PRB 08-17E

Library of Parliament Bibliothèque du Parlement

THE FEDERAL LOBBYING SYSTEM

Nancy Holmes
Law and Government Division

17 October 2008

PARLIAMENTARY INFORMATION AND RESEARCH SERVICE
SERVICE D'INFORMATION ET DE RECHERCHE PARLEMENTAIRES

TABLE OF CONTENTS

CANADA
LIBRARY OF PARLIAMENT
BIBLIOTHÈQUE DU PARLEMENT

THE FEDERAL LOBBYING SYSTEM

INTRODUCTION

The term "lobbying" refers generally to any effort to communicate with legislators or other public officials against or in favour of a specific cause. Until July 2008, lobbying at the federal level in Canada was governed by the *Lobbyists Registration Act*, which came into force in 1989 and established a registration system intended to foster the public's right to know and to be informed regarding who is trying to influence government policy in this country.

In December 2006, the *Federal Accountability Act* made substantive amendments to the *Lobbyists Registration Act*, including renaming the law the *Lobbying Act*, presumably because it seeks to regulate the activities of lobbyists, rather than simply monitor them by means of a registry system. The *Lobbying Act* came into force on 2 July 2008. This paper will review the legislative history of the *Lobbying Act* as well as outline the changes to the lobbying system brought about by the *Federal Accountability Act.*

LEGISLATIVE HISTORY

On 30 September 1989, following extensive consultations and considerable debate, the *Lobbyists Registration Act* came into force in Canada.(1) The legislation sought to make transparent the activities of lobbyists without impeding access to government. The Act

(1) Essentially, two principal viewpoints on how to regulate the lobbying industry in Canada emerged from a series of hearings on the subject held by the House of Commons Standing Committee on Elections, Privileges and Procedure in 1986–1987. Some argued against a registration system for lobbyists, asserting that it would involve too much paperwork and high administrative costs, and would interfere with client confidentiality. They suggested that a system of self-regulation by the lobbying industry would be a more cost-effective and less objectionable means of achieving ethical standards of behaviour. Others, however, contended that a registration system would endow lobbying with a sense of legitimacy. It would ensure the public's right to know and be informed regarding who is trying to influence government policy, thereby ensuring the health of Canadian democracy. The Standing Committee sided with the proponents of a registration system and, six months after it had tabled its report, the government introduced Bill C-82, the Lobbyists Registration Act.

was a response to the public perception at the time that individuals seeking to influence the government through political or personal contacts were abusing the system. Indeed, between 1965 and 1985, over 20 private members' bills were introduced in the House of Commons on the subject of lobbyist regulation in response to political scandals or public outcry.(2)

It was believed that the enactment of the *Lobbyists Registration Act* would lead to a reliable and accurate source of information on the activities of lobbyists, which would dispel much of the mystery surrounding lobbying and thus remove the atmosphere of conjecture and innuendo that can accompany such activities. The Act required *paid* lobbyists to register and disclose certain information through a public registry.(3) The Act did not attempt to regulate lobbyists or the manner in which lobbying was conducted.

The *Lobbyists Registration Act* evolved significantly over time,(4) in large part because of a statutory review provision in the legislation that required periodic parliamentary reviews of the provisions and operation of the Act.(5) The latest review was conducted in 2001 by the House of Commons Standing Committee on Industry, Science and Technology. In its report, *Transparency in the Information Age: The "Lobbyists Registration Act" in the 21st Century*, the Committee made several recommendations aimed at improving the operation of the Act.(6) Bill C-15, An Act to amend the Lobbyists Registration Act, responded to some of the major recommendations of the Industry Committee's report. Specifically, it sought to improve investigation and enforcement of the Act; simplify and harmonize the registration requirements for lobbyists; clarify and improve the language of the Act; and give effect to several technical amendments.(7) Although Bill C-15 received Royal Assent on 11 June 2003, it did not come into

---

(2) Testimony of Karen Shepherd, Director, Lobbyists Registration Branch, Industry Canada, before the House of Commons Standing Committee on Access to Information, Privacy and Ethics, 14 June 2005.

