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office of the
registrar
of lobbyists
BRITISH COLUMBIA

RECONSIDERATION 12-01

(INVESTIGATION REPORT 12-15)

LOBBYIST: JAY HILL

Summary: The finding in Investigation Report 12-15 that the consultant lobbyist contravened the *Lobbyists Registration Act* is upheld. The penalty of $2,500 imposed on the lobbyist is, however, reduced to $250 in view of the circumstances and in light of penalties imposed to date in other cases under the Act.

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

INTRODUCTION

[1] As the Deputy Registrar of Lobbyists, Mary Carlson, acknowledged in Investigation Report 12-15 ("IR12-15"), issued July 24, 2012, this case is unusual. It is also unfortunate, because Jay Hill, in filing a return under the *Lobbyists Registration Act* ("LRA"), motivated by a desire to be transparent and open, in the end contravened the statute by providing information that was not accurate, as is discussed below.

[2] In IR12-15, the Deputy Registrar, determined, under s. 7.2 of the LRA, that Mr. Hill had contravened ss. 3(1) and 4(1) of the LRA and imposed an administrative penalty of $2,500. In an August 8, 2012 letter to this Office, Mr. Hill requested, under s. 7.3 of the Act, a reconsideration of both the finding that he had not complied with the LRA and the administrative penalty amount. His letter identified the grounds for his request and made arguments in support of the request. On October 12, 2012, I invited Mr. Hill to make further submissions and he did so, in writing, on October 25, 2012.

[3] For the reasons given below, I find that Mr. Hill contravened s. 4(1) of the LRA in light of s. 5(1), but have decided to vary the administrative penalty, from $2,500 to $250. Last, I have decided that this decision and IR12-15 are to be published.

[4] In arriving at this decision, I have, in accordance with s. 7.3(3), considered Mr. Hill's reconsideration request, his submissions in this reconsideration, and the evidence and argument he submitted in the hearing process culminating in IR12-15.[1]

DISCUSSION

Should the finding of non-compliance be rescinded or confirmed?

[5] In IR12-15, the Deputy Registrar concluded that, on a balance of probabilities, Mr. Hill had not, at the time of his registration under the LRA, undertaken to lobby within the meaning of the LRA. Accordingly, because Mr. Hill was not required to register at all, his registration disclosing such an undertaking provided inaccurate information, in contravention of the LRA.[2]

[6] In his reconsideration request, Mr. Hill said that he did not, at the time of filing, know that the information he supplied was false or misleading. He said that, at the time, he was just starting his consulting business and was not familiar with the LRA's workings. Because he was concerned with doing the "right thing", he consulted his client's lawyers and relied on their advice to "ensure" that he was in compliance with the LRA. Further, in discussions with his client, it was agreed that he should register to avoid "public misperceptions", because of "the possibility of some future activity that may constitute lobbying", and the desire to be "as publicly transparent as possible." He argued, last, that if IR12-15 "stands the unintended consequence" may be "less transparency, not more."[3]

[7] In his reconsideration submissions, Mr. Hill says that, since he had not undertaken to lobby within the meaning of the LRA, a finding that the Deputy Registrar made in IR12-15, he was never required to register under s. 3(1). Accordingly, he argues, he could not be found to have contravened s. 3(1), including, I infer, as regards its 10-day registration time limit. He also argues that, while s. 3(1) imposes a "positive obligation" to file a return, it does not prohibit the

[1] In the interests of brevity, I will only refer specifically to those materials and the reasoning set out in IR12-15 to the extent strictly necessary.
[2] IR12-15 concludes that in filing an inaccurate return, Mr. Hill contravened ss. 3(1) and 4(1). I will return to this issue below.
[3] In a May 9, 2012 affidavit submitted to the Deputy Registrar in support of his hearing submissions, Mr. Hill deposed that his return was prepared for him by his client's lawyers. He deposed that he did not remember specific details surrounding his discussions with the lawyers, adding that he was convinced they were "very familiar with the LRA and knew how to compile and submit a proper registration." He also deposed that, after discussions with his client and his client's lawyers, he decided to "err on the side of caution and register in the interests of being completely transparent", to avoid misperceptions.

