

## DETERMINATION DECISION 23-05

### Consultant Lobbyist: Darryl Tempest

**Date: September 26, 2023**

**SUMMARY:** A consultant lobbyist, who has an undertaking to lobby on behalf of the Canadian Vaping Association, contravened s. 3(1) of the *Lobbyists Transparency Act* (LTA) when he failed to submit a Registration Return within 10 days after beginning to lobby on behalf of his client. The lobbyist attended two separate meetings with public office holders (POH). He argued the meetings were exempt from the LTA under s. 2(2)(b) of the LTA. It was found that s. 2(2)(b) of the LTA applied to the first meeting on August 12, 2020, but did not apply to the second meeting on September 23, 2021. The lobbyist was not required to report the August 12, 2020 meeting. However, the lobbyist was required to submit a Registration Return for his lobbying of POHs on September 23, 2021. The Registration Return was submitted three months late. The lobbyist received an administrative penalty of \$650.

**Statutes considered:** *Lobbyists Transparency Act*, S.B.C. 2001, c. 42.

**Authorities considered:** Investigation Reports 17-01, 17-02 and 19-01.

### INTRODUCTION

[1] This report concerns an investigation under s. 7.1 of the *Lobbyists Transparency Act* (LTA). This section gives the Registrar of Lobbyists (the Registrar) the authority to conduct an investigation to determine compliance with the LTA or its regulations. If the Registrar or delegate believes that the person under investigation has not complied with a provision of the LTA or its regulations, s. 7.2 of the LTA requires the Registrar to give a person under investigation notice of the alleged contravention and the reasons for the Registrar's belief that the contravention has occurred. Prior to making a determination under s. 7.2(2) of the LTA, 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 LTA recognizes two types of lobbyists: consultant lobbyists and in-house lobbyists. This report focuses on Darryl Tempest, a consultant lobbyist (the lobbyist), an individual who undertakes to lobby for payment on behalf of a client, the Canadian Vaping Association (CVA). I

note here that the lobbyist does not have a written contract. Instead, he has an oral agreement to lobby on behalf of the CVA.

[3] Under s. 7(4)(d) of the LTA, the Registrar has delegated to me the authority to conduct this investigation.

#### **ISSUES UNDER CONSIDERATION**

[4] The issues for consideration are:

- (a) Whether the lobbyist's activity is outside the scope of the LTA under s. 2(2)(b) of the LTA.
- (b) If the LTA does apply to the lobbyist's activity, whether the lobbyist failed to submit a Registration Return within 10 days after he lobbied on behalf of his client.
- (c) If the lobbyist did not comply with the requirements of the LTA, what, if any, administrative penalty is or penalties are appropriate in the circumstances.

#### **RELEVANT SECTIONS OF THE LTA**

[5] **"consultant lobbyist"** means an individual who, for payment, undertakes to lobby on behalf of a client.

[6] **"designated filer"** means

- (a) a consultant lobbyist...

[7] **Restrictions on application of Act**

2(2) This Act does not apply in respect of an oral or written submission made as follows:

...

(b) made to a public office holder by an individual on behalf of a person or organization concerning

- (i) the enforcement, interpretation or application of any Act or regulation by the public office holder with respect to the person or organization, or
- (ii) the implementation or administration of any program, policy, directive or guideline by the public office holder with respect to the person or organization;

[8] **Requirement to file Registration Return**

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

[9] **Power to investigate**

7.1(1) If the registrar considers it necessary to establish whether there is or has been compliance by any person with this Act or the regulations, the registrar may investigate.

(2) The registrar may refuse to investigate or may cease an investigation with respect to any matter if the registrar believes that

(b) the matter is minor or trivial,

(c) dealing with the matter would serve no useful purpose because of the length of time that has elapsed since the matter arose,

[10] **Hearing and administrative penalty**

7.2 (1) If after an investigation under section 7.1 the registrar believes that a person under investigation has not complied with a provision of this Act or the regulations, the registrar must

(a) give notice to the person

(i) of the alleged contravention,

(ii) of the reasons why the registrar believes there has been a contravention, and

(iii) respecting how the person may exercise an opportunity to be heard under paragraph (b) of this subsection, and

(b) give the person a reasonable opportunity to be heard respecting the alleged contravention.

(2) 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

(a) must inform the person of the registrar's determination that there has been a contravention,

(b) may impose an administrative penalty of not more than \$25 000, and

(c) must give to the person notice,

(i) of the registrar's determination that the person has not complied with a prescribed provision of this Act or the regulations and the reason for the decision,

(ii) if a penalty is imposed, of the amount, the reason for the amount and the date by which the penalty must be paid, and

(iii) respecting how the person may request reconsideration, under section 7.3, of the determination of non-compliance or the imposition or amount of the penalty.