(3) Only persons who are paid to communicate with federal public office holders are subject to the Act (see the section below entitled "A. The Act, 2. Disclosure Requirements"). Thus, for example, volunteers are not required to register pursuant to the legislation.

(4) Initially, the reporting requirement for registered lobbyists were so few that many people argued that the *Lobbyists Registration Act* was simply a "business card" law. The Act was subsequently amended in 1995, 1996, 2003, 2004 and 2006.

(5) For more on what took place during these parliamentary reviews, see Paul Pross, *The Lobbyists Registration Act: Its Application and Effectiveness*, research paper prepared for the Commission of Inquiry into the Sponsorship Program and Advertising Activities, Phase 2 report, *Restoring Accountability: Recommendations*, 1 February 2006.

(6) House of Commons Standing Committee on Industry, Science and Technology, *Transparency in the Information Age: The "Lobbyists Registration Act" in the 21st Century*, June 2001, http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=1032097&Language=E&Mode=1&Parl=37&Ses=1.

(7) See Geoffrey P. Kieley, *Bill C-15: An Act to amend the Lobbyists Registration Act*, LS-443E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 19 March 2003.

force until 20 June 2005, along with *Regulations Amending the Lobbyists Registration Regulations*. The delay was necessary in order to update the *Lobbyists Registration Regulations* as well as the electronic filing system for online registrations.

In July 2008, the *Lobbying Act* came into force. The Act is a result of significant changes made to the *Lobbyists Registration Act* by the *Federal Accountability Act*. The changes are a response to issues concerning disclosure, compliance, enforcement and the independence of the Registrar of Lobbyists that had been raised since the inception of the *Lobbyists Registration Act*, particularly in the course of parliamentary reviews of the Act. The changes also seek to implement most of the recommendations of Justice John Gomery in his 1 February 2006 report of the Commission of Inquiry into the Sponsorship Program and Advertising Activities.(8) For example, as a means of ensuring compliance with the legislation, the Gomery Commission recommended the appointment of an independent Registrar of Lobbyists who would report directly to Parliament rather than through a Cabinet minister (see the section entitled "Commissioner of Lobbying," below) and who would be provided with sufficient resources to publicize and enforce the requirements of the *Lobbyists Registration Act*, including investigation and prosecution by personnel at the Office of the Registrar of Lobbyists. The Commission also recommended that the limitation period for investigation and prosecution under the Act be increased from two to five years from the time the Registrar becomes aware of an infringement.

THE PRESENT SYSTEM

A. The Act

1. Commissioner of Lobbying

Under the *Lobbyists Registration Act*, the Registrar of Lobbyists was responsible for administering the information disclosure provisions of the Act and maintaining the public registry. Initially, the Registrar reported to Parliament through the Ethics Counsellor.(9) In March 2004, Bill C-4, An Act to amend the Parliament of Canada Act (Ethics Commissioner and

(8) Commission of Inquiry into the Sponsorship Program and Advertising Activities, *Restoring Accountability: Recommendations*, 1 February 2006, Chapter 9, pp. 171–4.

(9) In 1994, the Office of the Ethics Counsellor was established within Industry Canada. The Ethics Counsellor was a Governor in Council appointee who was required to provide the Minister of Industry with an annual report on the exercise of his or her powers, duties, and functions in relation to the *Lobbyists' Code of Conduct*. The report to the Minister was then transmitted to Parliament. The Ethics Counsellor's mandate at that time also included the administration of the *Conflict of Interest and Post-Employment Code for Public Office Holders*.