filing of a return "prior to entering into an undertaking or prior to actually lobbying."[4] As I understand his argument, an individual may file a return under s. 3(1) even if she or he is not required to under that section. Consistent with this, Mr. Hill goes on to say that the return that he filed—in essence, voluntarily—provided all of the information that s. 4(1) requires, "although I may have been honestly mistaken as to the accuracy of some information."[5]

[8] Section 3(1) of the LRA requires consultant lobbyists to file a return in prescribed form within "10 days after entering into an undertaking to lobby on behalf of a client". Section 4(1) stipulates the information that must be included in returns. Section 5(1) provides that an individual who submits a document to the Registrar "must certify…that, to the best of the individual's knowledge and belief, the information in the document is true." This certification is effected through the online registration system maintained by this Office and used by Mr. Hill. The system contains a notice to individuals who file a document that doing so invokes the certification contemplated by s. 5(1).

[9] Again, Mr. Hill argues that s. 3(1) only requires the filing of a return where an individual has undertaken to lobby, which he had not. I agree that the obligation under that section to file a return only applies where someone has undertaken to lobby. I also consider that the 10-day time limit for filing found in the section only applies to someone who is under a duty to file. An individual who files a return even though she or he has not entered into an undertaking cannot be held accountable under the LRA for failure to file in time. Only a consultant lobbyist can be held to account for a late filing. While Mr. Hill did not contravene s. 3(1) by virtue of being outside the 10-day registration requirement, that is not the end of the matter.

[10] The duty of accuracy in s. 5(1) applies to an "individual who submits a document, including a return, to the registrar under" the LRA. In my view, this provision imposes on someone who files a return even though he or she is not required to do so the same duty of accuracy as someone who files a return because the LRA requires it. It is well-established that the language of a statute must be interpreted in its entire context and in its grammatical and ordinary sense, in harmony with the scheme of the statute, the statutory purposes and the Legislature's intention.[6] In addition, the *Interpretation Act* provides that the LRA

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[4] Submissions, p. 2.

[5] Submissions, p. 2. Mr. Hill acknowledges in his reconsideration submissions that s. 5(1) provides that "an individual who submits a document, including a return, to the registrar under this Act must certify … that, to the best of the individual's knowledge and belief, the information in the document is true." He says, as he did in his reconsideration request, that, because he relied on legal advice, the information was true to the best of his knowledge and belief and he did not contravene the LRA. I will deal with the s. 5(1) issue below.

[6] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27.

must be interpreted "as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."[7] There is no doubt that, as the Deputy Registrar said in IR12-15, the purpose of the LRA is to bring transparency to the legitimate activity of lobbying, so that the public knows who is lobbying which public officials, what they are lobbying about, and when.

[11] Viewed in light of this legislative intention, and viewed in the overall context of the LRA, it is clear that s. 5(1) was intended to apply to cases where an individual submits a return even though not under a s. 3 duty to do so. In addition, s. 5(1) means that a document submitted to the Registrar must, to the knowledge and belief of the certifying individual, be true. It is a contravention of the LRA for an individual to submit a document that is not true to his or her knowledge and belief.

[12] In filing a return, even though he was not required to do so, Mr. Hill became an "individual who submits a document, including a return, to the registrar", and the obligation of accuracy as set out in that section applied to him. In filing a return, Mr. Hill certified under s. 5(1) that the information it contained was true to the best of his knowledge and belief. Again acknowledging Mr. Hill's motives, the information he provided was not, however, true. The evidence, including Mr. Hill's May 9, 2012 affidavit, establishes that, at the time of the filing, Mr. Hill was of the view that he was not lobbying and had not undertaken to do so, such that the LRA did not require him to register. The inaccuracy consisted of the representation that he had undertaken to lobby for a client, the particulars of which were also given, even though he had, to his knowledge, not undertaken to lobby.

[13] I am satisfied that, based on the material before this Office, Mr. Hill knew that his return was not true when he filed it and thus certified that he had undertaken to lobby when he had not. I am, alternatively, satisfied that, at the time of the certification, Mr. Hill was aware of information that could not plausibly leave him with a belief that his return was true. Viewed from either perspective, I conclude that he contravened s. 5(1). This view is not affected by Mr. Hill's evidence that he relied in some respect on his client's lawyers' experience with the LRA or to complete the return for him.

