O.R.L.
office of the registrar of lobbyists
BRITISH COLUMBIA

RECONSIDERATIONS 15-05, 15-06 & 15-07

LOBBYIST: Blair Lekstrom

February 17, 2016

SUMMARY: The finding in Investigation Reports 15-05, 15-06 and 15-07 that the lobbyist failed to comply with his obligations under s. 3(1) of the *Lobbyists Registration* Act, to file a return within 10 days after entering into an undertaking to lobby, is upheld. The penalties imposed, respectively, of $3,000, $3,000 and $2,000 are not, however, confirmed. Penalties of $1,000 in each instance are substituted, for a total of $3,000.

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

INTRODUCTION

[1] This report flows from three investigation reports, Investigation Report 15-05, Investigation Report 15-06, and Investigation Report 15-07, which are addressed in this one decision for convenience. I have, of course, considered each of the investigation reports separately, which each involve the same lobbyist and which were each decided by the same investigator in my Office.[1] The reports were dated September 24, 2015 and the reconsideration requests were made on October 26, 2015.

[2] In each report, the investigator found, after an investigation under s. 7.1 of the *Lobbyists Registration Act* ("LRA"), that Blair Lekstrom had failed to comply with s. 3(1) of the LRA, by filing a return outside of the 10-day period permitted under the LRA. The lobbyist requested a reconsideration of these findings and the penalties imposed.

ISSUES UNDER CONSIDERATION

[3] The questions for consideration are whether the findings made, and administrative penalties imposed, in the reports should be confirmed. The issues are set out, and dealt with, separately below.

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[1] The three investigation reports are referred to below, collectively, as the "reports".

RELEVANT SECTIONS OF THE LRA

1(1) …

"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, …

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

"undertaking" means an undertaking by a consultant lobbyist to lobby on behalf of a client, …

Requirement to file return

…

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

Form and content of return

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

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

(i) the name and business address of the firm, if any, where the consultant lobbyist is engaged in business,
(ii) the date on which the undertaking with the client was entered into and is scheduled to terminate, and
(iii) the name of each individual engaged by the consultant lobbyist to lobby on behalf of the client; …

(d) the name and business address of the client or organization; …

(h) if the client or organization is a member of a coalition, the name and business address of each member of the coalition; …

(2) An individual who files a return must supply the registrar with the following information within the applicable period: …

(b) any information required to be supplied under subsection (1) the knowledge of which the individual acquired only after the return was filed, within 30 days after the knowledge is acquired; …

DISCUSSION

[4] In this reconsideration report, I will deal separately with each of the findings as to lobbying, but discuss the appropriate administrative penalties all together at the end.

Investigation Report 15-05

[5] The lobbyist submitted four separate registrations under the LRA, one on May 3, 2015 and three on May 7, 2015. The first showed an undertaking start date of March 1, 2015 (City of Dawson Creek), while the other four showed a start date of March 5, 2015 (District of Chetwynd, District of Tumbler Ridge and Village of Pouce Coupe). These registrations were submitted after staff in this Office wrote to the lobbyist on April 27, 2015, asking if his activities on behalf of four British Columbia local governments, as reported in the media, constituted lobbying under the LRA. The lobbyist telephoned this Office on May 1, 2015, explaining that he believed he was an in-house lobbyist and did not need to register until he had lobbied for 100 hours. Staff advised him this was not the case, and the four registrations followed very soon after this conversation.

[6] Staff wrote to the lobbyist on May 25, 2015, advising it appeared there had been a late filing, and thus an apparent contravention of s. 3(1). The lobbyist made two submissions to this Office, including after the investigator had notified the lobbyist that he believed the lobbyist had contravened s. 3(1). On each occasion, the lobbyist submitted that he had believed that he was an in-house lobbyist, not a consultant lobbyist, and was not required to register because he had not lobbied more than 100 hours.

[7] Regarding the nature of the work the local governments had retained him to do on their behalf, the lobbyist said that he did not have written retainers with them, but that they had each decided to have him "meet with Mr. Dale Wall and try and reach an agreement on a renewed Fair Share MOU as the government indicated that they wanted to talk about the 10-year extension that the premier had committed to."[2]

[8] The investigator noted that the lobbyist had not explained how he believed that he was an "employee, officer or director" of any of the local governments, which it is necessary for an individual to be to fall under the definition of in-house lobbyist. Nor did the lobbyist provide any evidence to support his position.

