



INVESTIGATION REPORT 14-10

KINDER MORGAN CANADA INC.

DESIGNATED FILER: IAN ANDERSON

June 18, 2014

SUMMARY: The designated filer for an organization had filed a first-time return with the Office of the Registrar of Lobbyists (ORL). Under section 3(3)(b) of the *Lobbyists Registration Act* (LRA) the designated filer must file further returns within 30 days of the end of each 6 month period after the date of the previous filing. Despite several inquiries from ORL staff, the designated filer did not file a return until approximately five months after the due date, after receiving notice that the ORL had begun a compliance investigation.

In response to a notice sent pursuant to s. 7.2 of the LRA, the organization submitted that it had not engaged in sufficient in-house lobbying activity during the relevant period to require it to register and alternatively that the failure to register was inadvertent and minor. The investigator found that, on a balance of probabilities, the organization was required to register and assessed an administrative penalty of \$2,500.

Statutes Considered: *Lobbyists Registration Act*, S.B.C. 2001, c. 42; *Lobbyists Registration Regulation*, B.C. Reg. 284/2002

INTRODUCTION

[1] This report concerns an investigation under s. 7.1 of the *Lobbyists Registration Act* (LRA). This section gives the Registrar of Lobbyists (Registrar) the authority to conduct an investigation to determine whether there has been compliance 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, consultant lobbyists and in-house lobbyists. This report deals with Kinder Morgan Canada Inc., an organization that employs an in-house lobbyist. An in-house lobbyist is a paid employee, officer or director of an organization who lobbies on behalf of the organization, alone or with others, for at least 100 hours annually.

[3] The LRA requires that the designated filer must file a return with the ORL if the organization meets the criteria for registering. The LRA describes the designated filer as the most senior officer of the organization who receives payment for performing his or her functions, or where there is no senior officer who receives payment, then the most senior in-house lobbyist. In this case, the organization's designated filer is the President, Ian Anderson. Under s. 3(3)(b) of the LRA, the designated filer must file a return within 30 days of the end of each 6 month period after the date of the previous filing.

[4] The Office of the Registrar of Lobbyists (ORL) began this investigation, under the authority delegated by the Registrar under s. 7(4)(d) of the LRA, when the organization's designated filer did not file a return, apparently in contravention of s. 3(3)(b) of the LRA which requires that a return be filed within 30 days of the expiration of the previous return. I have been assigned to investigate this matter.

ISSUES UNDER CONSIDERATION

[5] The questions for consideration are:

- (a) was the designated filer required to file a return under s. 3(3)(b) of the LRA , within 30 days of the expiration of his organization's previous return, and
- (b) if so, what, if any, administrative penalty is appropriate for failing to file as required?

RELEVANT SECTIONS OF THE LRA

"designated filer" means

- (a) ...
- (b) in the case of an organization that has an in-house lobbyist,
 - (i) the most senior officer of the organization who receives payment for performing his or her functions, or
 - (ii) if there is no senior officer who receives payment, the most senior in-house lobbyist;

"in-house lobbyist" means an employee, an officer or a director of an organization

- (a) who receives a payment for the performance of his or her functions, and
- (b) whose lobbying or duty to lobby on behalf of the organization or an affiliate, either alone or together with other individuals in the organization,
 - (i) amounts to at least 100 hours annually, or
 - (ii) otherwise meets criteria established by the regulations;

"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) ...
- (c) in relation to an in-house lobbyist only, to arrange a meeting between a public office holder and any other individual for the purposes of attempting to influence any of the matters referred to in paragraph (a) of this definition;

Requirement to file return

- 3(3) The designated filer of an organization must file with the registrar a return in the prescribed form and containing the information required by section 4,
- (a) if no return has been filed previously, within 60 days of the date the organization first has an in-house lobbyist, or
 - (b) if a return has been filed previously, within 30 days of the end of each 6 month period after the date of filing the previous return.

RELEVANT SECTIONS OF THE LOBBYISTS REGISTRATION REGULATION

Who is an in-house lobbyist

- 1.2 For the purposes of paragraph (b) (i) of the definition of "in-house lobbyist" in section 1 (1) of the Act, all time spent on activities, including preparation, that are directly related to and necessary for carrying out lobbying are included within the determination of the time spent lobbying.

BACKGROUND

[6] On December 12, 2011, the designated filer for the organization filed a return under Registration ID 8127852 with a start date of December 12, 2011 and a registration end date of July 10, 2012.

[7] If a return has been filed previously, s. 3(3)(b) of the LRA requires the designated filer of an organization to file a return in the prescribed form, within 30 days of the end of each six month period after the date of filing the previous return.

[8] The organization did not file a return within 30 days of July 10, 2012.