[14] To be clear, I fully accept that Mr. Hill registered because of his desire to be open and transparent about his activities. I acknowledge that his motive was, as he put it, to avoid misperceptions and speculation. The irony is, however, that in seeking to be open and transparent, to avoid misperceptions, Mr. Hill filed a document that did not accurately disclose the true state of affairs.

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[7] Section 8, *Interpretation Act*.

Does s. 10(3) apply?

[15] In his request for reconsideration, Mr. Hill relied on s. 10(3) of the LRA in answer to the contention that he contravened s. 3(1) and s. 4(1):

> (3) A person does not commit an offence under subsection (2) if, at the time the information was supplied, the person did not know that it was false or misleading and, with the exercise of reasonable diligence, could not have known that it was false or misleading.

[16] My October 12, 2012 letter to Mr. Hill invited him to make submissions on this point also, and he indicated that he understood s. 10(3) does not apply. I agree. Section 10(3), which is found in Part 4 of the LRA, provides a defence to an individual where there is a prosecution for the offence, created by s. 10(1), of contravening "section 2.1 (2), 3 (1) or (3) or 4" of the LRA. This proceeding does not involve a prosecution; it is a reconsideration of the outcome of an investigation under Part 2.

Authority to impose an administrative penalty

[17] Mr. Hill further argues in his reconsideration submissions that this Office has no jurisdiction to levy an administrative penalty for a contravention of s. 5(1). He notes that, under s. 7.2(b), an administrative penalty may be imposed if, after a hearing such as the one held here, the Registrar "determines that the person has not complied with a prescribed provision of this Act or the regulations". He then refers to s. 4 of the Lobbyists Registration Regulation, B.C. Reg. 76/2010 ("Regulation"), which reads as follows:

> An administrative penalty may be imposed under section 7.2 (2)(b) of the Act for the contravention of any of sections 2.1(2), 3(1) and (3) and 4(1) and (2) to (4).

[18] Section 5 of the LRA is not a "prescribed provision" for the purposes of s. 7.2(b), meaning that no administrative penalty can be imposed, he says.

[19] I conclude otherwise. Section 5 of the LRA is not itself designated in s. 4 of the Regulation as a provision the contravention of which can lead to an administrative penalty being imposed. The Regulation refers to ss. 4(1) and (2) through (4), and s. 4(1) specifies the kinds of information to be contained in a return. Mr. Hill's return set out information contemplated by s. 4(1). In my view, however, the certification as to truth required under s. 5(1) means that, when an individual files a return, it is a contravention of s. 4(1) to file a return that is not true to the knowledge and belief of the individual who files and certifies it. Mr. Hill's return disclosed an undertaking to lobby, that, as has been found, did not exist, and it gave particulars of the purported undertaking.

[20] Accordingly, Mr. Hill contravened s. 4(1) by filing a return that was, within the meaning of s. 5(1), not true. It is therefore open to this Office in cases such as this to impose an administrative penalty under s. 7.2(b). I will now consider what penalty may be appropriate in this case.

Amount of the administrative penalty

[21] The Deputy Registrar noted in IR12-15 that the "purpose of the LRA is to achieve transparency regarding who is attempting to influence government decision-making", adding that "credible transparency requires credible accountability". As she also noted, using the registry "for purposes other than to declare legitimate lobbying activities, in this case essentially for reputation management" actually "defeats the public policy objective of transparency".

[22] The Deputy Registrar concluded that she should consider whether a penalty is needed to achieve specific deterrence and general deterrence. She went on to say that the investigation itself likely had achieved specific deterrence as regards Mr. Hill. She also said, however, that the "general lobbyist community" needed a "clear message" that this Office expects them to "take seriously their legal responsibilities" respecting the filing of accurate information. She concluded by saying that the "lobbyist community must receive the message that there are consequences" for using the registry for "purposes other than intended". Similar views were expressed by the Acting Deputy Registrar, Jay Fedorak, in Investigation Report 12-01 and its companion decisions, involving a single individual.