[9] He then found that the lobbyist first met a public office holder, within the meaning of the LRA, on March 19, 2015, with the undertakings having been entered into, based on information from the lobbyist, on March 1, 2015 and March 15, 2015. The registrations he later submitted were, the investigator found, outside of the 10-day window provided under s. 3(1).

[10] As to the nature of the lobbyist's work, the investigator quoted this from the lobbyist's July 2, 2015 emailed submission:

> I was engaged by the 4 municipalities to represent their positions with regard to what is referred to as the Fair Share agreement. The Fair Share agreement was set to expire in 2020 but the government initiated discussion with the local governments that they wished to enter into renewal discussions early as the existing agreement was unaffordable and not sustainable. Following that I was engaged first by the City of Dawson Creek and a short time later I was engaged by the other municipalities referenced in your email. I then met with my clients and followed with a number of meetings with Mr. Dale Wall who was hired by the government to represent them in renegotiating the Fair Share MOU…I want to point out that my clients did not approach government to initiate discussions to reach "better terms for oil and gas revenues" but rather they reacted to try and maintain what they already had which in the end they were not able to get.

[11] The investigator then found that this activity clearly fell within the LRA's definition of "lobby".

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[2] As quoted at para.12 of Investigation Report 15-05.

[12] In the penalty portion of this report, the investigator found that the lobbyist had not deliberately failed to register, *i.e.*, had not consciously attempted to avoid the law. He accepted that the lobbyist subjectively believed that he did not need to register, but found that the lobbyist "was negligent about understanding the nature of his solemn obligations under the LRA."

[13] In his reconsideration request, the lobbyist submitted that he did not lobby government on behalf of the clients who had engaged him:

> The government made it clear to these local governments that they intended on opening up and changing the existing Fair Share MOU for reasons they felt were necessary. When it became clear that the government may act unilaterally on this issue a number of local governments contacted me and asked if I could help them RESPOND to this issue. Having been involved with the Fair Share MOU since the early 1990's when I was in local government I was happy to support the local governments in their response. At no time do I believe I lobbied the provincial government or any of their appointees on this file. I cannot understand the findings in this investigation report as there is clearly a lack of understand on behalf of the investigator as to how this file was dealt with.

[14] The fact that the lobbyist was retained by the local governments to, as he put it, respond to the provincial government's communication of an intention to change the Fair Share MOU is not material. As the definition of "lobby" makes clear, the communication can be started by the office holder or the lobbyist. Further, if the communication is made "in an attempt to influence… 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", it constitutes lobbying.[3]

[15] As the report indicates, the lobbyist represented to this Office that he had been retained to meet with Dale Wall, who the lobbyist submitted was the representative of the provincial government and thus a public office holder under the LRA. The lobbyist then represented to this Office, in his May 27, 2015 email, that he was retained to meet the provincial government's representative, Dale Wall, to "try and reach an agreement on a renewed Fair Share MOU". It is evident that the Fair Share MOU, as the investigator must be taken to have found, is a "contract, grant or financial benefit", or a "program, policy, directive or guideline" of the provincial government. Communicating with Dale Wall regarding the opening up, renewal or change of the Fair Share MOU clearly falls within the definition of lobbying.

[16] Like the investigator, I do not question for a minute the good faith of the lobbyist. The fact that he did not intend to violate the LRA, however, is no defence. The LRA does not create absolute liability, but it does require due diligence. The lobbyist's failure to exercise ordinary care in ascertaining, and complying with, his statutory obligations

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[3] It is also lobbying if the communication is an attempt to influence "the development, establishment, amendment or termination of any program, policy, directive or guideline of the government of British Columbia or a Provincial entity", as the investigator noted in the report.

does not insulate him from the finding, which I confirm, that he failed to submit the required return under the LRA within 10 days after entering into an undertaking to lobby, contrary to s. 3(1). I therefore confirm, under s. 7.3(3)(b) of the LRA, the investigator's determination in Investigation Report 15-05 that the lobbyist contravened s. 3(1) of the LRA.