## BACKGROUND

[11] This Determination Decision examines whether Daryl Tempest, a consultant lobbyist with an undertaking to lobby on behalf of the Canadian Vaping Association (CVA), was required under the LTA to file a Registration Return, and, if so, whether the Registration was submitted late contrary to s. 3(1) of the LTA.

[12] The CVA is registered under the *Canada Not-for-profit Corporations Act*. It represents vaping retailers and vaping liquid manufacturers in Canada. The purpose of the CVA is to protect “...the future of independent specialty retail vapour business...by advocating on behalf of its membership with...Health Canada and regional health authorities...using constitutional legal representation and government relations specialists.”<sup>1</sup>

[13] On November 22, 2021, the ORL became aware of a meeting held on September 23, 2021, between the Ministry of Health’s Tobacco and Vapour Products Control Program (TBPCP) and the CVA. The meeting was attended by a director at TBPCP, and a senior policy analyst at TBPCP, both are considered POHs under the LTA, and the designated filer for the CVA, and the lobbyist. The purpose of the meeting was “...to discuss industry compliance efforts and challenges with the current enforcement of the E- Substance Regulations (ESR).”<sup>2</sup> The participants discussed packaging compliance and the overlap between federal legislation and the ESR and the publication of guidance for retailers. There was a discussion about the limited enforcement of online sales. The CVA asked the POHs to consider “age-gating” for online sales.<sup>3</sup>

[14] On November 24, 2021, the ORL wrote to the designated filer for the CVA. In that communication, the ORL pointed out that:

The LTA came into effect May 4, 2020...There were a number of significant changes to the legislation and regulation.

[15] It asked the CVA if it had communicated with a POH since May 4, 2020, in an attempt to influence any of the matters set out in the definition of “lobby” in the LTA. If yes, did any of the

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<sup>1</sup> The Canadian Vaping Association. Membership Benefits. <https://thecva.org/membership-benefits/>

<sup>2</sup> Ministry of Health. 2021. Tobacco and Vapour Products Control Program Meeting with the Canadian Vaping Association: September 23, 2021. <https://www2.gov.bc.ca/assets/gov/health/keeping-bc-healthy-safe/tobacco-regulation/meeting-summary-cva-2021-09-23.pdf>

<sup>3</sup> Age gating refers to an age verification system for online sales.

exceptions in s. 2(2) of the LTA apply to their communications with public office holders. The ORL provided links to guidance documents to assist the CVA.

[16] The designated filer for the CVA responded on December 7, 2021, copying the CVA's consultant lobbyist on the email. He explained that the CVA is a not-for-profit trade organization. He stated that "...Darryl's [the lobbyist] company has been contracted by the CVA to provide political outreach and executive service." He noted that the lobbyist was registered as a consultant lobbyist. The designated filer for the CVA mentioned that he and the lobbyist understood they were not required to register meetings since they did not interact with an elected official. He asked if meetings with non-elected officials required a registration.

[17] On December 9, 2021, the ORL replied to the designated filer for the CVA, noting the lobbyist did have an account, but no registration activities had been made. The ORL pointed out that the lobbyist was the executive director of the CVA, which means he may be an in-house lobbyist.

[18] On December 20, 2021, the designated filer for the CVA responded stating the lobbyist is not a paid employee of the CVA; instead, he is paid through a contracted company.

[19] The designated filer for the CVA stated that he and the lobbyist attended two meetings with POHs: one on August 12, 2020, and the second on September 23, 2021. Details as follows:

- August 12, 2020
  - Meeting with the Executive Director Public Health, Prevention and Planning Branch, Population and Public Health Division, to discuss labelling requirements per E-Substances Regulation (ESR)
  - Attended by Sam Tam (President and designated filer of the CVA) and Darryl Tempest
- September 23, 2021
  - Met with the Ministry of Public Health Director and Senior Policy Analyst to discuss E-Substances Regulation (ESR) compliance
  - Attended by Sam Tam (President and designated filer of the CVA) and Darryl Tempest

[20] On December 21, 2021, the ORL advised the designated filer of the CVA that the lobbyist was required to register no later than August 22, 2020, for the August 12, 2020, lobbying activity. It pointed out that the lobbyist was 16 months overdue in his registration. The ORL asked the designated filer of the CVA to ensure the lobbyist submitted a Registration Return no later than January 5, 2022.

[21] On December 23, 2021, the lobbyist submitted questions to the ORL pertaining to his registration. On the same day, the ORL advised the lobbyist that he would have to create a new Registration Return to report his lobbying activities. The effective date of the Registration Return would be the date of the first lobbying activity, in this case August 12, 2020.