[23] Mr. Hill contends that the $2,500 administrative penalty levied by the Deputy Registrar "is unfair in the circumstances", adding that "these circumstances do not warrant an administrative penalty." Mr. Hill cites the fact that another individual was given a cumulative penalty of just $325 for a total of 14 contraventions of the LRA. Those contraventions involved the filing of returns where the individual had not, despite what the filed returns indicated, undertaken to lobby for organizations identified in the returns.

[24] Mr. Hill also argues that the Deputy Registrar should not have relied on this Office's 'Lobbyists Registration Act Policies and Procedures', published March 2011 ("LRA Policies"). He says that policy 12.3 is inconsistent with the LRA, because the policy sets out a general range of possible penalties using the s. 10(2) language of "false and misleading", which applies only to offences, not administrative penalty proceedings.

[25] Mr. Hill also says that, in any case, no penalty should be imposed, because his error was "not deliberate", the error was minor, he gained no economic benefit from his error, no harm was done to anyone, a warning will suffice, and penalties are "of last resort".[8]

[26] As acknowledged in IR12-15, the LRA Policies set out factors that this Office will consider when determining the amount of an administrative penalty:

> 12.3 In determining the amount of the administrative penalty, the ORL will consider, among other things:
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> 12.3.1 Previous enforcement actions for contraventions of a similar nature by the person;
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> 12.3.2 The gravity and magnitude of the contravention;
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> 12.3.3 Whether the contravention was deliberate;
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> 12.3.4 Any economic benefit derived from the contravention; and
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> 12.3.5 The person's efforts to report and/or correct the contravention.
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> 12.3.6 The need to deter the individual and others from contravening the Act in the future.

[27] As noted in IR12-15, policy 12.4 provides that these factors do not fetter the Office's discretion in setting an administrative penalty. Policy 12.4 also says that policy 12.3 is a "general policy" that "does not fetter the ORL's ability to conclude that no administrative penalty is appropriate in the circumstances."

[28] The Deputy Registrar acknowledged that this case is "unusual". She also acknowledged that Mr. Hill had not previously been found to have contravened the LRA. She also considered that the investigation alone, quite apart from any penalty, had likely achieved specific deterrence as regards Mr. Hill, although she went on to refer to the need to deter others from contravening the LRA in the future.

[29] As regards the other factors set out in policy 12.3, this case is, in my view, far from grave. Nor is there any evidence of an economic benefit to Mr. Hill or economic harm to others. I am also of the view that Mr. Hill's motives in registering, mentioned above, are relevant. I accept that, far from setting out to mislead anyone or conceal his activities, he filed a return in an effort to be open.[9] At the end of the day, I cannot agree that the circumstances warrant imposing an

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[8] Submissions, pp. 4 and 5.

[9] In doing so, as I have found, he filed a return that was not true, although he certified it to be so to his knowledge and belief. Good motives for filing do not overcome this.

administrative penalty for this contravention by Mr. Hill, his first, above the amounts imposed in Investigation Report 12-01 and companion reports. Accordingly, the penalty imposed in IR12-15 is varied and is set at $250.

[30] The penalties in future cases will, of course, be assessed in light of their circumstances, but lobbyists should bear in mind that, despite the outcome here and in Investigation Report 12-01 and related reports, this Office's policies do speak to an administrative penalty for a first contravention starting at $1,000. Without fettering future decision-makers in any way, I would suggest that individuals should expect that future such contraventions are likely to yield penalties within the $1,000 to $7,500 range set out in the Policies.

Should IR12-15 and this decision be published?

[31] IR12-15 has not been published and Mr. Hill asks that it, and presumably this decision, not be published. Citing para. 33 of IR12-15, where the Deputy Registrar said, again, that the "situation before me is an unusual one to say the least", Mr. Hill says "it would not be fair or just to have this Report made public given my long-standing service to my constituents and the people of British Columbia and Canada."