Investigation Report 15-06

[17] In this report, the investigator found that the lobbyist had failed to file a return within the time required under s. 3(1). When the lobbyist spoke with office staff about the matter discussed above, he also discussed his work for two other clients and came to the conclusion that he should have registered for them as well. On May 7, 2015, the lobbyist filed a return disclosing that he had been retained by Duz Cho Construction to lobby. This return showed a retainer start date of June 17, 2013, prompting staff to contact the lobbyist about this potentially out-of-time filing, with a letter advising of an investigation being sent on June 16, 2015.

[18] The lobbyist provided this Office with a copy of his retainer agreement with Duz Cho Construction. He also told this Office, in a June 18, 2015 email, that he had met with BC Hydro staff on several occasions on behalf of his client, and had arranged meetings between BC Hydro and his client.[4] The retainer agreement disclosed that the lobbyist was retained to help the company obtain contracts from BC Hydro.

[19] The lobbyist again advised that he had believed he was an in-house lobbyist, and thus was not required to register, as he had not lobbied for more than 100 hours. As with the previous investigation report, the investigator rejected this submission, finding no evidence to support the view that the lobbyist was in fact an in-house lobbyist. He then found that the start date for the retainer was June 17, 2013. Since the lobbyist only filed a return on May 7, 2015, he was out of time under, and thus in violation of, s. 3(1).

[20] In his October 26, 2015 reconsideration request, the lobbyist sought reconsideration, as before, of both the finding of non-compliance and the amount of the administrative penalty. On the first issue, he acknowledged that he had met with "representatives of BC Hydro with regard to direct award work opportunities for Duz Cho Construction." As was the case with the above undertaking, this was lobbying within the meaning of the LRA, and the undertaking to lobby was set out in the retainer agreement.

[21] In his reconsideration request, the lobbyist took issue, however, with the investigator's conclusion that the date of the retainer agreement, June 17, 2013, was the start date for the undertaking to lobby. He submitted that the investigator had erred with respect to "the start date of any lobbying activities". He noted that, as a former

[4] BC Hydro, formally known as the British Columbia Hydro and Power Authority, is a "Provincial entity" within the meaning of the LRA.

minister, he was required to not have dealings with the provincial government for two years after leaving office. The lobbyist said this meant "that under no circumstances was I able to engage in lobbying the government in any capacity until at least the fall of 2014."

[22] The difficulty for the lobbyist, however, is that the s. 3(1) obligation to file a return is not, as the investigator clearly determined, triggered by the date on which lobbying activities actually start. Section 3(1) provides that the return must be filed within "10 days after entering into an undertaking to lobby", which the investigator found was June 17, 2013. Even if the retainer could be interpreted such that the lobbying aspect was not triggered until the fall of 2014, as the lobbyist has submitted, that would still make his filing out of time, since it did not occur until May of 2015.

[23] Again, I do not question for a minute the lobbyist's good faith, but this does not insulate him from liability for his failure to exercise ordinary care in ascertaining, and complying with, his statutory obligations. I confirm that the lobbyist failed to submit the required return under the LRA within 10 days after entering into an undertaking to lobby, contrary to s. 3(1). I therefore also confirm, under s. 7.3(3)(b) of the LRA, the investigator's determination in Investigation Report 15-06 that the lobbyist contravened s. 3(1) of the LRA.

Investigation Report 15-07

[24] As indicated earlier, when this Office contacted the lobbyist in April of last year, he telephoned and discussed his activities with staff. This led to the registrations mentioned above, and to another, in this case in respect of his retainer with HD Mining International Ltd. On May 10, 2015, the lobbyist filed a return disclosing that he had entered into an undertaking to lobby on behalf of this company on June 1, 2013. This again prompted this Office to send the lobbyist a formal compliance investigation letter on May 28, 2015.

[25] In his May 29, 2015 emailed response, the lobbyist again stated that he had believed that he was an in-house lobbyist, and was not required to register because he had not exceeded the 100 hours required under the LRA. He confirmed that he had attended a meeting on November 13, 2014, with the Minister of Jobs, Tourism and Skills Training, along with the chair of his client and an employee of the client. He provided a copy of his services agreement with the client.