[22] The ORL informed the lobbyist that he would not have to submit Lobbying Activity Reports if he did not meet with senior public office holders.

[23] A senior public office holder is defined in s. 4.2(1) of the LTA. If a lobbyist lobbies a senior public office holder, they are required to submit a Monthly Return under s. 4.1 of the LTA with, in part, information required under s. 4.2(2)(a) to (d) of the LTA. This information is captured in the Registry in the form of a Lobbying Activity Report.

[24] In a conversation with the lobbyist on January 7, 2022, the ORL discussed the lobbyist's obligations under the LTA. Throughout the ORL's interaction with the lobbyist, it provided links to guidance documents to assist the lobbyist in understanding his responsibilities under the LTA.

[25] In an email dated January 7, 2022, the ORL provided the definition of senior public office holders and an explanation of when a Monthly Return was required. The ORL provided links to guidance documents.

[26] The lobbyist submitted his Registration Return on January 7, 2022. On January 12, 2022, the ORL returned the Registration Return, seeking corrections to several sections in the lobbyist's Registration Return.

[27] The corrections were made and the lobbyist's Registration Return was activated on February 8, 2022.

## **INVESTIGATION**

[28] The ORL commenced an investigation under s. 7.1 of the LTA to determine whether the lobbyist was late in submitting his Registration Return contrary to s. 3(1) of the LTA.

[29] On June 7, 2022, the lobbyist was provided with formal notice under s. 7.2(1)(a), outlining the basis for the allegation that he had contravened s. 3(1) of the LTA. The investigator invited the lobbyist to respond in writing to the alleged contraventions and to provide any information or documentation pertinent to the contravention and any potential penalty.

[30] The lobbyist responded on July 7, 2022. He pointed out the meetings took place after the ESR had been approved by Order in Council 426/2020. The purpose of the meeting was to discuss retailer compliance with the ESR.<sup>4</sup>

[31] The lobbyist submitted that:

...paragraph (a) of the definition of “lobby”, lobbying essentially involves advocating in relation to some **prospective or potential** legislation, regulation, policy or program. Discussing with a public office holder the enforcement, interpretation and application of **existing** legislation or regulations with regards to one’s organization **is not lobbying**, and this is made explicit in section 2(2)(b) of the LTA.

He continued, stating the following:

As to paragraph (b) of the definition of “lobby”, while it is unclear who arranged the September 23, 2021 meeting, merely arranging a meeting between a public office holder and someone else is not enough to trigger the requirement for a consultant lobbyist to file a return under section 3(1). The meeting must be one “for the purpose of attempting to influence any of the matters referred to in paragraph (a)”, i.e., the development of **future** legislation, regulations, policies, programs, etc.

....

The purpose of the meeting was apparently to discuss the new labelling requirements contained in the ESR, which had just been approved and published about three weeks earlier.

For the same reasons stated above with respect to the September 23, 2021 meeting, the August 20, 2020 meeting did not constitute “lobbying” and the arranging of the meeting did not constitute “lobbying”. The purpose of the meeting was to discuss the interpretation, application and enforcement of the existing ESR, not to advocate for prospective or potential legislation, regulations, policies or programs.

[32] The lobbyist stated he was having a conversation with a POH about “...the enforcement, interpretation and application of existing legislation or regulations with regards to one’s organization...” which he notes is excluded from lobbying under s. 2(2)(b) of the LTA.

[33] On February 2, 2023, I notified the lobbyist that there was a change in investigators and I was assigned to this file.

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<sup>4</sup> Tobacco and Vapour Products Control Program Meeting with the Canadian Vaping Association: September 23, 2021. (<https://www2.gov.bc.ca/assets/gov/health/keeping-bc-healthy-safe/tobacco-regulation/meeting-summary-cva-2021-09-23.pdf>)

[34] While reviewing the file, I realized that the lobbying dates were incorrect in the June 2, 2022, compliance notification letter issued under s. 7.1 and 7.2 of the LTA. On June 26, 2023, I brought this to the attention of the lobbyist and issued a new letter under s. 7.1 and 7.2 of the LTA with the correct dates.

[35] To confirm what was discussed in these two meetings, I contacted the ED and director who attended the meetings.

[36] On June 26, 2023, I spoke with the director who attended the September 23, 2021, meeting. The director stated the designated filer for the CVA and the lobbyist informed her that the ESR packaging requirements compelled the vaping industry to change packages when they sold their product in BC. This was a result of the different packaging requirements between ESR and federal regulations. This was creating extra costs for the industry. The CVA president and the lobbyist asked for an amendment to the regulations on the packaging.