[9] On August 2, 2012, ORL staff notified the designated filer of the organization, by email, that the organization's registration had expired on July 10, 2012 and that the designated filer had 30 days after that date to register the organization's in-house lobbyists if they continue to lobby and met the 100 hours threshold in the previous twelve months. ORL staff also asked that, if the organization was not required to register, the designated filer respond by email as to why that was the case. The organization did not respond.

[10] On August 13, 2012 and August 21, 2012, ORL staff sent further emails to members of the organization asking for a response. On August 21, 2012 a member of the organization emailed the ORL advising that the ORL's message had been passed on to the organization's legal department.

[11] On September 10, 2012, ORL staff sent a further email to a member of the organization requesting a response. The legal department of the organization replied that it would rectify the situation that week. The ORL did not receive further communication from the organization.

[12] On September 26, 2012, ORL staff notified several members of the organization, by email, that if the ORL had not received a registration or a response by September 28, 2012, as to why the organization was not required to register, the matter would be forwarded to the Deputy Registrar for her consideration.

INVESTIGATION

[13] The ORL commenced an investigation under s. 7.1 of the LRA to determine whether the organization had complied with the LRA.

[14] On December 27, 2012, the Deputy Registrar sent a compliance investigation letter to the organization's President, Ian Anderson. Among other matters, the Deputy Registrar asked the organization to provide information about its lobbying activities during the period from August 10, 2011 to August 10, 2012. The Deputy Registrar requested the following:

- the names of public office holders with whom the organization communicated;
- the dates the communications took place and the type of communication, whether in person, by telephone or email;
- the nature of the conversations;
- copies of all written correspondence sent by the organization to public office holders; and
- notes of any meetings between the organization and public office holders.

This information would help ORL staff assess whether the organization's lobbying activity amounted to at least 100 hours annually.

[15] The organization responded under cover of letter dated January 2013, with copies of documents relating to its lobbying activities. The organization also sent a table of its lobbying activities with headings such as *Date of Communication* and *Public Office Holders Contacted*. The documents were cross-referenced in the table. One telephone communication and eight in-person meetings were also listed, although not cross-referenced to documents.

[16] On January 7, 2013, the designated filer for the organization filed a return under Registration ID 13691321 with a registration start date of January 7, 2013 and a registration end date of August 5, 2013.

[17] On September 26, 2013, the Acting Deputy Registrar notified the organization that he was providing formal notice under s. 7.2(1)(a) of the LRA that he had formed the

preliminary belief, subject to hearing from the designated filer for the organization, that the designated filer had not complied with s. 3(3)(b) of the LRA when he did not file a return within 30 days of the end date of the previous return for the organization.

[18] On November 7, 2013, an employee of the organization responded to the formal notice. The response consisted of a three part submission, framed as alternatives, being (a) there was no requirement to file, (b) the failure to re-register was inadvertent and minor and (c) no penalty is warranted.

[19] With respect to the requirement to file, the organization's representative stated, in part, the following:

I have carefully scrutinized the records of Kinder Morgan's lobbying activities for the 12 months between August 10, 2011, and August 10, 2012. On the basis of my review and my discussions with the relevant employees, it is apparent to me that Kinder Morgan's in-house lobbying activities during the relevant time period were significantly less than 100 hours. You have the relevant records. While there were approximately two dozen instances of lobbying, many consisted simply of a letter, and the preparation time for many of the activities was relatively minor because, in essence, the relevant materials, once prepared, were repeatedly re-used. This is also consistent with the fact that Kinder Morgan has very few internal staff involved in lobbying of any kind.

...The decision to register is not evidence for your purposes that the minimum hours requirement was satisfied. In our respectful submission there is no basis for a finding of fact, on the balance of probabilities, that the 100 hour requirement was met by Kinder Morgan's in-house lobbyists during the period which is the subject of your investigation...

[20] With respect to the failure to register, the organization's representative stated, in part, the following:

The failure to register was not intentional ... the employee responsible for the administration and filing of lobbyist reports ceased ... employment ... on May 2, 2012. By oversight ... when ... replaced, this task was not included in the assigned tasks, and this omission went unnoticed for a number of months until your letter to Mr. Anderson of December 27, 2012.

....In a very practical sense, this is a case of delayed compliance, not non-compliance.

[21] With respect to the issue of a penalty, the organization's representative stated, in part, the following:

...even if it is found that there has been a failure to comply with the Act, this is not an appropriate case for the imposition of an administrative penalty. Kinder Morgan's activities in British Columbia ... are highly visible.... It can hardly be suggested that a temporary lapse in renewing our registration was borne out of an intention to mislead the public into thinking that we were not, on a regular basis, discussing our business with government. There was no intention to subvert the purposes of the Act, no profit to Kinder Morgan from doing so, and indeed, once it became clear that its registration had not been renewed as would ordinarily have been the case, steps were taken promptly and comprehensively to address the error, with the result that there has been full disclosure of all our in-house lobbying during the period of the lapsed registration. This is not a case of a false or misleading filing...