[26] The lobbyist also stated that he did not believe he had actually lobbied the government on his client's behalf. The lobbyist confirmed that his client arranged the meeting and that the purpose of the meeting was to provide an update. The lobbyist stated "At no point in the meeting with [the Minister] did I engage her or the government representatives in lobbying activities trying to secure anything for HD Mining International." The investigator went on to find, however, that the services agreement with the client "clearly contemplates lobbying as one of the services the lobbyist will

provide the client."[5] He noted that the contracted services included these: "administer and assist with relations and dealings with all federal and provincial regulatory agencies and government departments and ministries", and attending "such other meetings at such other locations as may be considered necessary by the Chairman to advance HD's business interests, including with potential investors, strategic partners, lenders, government and regulatory agencies and First Nations representatives".[6]

[27] Based on my assessment of the information that was available to the investigator, including the retainer agreement and the lobbyist's representations, I am satisfied that the lobbyist did, in fact, enter into an undertaking to lobby within the meaning of the LRA. The fact that the lobbyist believes he did not lobby, because he did not arrange the meeting with the Minister, and so on, does not change the nature of what he agreed to do as part of the retainer. He entered into an undertaking to lobby.

[28] It has to be noted, in relation to this and the other two investigation reports here under reconsideration, that the lobbyist says, on the one hand, that he believed he did not need to register in any of these cases, but, on the other hand, he did register once this Office clarified for him what his statutory obligations were. As is indicated below, the lobbyist's expressions of good faith are relevant to the amount of the penalty that should be assessed, but do not change the fact that, in relation to each of these three retainers, he was required to register, but did not do so in time. I therefore confirm, under s. 7.3(3)(b) of the LRA, the investigator's determination in Investigation Report 15-07 that the lobbyist contravened s. 3(1) of the LRA.

ADMINISTRATIVE PENALTY

[29] In assessing what penalty was appropriate, the investigator referred to the Registrar as having a "broad discretion" in determining what is the appropriate penalty. It is true that the LRA confers on me the authority to impose an administrative penalty, but it is not, in my view, particularly helpful to refer to a "broad discretion".

[30] As the investigator noted in all three investigation reports, my Office has published policies and procedures that, among other things, provide principled guidance for deciding what penalty is appropriate in the circumstances of a given case. As the investigator noted, this guidance is not binding and does not fetter the exercise of authority in a given case. The circumstances of the case must govern.

[31] In all three reports under consideration here, the investigator had regard to the following factors:

- previous enforcement actions for contraventions by the lobbyist;
- the gravity and magnitude of the contravention;

[5] Paragraph 23.
[6] Schedule 1 to the agreement, as quoted at para. 23.

- whether the contravention was deliberate;
- any economic benefit derived from the contravention;
- the efforts to report and/or correct the contravention; and
- whether a penalty is necessary for general and specific deterrence.

[32] In relation to the circumstances in each case, the investigator concluded that it was not appropriate for there to be no penalty. He noted that the lobbyist's explanation for failing to file "did not have any legitimate connection to the wording of the statute."[7] On the other hand, the investigator accepted, in all three reports, that the contraventions were not "deliberate", *i.e.*, he accepted that, until this Office disabused him of his error, the lobbyist subjectively believed that he was not required to register. He found that the infractions were not deliberate "in the sense that the lobbyist actively sought to avoid the LRA."[8]

[33] The investigator also stated in all three reports that the contraventions were "serious".[9] In the case of Investigation Report 15-05, he noted that the contraventions persisted for some two months. Regarding Investigation Report 15-06 and Investigation Report 15-07, he determined that the contraventions "persisted for almost two years."[10]

[34] I discern tension between the investigator's findings that the contraventions were not deliberate and his pointing out, in all three cases, that the lobbyist, as a former member of Cabinet and an experienced politician, should have known better. Ultimately, if the investigator was influenced in assessing the various penalties by the lobbyist's negligence, his failure to ascertain his obligations, it should not have weighed heavily in pushing the penalty higher. If the investigator allowed this factor to do so, I respectfully disagree.

