] On May 13, 2016, an LRA investigator sent a notice pursuant to s. 7.2(1) of the LRA to the lobbyist setting out the basis for the allegation that the lobbyist had not complied with s. 3(1) of the LRA. The investigator invited the lobbyist to respond in writing to the alleged contravention and provide any information or documentation pertinent to this contravention and any potential penalty.

[17] On June 9, 2016, counsel for the lobbyist responded to the notice. Counsel confirmed that the lobbyist had admitted his contravention of s. 3(1) of the LRA on numerous occasions. Counsel stated that the lobbyist asked him to confirm to the ORL that his position had not changed. Counsel further provided detailed submissions in respect of an appropriate administrative penalty, which I have taken into consideration and discuss below.

[18] The description of services in the Professional Services Agreement indicates that the lobbyist was expected to meet with key stakeholders at the local, municipal and First Nation government levels. The lobbyist was also expected to be involved in meetings with Ministry of Environment representatives in order to identify the scope of expectations for public consultation as part of the Ministry of Environment's application process.

[19] On August 3 and 15, 2016, an LRA investigator requested that the lobbyist provide submissions on when he entered into an undertaking to lobby. On August 12

and 17, 2016, counsel for the lobbyist provided additional submissions. Counsel submitted that the Professional Services Agreement does not include an undertaking to lobby a public office holder as a service the lobbyist will provide and that the lobbyist had not anticipated that he would be lobbying public office holders at the time he entered into the Professional Services Agreement. Counsel further submitted that the scope of services only evolved to include an undertaking to lobby approximately two weeks before he attended a meeting with an MLA on June 3, 2015.

DISCUSSION

[20] The lobbyist admits he contravened s. 3(1) of the LRA. The lobbyist states that he didn't realize that contacting government officials to schedule meetings for a client without filing a return contravened the LRA.

[21] I must also address the issue as to when the lobbyist entered into an undertaking to lobby on behalf of a client. The Professional Services Agreement states that a service the lobbyist would perform is meeting with representatives of the Ministry of Environment to understand expectations for public consultation. In my view, this does not necessarily include an attempt to influence as set out in the definition of lobby in the LRA. The Professional Services Agreement does not otherwise state that a service the lobbyist undertook to perform was to lobby a public office holder. I accept that the scope of services the lobbyist was to perform evolved to include an undertaking to lobby sometime in May 2015. At that time, the lobbyist contacted a public office holder to arrange a meeting.

[22] The meetings the lobbyist arranged and/or attended with public office holders on behalf of his client between May and December 2015 clearly fall within the definition of lobby in the LRA. Therefore, the lobbyist engaged in lobbying well in advance of registering with the ORL on February 2, 2016. This is taken into consideration in determining any potential administrative penalty.

[23] I cannot stress enough how important it is that all lobbyists must ensure that they are familiar with the LRA prior to commencing any activities relating to lobbying. Failure to do so increases the likelihood that a lobbyist will run afoul of the LRA and be subject to administrative penalties.

FINDING

[24] 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 his client.

ADMINISTRATIVE PENALTY

[25] 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))

[26] Section 7.2 of the LRA confers discretion on the Registrar to impose administrative penalties. To provide a measure of structure in the exercise of that discretion, the ORL has published "Policies and Procedures" (the "Policy") 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 makes clear, its purpose is to structure discretion. It does not fetter discretion. I have approached the Policy as intended to provide a principled guide to the exercise of my discretion to determine a penalty.

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

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

[29] The LRA makes clear that transparency includes timeliness. This includes the requirement to file a return within the legislated deadline. 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.

[30] In deciding what the appropriate administrative penalty within that range is, 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.

[31] I have considered these factors and the submissions made by the lobbyist and his legal counsel.

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

[33] On the question of the gravity and magnitude of the contravention under investigation, the lobbyist entered an undertaking to lobby in mid-May 2015 and registered with the ORL on February 2, 2016. This makes the lobbyist over eight months late in submitting a registration. During this period of time the lobbyist had lobbied on a number of occasions without being registered. Therefore, I consider this to be a moderate contravention.

[34] 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 of the LRA. The 10-day time limit 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 defeats the LRA's goal of transparency because undermines the ability of the public to know who is attempting to influence government at any point in time.

[35] The next factor I have considered is whether the contravention was deliberate. I accept, on balance, that the contravention resulted from the lobbyist's misunderstanding of the requirements and application of the LRA. After receiving legal advice from counsel, the lobbyist submitted his registration without prompting from the ORL. In addition, the lobbyist realized he had reported the incorrect undertaking start date and subsequently notified the ORL and promptly amended the date.

[36] 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 return with the ORL. On the other hand, he did not obtain that payment because of the contravention.

[37] I have already addressed the efforts the lobbyist made to report or correct the contravention. It is in the lobbyist's favour that he registered of his own volition and also corrected his undertaking start date after he realized it was incorrect.

[38] 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, and to remind all lobbyists of their legal obligations to be diligent in keeping their registrations current and accurate.

[39] The Policy, which is intended only as a guide, suggests a range of penalties for contraventions of the LRA. The penalty for a late filing has a range of \$100 to \$5,000 for a first instance of non-compliance. I have reviewed previous ORL investigation reports and their associated penalties.

[40] In my view, this contravention is similar to Investigation Reports 16-06 and 16-01. The consultant lobbyists received penalties of \$800 and \$700 respectively. These consultant lobbyists were almost nine and eight months late respectively in filing their returns and both lobbied during the period they were not registered. As in this case, the respective lobbyists in those matters self-reported corrections prior to receiving the investigators' notice pursuant to s. 7.2(1) of the LRA.

[41] The penalty in this case is intended to reflect the lobbyist's delay of over eight months, similar to Investigation Reports 16-06 and 16-01, in filing his return as a consultant lobbyist and the fact that the lobbyist lobbied for a period of time when there was no return publicly available at the ORL. I have determined that an administrative penalty of \$700 is appropriate.

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 Atlantic Power. 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 November 22, 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

Date: October 11, 2016

ORIGINAL SIGNED BY

Trevor Presley, Investigator and
Delegate of the Registrar of Lobbyists