[37] In addition, the director noted that the lobbyist and president of the CVA asked for changes to limit online sales. This is consistent with the September 23, 2021, meeting notes published by the Ministry of Health's Tobacco and Vapour Product Control Program, where the designated filer of the CVA and the lobbyist recommended the Ministry to consider "age-gating," an online age verification system.<sup>5</sup>

[38] On June 28, 2023, I emailed the ED who attended the August 12, 2020, meeting with the designated filer of the CVA and the lobbyist.

[39] On June 28, 2023, the ED responded, stating the lobbyist had corresponded with him. The lobbyist had requested a meeting to discuss issues raised in their correspondence. The ED had a short (less than 30-minute) informal meeting on August 12, 2020, with both the president of the CVA and the lobbyist, via video conference call. The purpose of the meeting was "...to better understand the context of their issues." The lobbyist made a brief oral presentation providing greater context and elaboration on the issues raised in prior correspondence. The ED listed the areas of concern as:

- Labelling and packaging on e-substances;
- Volume of e-liquid substances for sale;
- 2mL atomizer, tank and cartridge/pod capacity;
- Notification requirement timelines and transition period for existing stock.

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<sup>5</sup> Ministry of Health. 2021. Ministry of Health Tobacco and Vapour Products Control Program – Meetings with tobacco and vapour industry. <https://www2.gov.bc.ca/gov/content/health/keeping-bc-healthy-safe/tobacco-vapour/meetings-with-tobacco-vapour-industry>



The ED made it clear to the lobbyist that he was there to listen and that there would be no discussion on policy. The ED noted that they were not given an opportunity to “suggest, recommend or ask for any changes to the ESR.” At the end of the meeting, the ED stated he “...would take it away - raise it internally for further assessment as applicable, and applicable consideration and response.”

[40] In a July 31, 2023, submission from the lobbyist’s counsel, he reiterated what was mentioned earlier by the lobbyist. He did say that the discussions at the August 12, 2020, meeting where about “...the interpretation and application of vague, undefined phrases such as “packaged in a plain manner.” He argued that this activity falls within the meaning of s. 2(2)(b) of the LTA.

## DISCUSSION AND FINDINGS

### *Does 2(2)(b) of the LTA apply?*

[41] Lobbying requires a communication with a POH in an attempt to influence the POH to do one of the following, paragraphs (iii) and (iv) are relevant here:

(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...

For 2(2)(b) to apply there must be:

an oral or written submission, made to a public office holder, by another individual, on behalf of a person or organization

concerning the:

- (i) enforcement, interpretation, or application of a regulation (in this case), or the
- (ii) implementation or administration of any program, policy, directive or guideline by the public office holder with respect to the person or organization.

[43] The approach to statutory interpretation endorsed by the Supreme Court of Canada has been to discern legislative intent by examining the words of a statute in their entire context and in their grammatical and ordinary sense, in harmony with the statute’s scheme and object.<sup>6</sup> S. 8 of the *Interpretation Act* also requires that “[e]very enactment must be construed as being

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<sup>6</sup> *British Columbia v. Philip Morris International, Inc.*, 2018 SCC 36 at 17 citing *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27 [*Rizzo Shoes*], at para. 21.

remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[44] The object of the LTA is to create rules and obligations in British Columbia to ensure lobbying of public office holders is transparent and fair.<sup>7</sup> Who is captured by the requirements of the Act and what kind of activity is being captured is also relevant. “Public office holder” is defined very broadly under the LTA to include most public servants. The LTA covers a wide range of activities by default in the definition of “lobby.”

[45] The Attorney General, at the time, stated recent amendments to the LTA were proposed to further expand on the object of the Act:

Transparency in lobbying supports the legitimate, necessary participation of different voices, views and expertise in a democracy while preventing actual or perceptions of undue influence, unfair competition and regulatory capture.<sup>8</sup>

[46] The LTA addresses the above tension by including a wide range of activities by default in the definition of “lobby,” while carving out certain individuals and circumstances from registration obligations when necessary for legitimate democratic participation. In other words, the intended purpose of the LTA is to promote transparency without limiting participation.

[47] Section 2(2)(b) of the LTA, on the other hand, is a limited exception applying only to an individual who makes an oral or written submission to a POH on behalf of a person or organization. This limits the application of the LTA to certain individuals under specific circumstances from the obligation to register.

[48] Black’s Law Dictionary defines “submission” as “an advocate’s argument,”<sup>9</sup> while the Canadian Oxford Dictionary defines it as “a thing that has been submitted for consideration, evaluation, or judgment” or “(law) a matter referred to a third party, esp. a judge or jury, for arbitration.”<sup>10</sup>

[49] This is a much more restricted term than to communicate. The plain meaning of “submissions” in the context of the LTA are primarily one-way communications to a decision-maker on a narrow topic. This interpretation is consistent with the scheme and object of the Act because it only allows for narrow, specific kinds of communications to avoid the general application of the definition of “lobby.”