[22] By letter dated April 22, 2014, I asked the organization's representative to respond to a set of questions relating to the organization's lobbying activity.

[23] The organization confirmed receipt of my letter, also on April 22, 2014. By emails dated May 8, 2014 and May 14, 2014, I asked the organization about a response to my letter. The organization has not replied to date.

DISCUSSION

[24] The documents sent by the organization relating to their lobbying activities during the period August 10, 2011 to August 10, 2012 consist of the following:

- briefing notes
- print outs of power point presentations
- emails with bureaucrats and members of the Legislative Assembly,
- letters to the Premier, Cabinet Ministers and other members of the Legislative Assembly
- backgrounder

[25] Some of the documents are marked "confidential". They reflect the organization's plan as to how to communicate with the government. Letters and emails to MLA's and members of cabinet invite communication with the elected officials. They set out the plans of the organization. I would expect that the creation of these documents would involve research, strategy meetings among organization staff and follow up.

[26] I agree with the organization's submission that some relevant materials have been used for more than one document. Many of the letters are essentially duplicates. Some of the records appear to include similar or identical background information.

[27] In my opinion, the documents sent to this office by the organization do not reflect all lobbying activities that would have taken place during the relevant period. We have not been provided with the organization's own notes or records relating to meetings and

communications between the organization and public office holders, for example. I think it is reasonable to expect that the preparation of correspondence and planning for meetings would require internal consultation and review. The search by the organization may not have been as comprehensive as it could have been or records may have been treated as transitory and not retained.

[28] As well, I think it likely that not all lobbying activity would be reduced to written form or recorded in formal documents. The LRA does not require this. However the time spent in such lobbying activities as considering strategy, researching issues and oral communication is relevant and, given the issues at stake in this matter, would likely be significant. The *Lobbyist Registration Regulation* states that "...all time spent on activities, including preparation, that are directly related to and necessary for carrying out lobbying..." are to be included within the organization's determination of time spent lobbying when assessing if it has met the 100 hour requirement.

[29] The documents used for lobbying indicate the scope of the issues at stake. Public statements by the organization indicate that the projected capital cost is billions of dollars. The proposed expansion of the pipeline system would increase capacity from 300,000 to approximately 850,000 barrels per day. This is a major project.

[30] The organization sent a five page letter dated August 12, 2012 to Premier Clark. It is a comprehensive response to the BC government's report on heavy oil pipelines. The last line of the letter states "We welcome the opportunity to continue engagement with the BC Government and other stakeholder[s] in the coming months." This letter illustrates, in my opinion, the depth and breadth of issues which the subject of the organization's lobbying activities. It also sets out the ongoing commitment to those activities.

[31] The organization did not respond to my request for further information dated April 22, 2014, nor the two follow up inquiries, other than to acknowledge receipt of my letter. I draw an unfavourable inference from this lack of response in that, if the information would have supported the organization's position as to the amount of its lobbying activity, I think it is more likely the organization would have produced it.

[32] The designated filer for the organization first registered on December 12, 2011. The decision to register reflected the organization's own assessment that it was required to do so, presumably as it was at or close to the minimum requirement of 100 hours. The records for the period August 2011 to August 2012 in my opinion, as noted above, likely do not reflect all activity during this period.

[33] The most senior officer of the organization next registered on January 7, 2013, and has continued to be registered since that time. Given that the designated filer held the belief that he was required to register for the period December 2011 to August 2012 and January 2013 to date suggests, in all the circumstances, that it is unlikely that there

would have been a substantial enough lull in lobbying activity in the intervening period to warrant not registering. The organization has not provided evidence of such a lull.

Response to the organization's submission: No requirement to file

[34] The organization was not previously registered before its filing on December 12, 2011. If no return has been filed previously, s. 3(3)(a) of the LRA requires that the designated filer of an organization file a return with the registrar within 60 days of the date the organization first has an in-house lobbyist.

[35] The legislative trigger for the organization is lobbying activity that "amounts to at least 100 hours annually." When an organization files a return under s. 3, it is certifying under s. 5 of the LRA that it has employees, officers or directors whose lobbying or duty to lobby "amounts to at least 100 hours annually". Accordingly, in my opinion, the act of registration is evidence relating to lobbyist activity. I acknowledge that the amount of time spent on activities that come within the definition of lobbying may not always be easy to measure.

Response to the organization's submission: The failure to re-register was inadvertent and minor

[36] The organization framed its submission as to the failure to register as being inadvertent, as an alternative. The organization's statement, as to its intention to register, even while arguing that it was not required to do so, in my opinion, is some evidence of its belief that it may well have been required to register. I do not view this statement in the same light as an alternative pleading. It is in the nature of evidence. The statements explaining the inadvertence are very specific and presented as facts.