Senate Ethics Officer) and other Acts in consequence, changed the reporting structure under the *Lobbyists Registration Act*. The Act removed the position of Ethics Counsellor from the lobbyists registration system and stipulated that the Registrar of Lobbyists report to Parliament through the Registrar General (the minister of Industry). However, while this change created a more independent ethics office (called Ethics Commissioner), it left the Registrar of Lobbyists under the control of a Cabinet minister, and it was contended that, as an employee of a government department, the Registrar could be subject to government influence and therefore could not fairly and impartially enforce the *Lobbyists' Code of Conduct*, which contains rules that restrict lobbyists' relationships with Cabinet ministers and other public officials. In February 2006, the Office of the Registrar of Lobbyists was transferred from the Industry to the Treasury Board portfolio as a transitional measure to increase the independence of the Office until forthcoming revisions were made to strengthen the governing legislation pursuant to the *Federal Accountability Act*.

The *Lobbying Act* replaces the position of Registrar of Lobbyists with that of Commissioner of Lobbying (the Commissioner), an independent Officer of Parliament, responsible for promoting an understanding of, acceptance of and compliance with the Act. In addition to an education mandate, particularly with respect to lobbyists, their clients and public office holders, and some enforcement measures (see the section entitled "Offence Provisions and Sanctions," below), the Act provides the Commissioner with broad investigatory powers in relation to both the legislation and the *Lobbyists Code of Conduct*.[(10)] All investigations are to be conducted in private, and the Commissioner must report to Parliament on his or her findings and conclusions after the completion of an investigation. The Commissioner is also required to table an annual report before Parliament on the administration of the Act. A special report may also be prepared on any matter of importance that falls within the Commissioner's mandate.

Despite enhanced investigatory powers, the Commissioner, like the former Registrar, does not have the authority to impose administrative or monetary penalties as alternatives to criminal charges under the Act.[(11)] The Commissioner must cease an

(10) The former Registrar of Lobbyists had no investigatory powers under the *Lobbyists Registration Act*, although he could conduct investigations into possible breaches of the *Lobbyists' Code of Conduct*.

(11) Under the *Lobbyists Registration Act*, when the Lobbyist Registration Branch received a request or complaint from the general public, media, member of Parliament or organization, or when officials of the branch believed there was a possible contravention of the Act or Code, the branch would assemble and review factual evidence to determine whether a formal investigation was warranted. Where there was an indication of a possible contravention of the Act, the matter was turned over to the RCMP. As well, the Registrar of Lobbyists was required to notify police forces where there were reasonable grounds to believe that a criminal offence had been committed under the Act. No charges were ever laid for contraventions of the *Lobbyists Registration Act*, leading some observers to conclude that the legislation could not be adequately enforced.

investigation and advise the appropriate authorities where he or she believes on reasonable grounds that a person has committed an offence under this Act or any other Act of Parliament or of a provincial legislature. It therefore remains to be seen how effective these new investigatory powers will be, given that the ultimate enforcement of the law will still rely on the use of criminal sanctions by a body outside of the lobbyists system.

2. Disclosure Requirements

The *Lobbying Act* continues to apply only to *paid* lobbyists who communicate with federal public office holders on behalf of a third party.(12) Three types of lobbyists are identified by the Act:

1. Individuals who lobby on behalf of clients must register as *consultant lobbyists*.

2. Senior officers of corporations that carry on commercial activities for financial gain must register as *in-house lobbyists (corporate)* when one or more employees lobby and where the total lobbying duties of all employees would constitute a significant part of the duties of one employee (20% or more).

3. Senior officers of organizations that pursue non-profit objectives must register as *in-house lobbyists (organizations)* when one or more employees lobby and where the total lobbying duties of all employees would constitute a significant part of the duties of one employee (20% or more).

Public office holders, as defined under the Act, are virtually all persons occupying an elected or appointed position in the federal government, including members of the House of Commons and the Senate and their staff.(13) The *Lobbying Act* added "designated public office

---

(12) Bill C-15, An Act to amend the Lobbyists Registration Act, modified the definition of lobbying, which used to apply in situations where a person or organization communicated with a public office holder in an attempt to influence government decisions. The phrase "in an attempt to influence" had, however, given rise to interpretive and therefore enforcement problems under the Act. Now the Act states that lobbying will consist of communicating with a public office holder by a paid individual on behalf of any person or organization with respect to the development of legislative proposals; introduction, passage, defeat or amendment of bills or resolutions in Parliament; the making or amendment of regulations; the development of public policies and programs; and the awarding of grants and contracts. In the case of a consultant lobbyist, a person hired to communicate on behalf of a client, lobbying also consists of arranging a meeting between a public office holder and another person. There is no longer an exemption from registration if a public office holder initiates contact with a lobbyist; however, an exclusion does exist for persons making simple enquiries or requests for information from public office holders.