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<sup>7</sup> Reconsideration Report 22-01, para 30.

<sup>8</sup> British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, 41st Parl, 3rd Sess, No 185 (19 November 2018) at 6545 (Hon. D. Eby).

<sup>9</sup> 8<sup>th</sup> ed.

<sup>10</sup> 2<sup>nd</sup> ed.

[50] On the other hand, the definition of lobbying is much broader. It requires a communication between a lobbyist and a public office holder in an attempt to influence a wide variety of government decision making outlined in paragraph (a) of the definition of “lobby” in the LTA. Black’s Law Dictionary defines “communication” as “the expression or exchange of information by speech, writing, gestures, or conduct.”<sup>11</sup> Consistent with the modern approach, a broad, liberal interpretation of “communicate” fits harmoniously with the transparency and fairness objects of the LTA and includes written, oral, electronic, and in some cases instances like gestures or conduct.

[51] The terms used in the definition of “lobby” all relate to the prerogative power of government to create (and rescind) rules. The terms used in s. 2(2)(b), on the other hand, are limited to actions or processes which put something pre-existing—whether an Act, regulation, program, policy, directive or guideline—into effect. In a similar structure, ss. (a)(i) to (iv) in the definition of “lobby” contain language that is broad and inclusive, subject to the more limited exception found in s. 2(2)(b)(i) and (ii). Taken together, subsections (a)(i)-(iv) in the definition of “lobby” have the effect of capturing the entire lifecycle of government rule-making, whether legislative (subsections (i)-(iii)) or policy (subjection (iv)). The corresponding s. 2(2)(b) exception, on the other hand, is limited to the *results* or *impacts* of a legislative or policy decision.

[52] Further support for this interpretation is found in the differences in who the decision-maker is in each situation. Lobbying is concerned with any government decision, be it policy or legislative, whereas the s. 2(2)(b) exceptions are limited to what can be characterized as operational decisions by individual public office holders.

[53] Any communications that touch on changing the Act or regulation (in the case of s. 2(2)(b)(i)) or program, policy, directive or guideline (in the case of s. 2(2)(b)(ii)) would fall outside of the scope of the exception and require registration.

[54] After careful review of the file and the lobbyist’s submission, I understood he had discussions with the POHs present at the meetings he attended concerning the enforcement, interpretation and the application an existing regulation, the ESR. The lobbyist argues, because this activity involved an existing, not a “prospective or potential”, regulation, it was exempted from lobbying under s. 2(2)(b) of the LTA. Accordingly, the lobbyist’s position is that this was not lobbying since it did not fall within the meaning of lobbying under paragraph (a) of the LTA.

[55] Furthermore, the lobbyist contends the meetings were not arranged for the purpose of attempting to influence any of the matters referred to in paragraph (a) of the definition to lobby; therefore, his actions did not fall within the definition of lobbying under paragraph (b) of the LTA. Consequently, he was not required to submit a Registration Return.

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<sup>11</sup> 8<sup>th</sup> ed.

**August 12, 2020, meeting**

[56] At this meeting, the lobbyist did make an oral submission to a POH on behalf of the CVA (the organization).

[57] The lobbyist notes that the regulations were approved and ordered on July 20, 2020, by Order in Council 426/2020.<sup>12</sup> The regulations were less than a month old when the August 12, 2020, meeting took place. The lobbyist had been in communication with the ED, prior to the meeting, articulating issues arising from the introduction of the regulations.

[58] The August 12, 2020, meeting was requested by the lobbyist to discuss the ESR, specifically the labelling requirements. The lobbyist categorized this as a discussion about the interpretation, application and enforcement of the ESR. They were seeking clarity on this new regulation. The lobbyist contends that the LTA did not apply to this activity.

[59] The ED described the meeting as an opportunity for the lobbyist and the designated filer for the CVA to expand on issues raised by the introduction of the ESR, discussed in previous correspondence. It was a short informal meeting where the lobbyist provided context and elaborated on specific aspects of the ESR, focusing on the labelling and packaging, volume of e-liquid substances, 2ml capacity of tank containers, cartridge/pod capacity, atomizers and concerns related to existing stock. The lobbyist was explaining what each item meant, creating an understanding on each of the topics. The ED was clear he was present to listen to their concerns, not to discuss policy alternatives or changes to the ESR. The ED made it clear that the lobbyist did not request changes. The ED informed the two that he would raise their presentation internally for applicable assessment, consideration and response.