[35] More important, the penalties that the investigator assessed were, in my view, outside the range of the penalties this Office has levied for similar infractions. The penalties in these cases were $3,000, $3,000 and $2,000, with the investigator explicitly assessing the penalties in each instance in light of the penalties he assessed in the other instances. The investigator did not explain why the penalties he levied were higher

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[7] Investigation Report 15-05, para. 31; Investigation Report 15-06, para. 26; Investigation Report 15-07, para. 38.

[8] Investigation Report 15-05, para. 39; Investigation Report 15-06, para. 34; Investigation Report 15-07, para. 37.

[9] Investigation Report 15-05, para. 36; Investigation Report 15-06, para. 31; Investigation Report 15-07, para. 34.

[10] Investigation Report 15-06, para. 33; Investigation Report 15-07, para. 36. Given the investigator's acceptance that the lobbyist did not deliberately fail to comply, it is not entirely clear to me why the investigator appears to have considered the period during which these contraventions persisted as relevant to the assessment of penalty.

than the range of penalties in similar cases. His finding that the infractions here were not deliberate is certainly not a basis for the penalties being outside the range.

[36] As regards previous penalties, I note, as examples only, that the following penalties were assessed by this Office in 2015 in cases of failure to register in time:

Investigation Report 15-01: $1,500;[11]
Investigation Report 15-02: $1,200;
Investigation Report 15-03: $1,000;
Investigation Report 15-09: $700;
Investigation Report 15-10: $600; and
Investigation Report 15-11: $1,700.[12]

[37] In 2014, some 14 investigation reports were published by this Office. In only three did the penalties amount to $1,000 or more. In the three cases where the penalties were at that level, there were multiple contraventions by the lobbyists in question. This was also the case for Investigation Report 15-11, where there were multiple infractions by the lobbyist. That is the only instance of which I am aware where this Office has imposed a penalty or more than $1,500, not to mention a penalty of $3,000 for late filing.

[38] Having regard to the above-noted principles, I note that, as the investigator tacitly accepted, the series of contraventions came to light at the same time and the lobbyist corrected them all at essentially the same time. It is not appropriate, in my view, to treat the contraventions as recurring or repeated. It is also clear that the investigator accepted the contraventions were not deliberate, as I also accept. I also confirm the investigator's determination that the economic benefit factor is neutral in this case.

[39] While I fully recognize the principles of specific and general deterrence, in my view the penalties the investigator imposed here are outside the range of what is needed to achieve either of these objectives. The investigator did not refer, as I have, to previous penalties for similar infractions. He did not explain why the penalties he imposed in these three cases are more than double the higher end of previous penalties, which it is safe to assume account for deterrence and other relevant factors.

[40] The importance of compliance with all aspects of the LRA, including its requirement for timely registration, cannot be overstated. The LRA's purpose is, as the investigator rightly noted, to promote transparency in lobbying, with current, complete and accurate information being of critical importance. Failure to register in a timely way, as the investigator noted, undermines the public's ability to know who is attempting to influence government at any point in time. However, nothing in the cases at hand, in my view, justifies penalties so far outside the range noted above.

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[11] The penalty here, for late filing contrary to s. 3(1), was confirmed in Reconsideration 15-01.
[12] In this case, the lobbyist had violated three of the LRA's provisions, including s. 3(1).

[41] In all of the circumstances, I have decided not to confirm the penalties imposed by the investigator. Instead, it is appropriate in my view that the same penalty be imposed in relation to each of the contraventions. The appropriate penalty in each instance is $1,000.

CONCLUSION

[42] For the above reasons:

1. Under s. 7.3 of the LRA, I confirm the findings that the lobbyist contravened s. 3(1) of the LRA in the circumstances set out in each of Investigation Report 15-05, Investigation Report 15-06 and Investigation Report 15-07;

2. Under s. 7.3, I do not confirm the administrative penalties imposed for those contraventions of s. 3(1) and instead impose a penalty of $1,000 for each of the three contraventions.

3. Pursuant to s. 7.4(1)(b) of the LRA, the lobbyist must pay the aggregate penalty of $3,000 no later than **April 1, 2016**.

February 17, 2016

Elizabeth Denham
Registrar of Lobbyists