(13) The Act defines "public office holder" as any officer or employee of the federal government, including members of the Senate or House of Commons and members of their staff, Governor in council appointees, ministers, officers, directors or employees of any federal board, commission or tribunal, members of the Canadian Armed Forces and members of the Royal Canadian Mounted Police. This definition is much broader than that under the *Conflict of Interest Act*, which defines public office holders as ministers of the Crown and individuals working for them who are not public servants, and certain Governor-in-Council appointees.

holder" as a new definition under the law. The term refers to key decision makers within government and includes ministers of the Crown, their exempt staff, senior public servants (e.g., deputy or assistant deputy ministers) and other positions designated by regulation (e.g., certain senior members of the Canadian Forces). The Act also treats as a designated public office holder any member of a Prime Minister's transition team (see the section entitled "Five-year Post-employment Ban," below). The new designation relates to post-employment limitations on lobbying as well as disclosure requirements that came into force with the *Lobbying Act*.

Lobbyists subject to the Act are required to register and disclose certain information within specified time limits.(14) This information is made available to the public through an Internet-based registry that has evolved over time to meet the data requirements of the legislation and to facilitate the needs of system users. The new disclosure requirements in the *Lobbying Act* are intended to enhance transparency by providing Canadians with more timely and comprehensive information on who is lobbying public office holders and in what context. For example, lobbyists must now identify not only whether they were a public office holder, but also whether they were a designated public office holder and if so, the date on which they ceased to hold that office. This requirement ties in to the new prohibition on lobbying by designated public office holders under the Act (see the section entitled "Five-year Post-employment Ban," below).

As well, all lobbyists are now required to file monthly returns (including name, date and particulars) that record lobbying activities involving communications with a designated public office holder when certain conditions prescribed by regulation are met. The *Lobbyists Registration Regulations* exclude certain communications from the monthly reporting requirement when the communications are initiated by a public office holder.(15) The Act allows the Commissioner to contact present or former designated public office holders to verify the information provided and to post these responses on its public internet-based registry. The Commissioner will prescribe the time, manner and form for providing the requested information, and he or she may report to Parliament on the failure of a present or former designated public office holder to respond, or satisfactorily reply, to a request for verification.

---

(14) Information is submitted in the form and manner prescribed by regulation; the forms and regulations function as an integral part of the implementation of the *Lobbying Act*. The regulations also set out certain additional information to be disclosed in returns beyond the information set out in the Act. The information includes, but is not limited to, the name of the client or employer, the subject-matter lobbied, the federal institution being lobbied, the lobbying methods used, if the lobbyist was formerly a public office holder, the public office(s) held, as well as, if they were a designated public office holder, the last date on which they held that position.

(15) Communications initiated by public office holders relating to the development of policy, programs or legislation are excluded so that the government may consult Canadians without unduly burdening individuals or organizations with registration requirements when consulted.

3. Five-year Post-employment Ban

Designated public office holders are now prohibited by law from lobbying for a period of five years after leaving office.(16) The five-year lobbying ban also applies to persons identified by the Prime Minister as having provided support and advice to him or her during the transition period from election to swearing-in as Prime Minister. The five-year period starts from the time the member ceases to carry out his or her functions with the team. Everyone who contravenes this provision is subject to an offence and liable on summary conviction to a fine not exceeding $50,000. The Commissioner also has the power to make public any offence committed under this section as well as the name of the offender. The prohibition does not apply to individuals who were designated public office holders through employment exchange programs.