[60] Based on the information before me, there was an oral submission presented to the ED, a POH. It focused on how the lobbyist and his client interpreted the ESR and how the ESR would be applied to the vaping industry. In other words, how the ESR, a pre-existing regulation, would be put into action. The lobbyist did not communicate with the ED for the purpose of influencing him into amending or repealing the ESR, nor did he ask for the development, establishment, amendment or termination of any program, policy, directive or guideline within the ESR. The lobbyist was seeking clarity on the interpretation, application, or the administration of the ESR. This activity falls outside the scope of the LTA under s. 2(2)(b) of the LTA.

[61] I find that the August 12, 2020, meeting does not fall within the definition of lobbying as it related to the interpretation, application, or the administration of the ESR. The lobbyist was not required to submit a Registration Return for this meeting since this activity is excluded from registering under s. 2(2)(b)(i)(ii) of the LTA.

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<sup>12</sup> [https://www.bclaws.gov.bc.ca/civix/document/id/oic/arc\\_oic/0426\\_2020](https://www.bclaws.gov.bc.ca/civix/document/id/oic/arc_oic/0426_2020)

**September 23, 2021, meeting**

[62] The September 23, 2021, meeting was requested by the CVA. The purpose of the meeting was to discuss retailer compliance and the challenges faced by the industry with the ESR. Specifically, it focused on packaging compliance and limited enforcement of online sales.

[63] The lobbyist stated they discussed the lack of clarity with packaging requirements under the ESR. The Ministry of Health’s Tobacco and Vapour Product Control Program meeting notes<sup>13</sup> confirm this, where they state that the CVA requested greater clarity on B.C.’s packaging requirements under s. 8 of the ESR.

[64] The director who attended the meeting expanded on this, stating retailers were obligated to comply with both BC and federal packaging and labeling requirements. Producers were required to change packaging for products sold in BC. The director stated, given the jurisdictional differences in the packaging requirements, the lobbyist requested changes to the packaging guidelines in the ESR.

[65] I do not accept that this was about asking for clear guidelines consistent with the implementation or administration of existing guidelines envisioned by s. 2(2)(b)(ii) of the LTA. Instead, it was about the development of guidelines, plainly within the definition of lobbying under (a)(iv) of the definition to lobby.

[66] The second topic of the September 23, 2021, meeting addressed concerns with online marketing, the lack of enforcement, differences in online product quantity and nicotine concentrations and the need for an age verification system or “age-gating” for online sales.

[67] The lobbyist admits that the discussion about age-gating may cross the line into lobbying. However, he points out that age-gating was already in force under the Federal *Vaping Products Promotion Regulations*, SOR/2020-143, therefore, their request would not be considered lobbying since it did not involve a proposal for “...legislative or regulatory change...” He submits that their actions are exempt under s. 2(2)(b) of the LTA since it would be considered a submission on behalf of the CVA into the enforcement, interpretation and application of an existing regulation.

[68] However, the director stated that the lobbyist asked for an amendment to the regulations limiting online sales. The meeting summary supports this where it states:

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<sup>13</sup> Ministry of Health. 2021. Ministry of Health Tobacco and Vapour Products Control Program – Meetings with tobacco and vapour industry. <https://www2.gov.bc.ca/gov/content/health/keeping-bc-healthy-safe/tobacco-vapour/meetings-with-tobacco-vapour-industry>

CVA recommends the Ministry and Health Canada consider requiring “age-gating” for online sales, in which customers must produce identification before they purchase products online and again when the product is delivered to the customer.<sup>14</sup>

[69] The Ministry of Health’s Tobacco and Vapour Product Control Program meeting notes<sup>15</sup> indicated that the meeting concluded with the Ministry agreeing to continue to provide guidance to the retail industry on packaging and that they would collaborate with Health Canada on the cross-jurisdictional issue of online sale of vapour products that are non-compliant with provincial and federal legislation.

[70] In my view, recommending an amendment to the ESR to include an online age verification system constitutes lobbying under paragraph (a)(iii) of the LTA.

[71] I find that the lobbying activity in the September 23, 2021, meeting, is not outside the scope of the LTA under s. 2(2)(b) of the LTA. The lobbyist engaged in lobbying in the September 23, 2021, meetings under paragraph (a)(iii) and (iv) of the LTA.

### ***Requirement to file a registration return s. 3(1) of the LTA***

[72] A lobbyist is required to submit a Registration Return within 10 days of lobbying. That means the lobbyist was required to submit his Registration Return for lobbying on behalf of the CVA no later than October 4, 2021, for lobbying conducted on September 23, 2021. The lobbyist did not submit his Registration Return until January 12, 2022. This was a continuing contravention that spanned approximately three months.

[73] I find that the lobbyist contravened s. 3(1) of the LTA when he failed to submit a Registration Return within 10 days of lobbying on behalf of the CVA.