FINDING

[37] I find that, on a balance of probabilities, that the organization's in-house lobbyist, alone or together with other individuals in the organization, engaged in lobbying activities amounting to at least 100 hours annually during the relevant period. Accordingly, the organization was required, under s. 3(3)(b) of the LRA to file a return within 30 days of the end of the 6 month period after December 12, 2011 and that it failed to register.

ADMINISTRATIVE PENALTY

[38] The LRA makes clear that transparency includes timeliness. This includes the requirement to file a return within the legislated deadline. The goal of transparency is frustrated if the deadlines required by the LRA are not met.

[39] In assessing whether a penalty is necessary in this instance, I must consider, among other matters:

- previous enforcement actions for contraventions
- the gravity and magnitude of the contravention
- whether the contravention was deliberate
- any economic benefit derived from the contravention
- the efforts to report and/or correct the contravention
- whether a penalty is necessary for general and specific deterrence

[40] I have considered these factors and the submissions made by the organization.

[41] With respect to the organization's submissions on the issue of an administrative penalty, in my opinion, a fundamental purpose of the LRA is to ensure that public notice of lobbying activity is governed by legislation, not at the discretion of a lobbyist, no matter how well intentioned they may be in disclosing their activities.

[42] There have been no previous enforcement actions for contraventions by this designated filer.

[43] On the question of the gravity and magnitude of the contravention under investigation, the organization filed a return on January 7, 2013. This was approximately five months after the time required for filing by the LRA. During this time, the organization was lobbying, outside the purview of the LRA.

[44] The organization says the contravention resulted from inadvertence. While this may have been the case with respect to an initial delay, ORL staff sent the organization five communications seeking clarification as to the registration status, over a period of three months after the departure of the employee the organization states was responsible for filing lobbyist reports. On two occasions, staff of the organization indicated that they were following up. Otherwise there was no response.

[45] There is no evidence that the organization's designated filer derived any economic benefit from the contravention.

[46] The designated filer for the organization filed the new registration following receipt of the compliance investigation letter dated December 27, 2012 from the Deputy Registrar.

[47] On the question of specific and general deterrence, it is important for the objectives of the LRA that designated filers be diligent in meeting their legal obligations to file their returns as required by the legislation.

[48] With respect to both specific and general deterrence, s. 7.8 of the LRA requires this office to deliver a copy of investigation reports of non-compliance to the Speaker of the Legislative Assembly. Our practice is to post investigation reports of non-compliance on our website. The LRA also authorizes this office, if appropriate, to impose an administrative penalty for not complying with the LRA. These measures act as deterrents.

[49] With respect to specific deterrence, the designated filer for the organization eventually filed a new registration and has continued to be compliant in registering. However, the organization failed to respond to five requests in writing that it re-register or explain why it was not required to do so. It did not register until approximately five months after it was required to do so. In the circumstances of this case, I conclude that an administrative penalty is appropriate.

[50] In my opinion, it is important that all organizations, including large organizations such as this, dealing with public office holders at a high level on issues affecting the public in a significant manner, be seen to comply with legislation directed at transparency. The amount of the administrative penalty should be substantial enough to reflect the importance of meeting the requirements of the LRA.

[51] In Investigation Report 13-01, the Acting Deputy Registrar of Lobbyists stated:

[29] The purpose of the LRA is to promote transparency in lobbying. It does so by requiring designated filers to register lobbying activities and declare, among other things, who they are lobbying, on whose behalf, on what subject matter and toward what outcome. All of this information is available to the public on a searchable registry, so citizens can see for themselves who is attempting to influence government decisions.

This transparency is threatened when organizations fail to meet their obligations under the LRA.

[52] The ORL policies and procedures, which are intended only as a guide, suggest that a penalty between \$500 and \$7,500 be levied for a first contravention of the LRA for failing to register. In this case the organization failed to register despite receiving several emails from the ORL seeking information as to the status of their registration and responding to the ORL that it was following up with the matter. The organization registered only after the ORL sent notice in December 2012 that it was beginning a compliance investigation.

[53] I conclude that an appropriate administrative penalty in this case is \$2,500.

CONCLUSION

1. Under s. 7.2(2) of the LRA, I find that the lobbyist contravened s. 3(3)(b) of the LRA by failing to file a return as required.
2. The notice of alleged contravention has been substantiated.
3. I impose an administrative penalty of \$2,500.
4. The organization must pay this penalty no later than July 30, 2014.
5. If the organization requests reconsideration under s. 7.3 of the LRA, it 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

June 18, 2014

ORIGINAL SIGNED BY

Darrel Woods, Investigator
Office of the Registrar of Lobbyists