[32] In his reconsideration request, Mr. Hill cites s. 7.9(1) as conferring a discretion respecting whether or not to disclose a report. Section 7.9 reads as follows:

> 7.9(1) This section applies if
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> (a) the registrar refuses to investigate, ceases an investigation or suspends an investigation under section 7.1, or
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> (b) after an investigation or a hearing, as applicable, the registrar believes or determines that a person under investigation has complied with this Act and the regulations.
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> (2) The registrar may
>
> (a) make a report of the registrar's findings and conclusions and reasons for those conclusions in respect of a matter referred to in subsection (1), and
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> (b) if the register [sic] considers it to be in the public interest, make the report publicly available.

[33] The discretion afforded by s. 7.9(2)(b) does not apply here. It applies only in the circumstances mentioned in s. 7.9(1), none of which encompasses this case. Rather, ss. 7.8 and 7.91 apply. Under s. 7.8(1), if, after a hearing under s. 7.2, the Registrar determines that someone has not complied with a provision of the LRA, she or he "must make a report of" the Registrar's "findings and

conclusions and reasons for those conclusions", and must report the "amount of any administrative penalty imposed". Section 7.8(4) then requires the Registrar to deliver each report to the Speaker of the Legislative Assembly. The Speaker then "must promptly lay the report before the Legislative Assembly", or file it with the Clerk of the Legislative Assembly if the House is not then sitting or will not be sitting within 10 days after the report is received by the Speaker. No discretion, to be clear, is given to the Speaker respecting disclosure of such reports to the Legislative Assembly.

[34] It is true that s. 7.91 provides that the Registrar "may" disclose a report required to be made under s. 7.8, and "may" include in such a report "any of the matters" set out in s. 7.8(1) or (2) or s. 7.9(2)(a). The upshot of s. 7.8(4) in a case such as this, however, is that the report will ultimately be made available by being tabled in the Legislative Assembly. In the context of the LRA as a whole, and in light of its legislative purpose of transparency, I do not interpret s. 7.91 as incorporating a 'public interest' disclosure test as I understand Mr. Hill to suggest.[10] Section 7.91 is an enabling provision. It is, in other words, intended to confer on the Registrar the authority to disclose reports and information, but without incorporating a 'public interest' test.

[35] The question, then, is whether the discretion conferred by this section should be exercised in favour of disclosure. While the circumstances of each case will govern, in this situation, I conclude that publication of IR12-15, and this decision, is desirable in view of the need both to educate lobbyists, clients and the public, and to provide general deterrence for those who must comply with the LRA. If IR12-15 and this decision were not published, these important objectives would not be advanced as effectively.

[36] Further, Mr. Hill has not persuaded me that it "would not be fair or just" to have IR12-15 or this decision made public. His service to the public, to which he referred, is admirable, but it is not a sufficient reason to decide against publication. Again, I accept that Mr. Hill registered for laudable reasons, notably his desire to be open and transparent about his activities, but this does not mean that the education, guidance and deterrence provided through IR12-15 and this reconsideration should not be made available to the public.

[37] At all events, by virtue of s. 7.8(4), the documents will be tabled in the Legislative Assembly. Out of respect for the Legislature's intention as expressed in s. 7.8(4), however, I have decided to defer publication of this decision and IR12-15 until the earlier of the date on which they are tabled in the Legislative Assembly and the date on which they are delivered to the Clerk of the Legislative Assembly.

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[10] I also note that the Legislature explicitly provided such a test in s. 7.9(1), the provision Mr. Hill cites—the Legislature's choice not to use the same express "public interest" language in s. 7.8 or s. 7.91 further supports the view that no 'public interest' test is implicit in s. 7.91.

CONCLUSION

[38] For the above reasons, under s. 7.3 of the LRA, I decline to rescind the Deputy Registrar's determination in IR12-15 that Mr. Hill contravened the LRA and confirm that determination for the reasons and as set out above.

[39] For the reasons also given above, under s. 7.3, I have decided to vary the amount of the administrative penalty imposed in IR12-15 to $250. As required by s. 7.3, I extend the date by which the varied penalty of $250 must be paid to 30 days after the publication of this report, that is on or before January 21, 2013.

December 6, 2012

Elizabeth Denham
Registrar of Lobbyists