### **ADMINISTRATIVE PENALTY**

[74] Section 7.2(2) of the LTA 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 the Act or the regulation, 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. If the ORL considers it to be in the public interest, considering the gravity of the contravention and the number of previous contraventions or administrative penalties imposed, if any, it may impose a prohibition on lobbying and on filing or on having a Registration Return filed in

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<sup>14</sup> <https://www2.gov.bc.ca/gov/content/health/keeping-bc-healthy-safe/tobacco-vapour/meetings-with-tobacco-vapour-industry>

<sup>15</sup> Ibid.

respect of the person, for a period of not more than 2 years. Such person must be given notice of the contravention determination.

[75] Section 7.2 of the LTA 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 a *Registrar of Lobbyists: Guide to Investigations* guidance document (guide to investigations) to advise members of the public and those engaged in lobbying about what will guide the ORL in exercising its enforcement duties under the LTA and its Regulation. As the guide to investigations makes clear, its purpose is to structure discretion. It does not restrict discretion. It is not law. I have considered that guidance in the exercise of my delegated discretion to determine a penalty based on the facts before me.

[76] 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 LTA and its predecessors have been in place from April of 2010. Lobbyists should be aware of their obligations under the LTA and are responsible for meeting them.

[77] The guide to investigations first sets out a general financial range for particular infractions (depending on whether it is a first, second or third infraction). Second, it provides a list of factors that will be considered in determining the amount of the administrative penalty. Finally, it includes a clear statement that the “...guidelines do not bind or fetter the ORL’s ability to depart from these guidelines, both in respect of administrative monetary penalties and prohibitions, in appropriate circumstances.”

[78] The penalty range for failing to submit a Registration Return is between \$500-\$7,500 for a first contravention.

[79] In determining 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 efforts made by the registrant to report or correct the contravention;
- Whether a penalty is necessary for specific and general deterrence; and
- Any other factors that, in the opinion of the registrar or their delegate, are relevant to the administrative penalty.

***Lobbyist's submission on the penalty***

[80] The lobbyist points out in his submission that he has no previous contraventions under the LTA.

[81] The lobbyist argues that there was "...no negative impact upon transparency in lobbying, since the Ministry of Health has undertaken to publish its own summary of the September 23, 2021 meeting."

[82] He mentions the ORL told him since he did not lobby senior public officer holders, he was not required to submit a Monthly Return with his lobbying activity. He stated:

In hindsight, one might conclude that your office was advising the CVA of the non-existence of a filing obligation under section 4.1 of the LTA rather than section 3(1). However, that is the kind of technical legal distinction that ordinary people, living and working outside of B.C., who do not work with the LTA on a day-to-day basis, could reasonably be expected to miss. This is especially so when your own colleague advised Mr. Tam and Mr. Tempest in writing that "filing Lobbying Activity Reports for these lobbying activities is likely not required."

It would appear the lobbyist misunderstood the distinction between a Monthly Return (Lobbying Activity Report) and a Registration Return. Since he was not required to submit a Lobbying Activity Report, I understand he believed this meant he was not required to submit a Registration Return for the lobbying he conducted on September 23, 2021.

[83] The lobbyist points out that the contravention was not deliberate and occurred in light of written advice from the ORL. He notes that he did not derive any economic benefit from the contravention. The lobbyist submits that he worked earnestly with the ORL to meet his obligations under the LTA.

***Discussion***

[84] I want to make it perfectly clear: the ORL is here to assist lobbyists, whether through answering questions or pointing lobbyists to any aspect of the range of guidance and other resources on the ORL website. However, it is ultimately the responsibility of the lobbyist to understand and meet their obligations under the LTA.

[85] I see that the lobbyist has no prior contraventions. Further, the lobbyist did work with the ORL and remained engaged with the ORL until he submitted his Registration Return. I accept that the lobbyist did not obtain an economic benefit. These are factors that weigh in favour of a lower penalty.



[86] The goal of the LTA is to promote transparency, to provide the public with accurate and timely information about who is lobbying government and the purpose of the lobbying. To say that a meeting was transparent because a Ministry published a summary of a meeting with lobbyists on its website shows a misunderstanding the purpose of the LTA. I do not agree that discrete notification of meetings listed deep within a Ministry's website provides the level of transparency that legislators envisioned under the LTA. The public relies on the Lobbyists Registry to provide a comprehensive and searchable listing of who is lobbying government on what topics. When a lobbyist fails to register with the Lobbyists Registry, the public is left in the dark. It is the lobbyist's responsibility to make sure they submit their Registration Return in a timely manner, so the public is informed about who a lobbyist is lobbying and on what subjects they lobby on.

[87] I turn now to the question of the gravity of magnitude of the contravention. Failing to file a Registration Return on time defeats the LTA's goal of transparency because it undermines the public's ability to know who is attempting to influence government at any given time. The 10-day time limit is not optional or arbitrary. It is linked to the public's right to know the information set out in section 4 of the LTA, and it requires that information is provided within the time limits set out in the LTA. The public was deprived of information they had a lawful right to know about for approximately three months. Relative to 10-day time limit, three months is a significant period, which weighs in favour of a higher penalty.

[88] It was the ORL who contacted the lobbyist to determine whether he should register. The lobbyist did not initiate contact by, for example, approaching the ORL seeking information about the Registry. It was not until he was engaged by the ORL that he finally submitted his Registration Return. This weighs in favour of a higher penalty.

[89] It appears the lobbyist did not realize he was required to submit a Registration Return. If the ORL had not questioned him about the September 23, 2021, meeting, it is unlikely the lobbyist would have submitted a registration. Misunderstanding or not, it is up to the lobbyist to meet their obligations under the LTA. Not knowing one's obligations under LTA is not an excuse for failing to follow the law. This is a factor that weighs in favour of a higher penalty.

[90] I have examined past Investigation Reports for similar contraventions as relevant factors in determining a reasonable penalty for this contravention. I have looked to investigations that dealt with late filing of a Registration Return.

[91] In Investigation Report (IR) 17-01, the lobbyist was late in submitting his Registration Return by two months. He had received warning letters in the past. He did not derive an economic benefit, nor was the contravention deliberate. The lobbyist did bring this error to the attention of the ORL. He received an administrative penalty of \$500.

[92] In IR 17-02, the lobbyist had no previous contraventions. The lobbyist was 10 months late in submitting his Registration Return. The lobbyist lobbied while he was not registered. The

contravention was not deliberate. There did not appear to be an economic benefit resulting from the contravention. The lobbyist received an administrative penalty of \$800.

[93] In IR 19-01, the lobbyist had lobbied but failed to submit a Registration Return until seven months after lobbying. The ORL discovered the discrepancy in the dates the lobbyist lobbied and the date the Registration was submitted. The ORL brought this to the attention of the lobbyist. The lobbyist worked with the ORL to remedy this discrepancy. This was the lobbyist's first contravention. There was no indication that the contravention was deliberate, nor was there evidence of an economic benefit. Given the circumstances, the lobbyist was issued an administrative penalty of \$700.

[94] In these investigations, all the lobbyists submitted Registration Returns, albeit late. The important distinction in this case, if the ORL had not approached the lobbyist, it is unlikely he would have registered. The lobbyist did, however, work with the ORL to remedy this contravention, ultimately submitting a Registration Return for his lobbying activity. The lobbyist was approximately three months late in submitting his Registration Return.

[95] It does not appear that the contravention was deliberate. The lobbyist had no prior contraventions.

[96] The contravention in this case is clear. A penalty is necessary for both specific and general deterrence. In terms of specific deterrence, this investigation, the ensuing administrative penalty and the publication of the outcome of this investigation, will encourage the lobbyist to check that he has met his obligations under the LTA. In considering general deterrence, the publication of this report and recognition that the ORL will issue administrative penalties to those who contravene the LTA will act as a reminder to lobbyists of their legal obligations to be diligent in filing Registration Returns on time.

[97] I find that the lobbyist was approximately three months late in submitting his Registration Return, contravening s. 3(1) of the LTA. Taking into consideration the facts of this case and similar penalties imposed in past investigations, for submitting a Registration Return late, it is my view that a reasonable administrative penalty is **\$650**.

## **CONCLUSION**

1. Under s. 7.2(2) of the LTA, I find that:

- i. the lobbyist's meeting on August 12, 2020, was exempt from lobbying under s. 2(2)(b) of the LTA, therefore he was not required to submit a registration for this meeting.
- ii. the lobbyist's actions at the September 23, 2021, meeting did fall within the definition of lobbying. The lobbyist was required to submit a Registration Return for

this meeting no later than October 4, 2021. He did not submit a Registration Return for this meeting until January 12, 2022. The lobbyist was three months late in submitting his Registration Return, contravening s. 3(1) of the LTA. The notice of this alleged contravention has been substantiated. I impose an administrative penalty of **\$650** for contravening s. 3(1) of the LTA.

2. The lobbyist must pay the amount for the penalties no later than **November 8, 2023**.
3. If the lobbyist requests reconsideration under s. 7.3 of the LTA, they are 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: September 28, 2023

ORIGINAL SIGNED BY

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Tim Mots  
Investigator and Delegate of the  
Registrar of Lobbyists