A former designated public office holder may apply to the Commissioner for an exemption under this law and the Commissioner may grant such an exemption where doing so would be in keeping with the purpose of the legislation and consistent with criteria set out therein (i.e., if the applicant was a designated public office holder for only a short time, or was employed on an acting or administrative basis only, or was employed as a student). The Commissioner is required to make public every exemption granted, along with his or her reasons for doing so.

Members of a Prime Minister's transition team may also apply to the Commissioner for an exemption under the Act; however, the criteria for this exemption differ from those with respect to other designated public office holders. Reference can be had, for example, to the circumstances under which the member left the team, the authority and influence the member possessed while on the team and the degree to which the member's new employer might gain unfair commercial advantage upon hiring the member. Presumably these criteria are in place because it is felt that transition team members are very closely involved in senior government offices – often in the staffing of high-level positions – and that they could thus potentially exercise considerable influence over these offices if they were permitted to lobby them within five years of leaving the team.

---

(16) Prior to the *Federal Accountability Act*, the *Conflict of Interest and Post-Employment Code for Public Office Holders* provided that former ministers, senior public servants and designated ministerial staff could not act as consultant lobbyists or accept employment as in-house lobbyists for a period of five years after leaving office. Although public office holders were bound by this obligation under the Code, the Code did not have the force of law.

4. Prohibition on Contingency Fees

The *Lobbying Act* attempts to eliminate any previous confusion or inconsistencies that may have existed in the area of contingency fees under the *Lobbyists Registration Act*. Concerns had been increasingly raised by the public and also some parliamentarians about the apparent conflict between Treasury Board policy prohibiting contingency fees in certain instances and the requirement in the *Lobbyists Registration Act* that lobbyists report such arrangements. The *Lobbying Act* therefore contains a broad prohibition on contingency fee arrangements so that consultant lobbyists are prohibited from receiving any payment that is in whole or in part contingent on the outcome of their lobbying efforts, and their clients are similarly prohibited from making any such payments.(17) Transitional provisions allow for certain contingency arrangements made prior to the coming into force of the *Lobbying Act*.

5. Offence Provisions and Sanctions

The *Lobbyists Registration Act* contained penalties for non-compliance with the legislation (e.g., failure to register) and for submitting false or misleading information. The *Lobbying Act* added offence provisions for failure to file a requisite return or for a designated public office holder to make a false or misleading statement in response to a request for information from the Commissioner. Anyone convicted of these offences by way of summary conviction is liable to a maximum fine of $50,000 (up from $25,000 under the *Lobbyists Registration Act*) or imprisonment for up to six months, or both. Where proceedings are by way of indictment, the maximum fine will be $200,000 (up from $100,000) or imprisonment for up to two years, or both. The Act also provides that anyone convicted of contravening any other provision of the Act, except in relation to the *Lobbyists' Code of Conduct*, will be liable to a maximum fine of $50,000 (up from $25,000). The limitation period for instituting proceedings by way of summary conviction under the Act is not later than

(17) The contingency fee ban does not apply to in-house lobbyists employed by a corporation or by an organization.

five years after the Commissioner became aware of the facts and not later than ten years after the offence was committed.(18)

The Commissioner may prohibit anyone who has been convicted of an offence under the Act from lobbying for a period of up to two years. The Commissioner must be satisfied that the prohibition is necessary in the public interest, and he or she must also take into consideration the gravity of the offence and the existence of any previous convictions. In addition, the Commissioner will also have the power to make publicly available any information related to a person convicted of an offence under the Act, including the person's name, the nature of the offence, the punishment imposed and any lobbying prohibition the Commissioner may have imposed.

Again, as no charges were ever laid under the *Lobbyists Registration Act* and many of the enforcement provisions under the *Lobbying Act* will continue to rely on criminal prosecutions, one may question how effective these new enforcement powers will be. It also remains to be seen what role the Director of Public Prosecutions will play in this regard.(19)

B. The Lobbyists' Code of Conduct

Canada was the first country to reinforce its lobbyist disclosure rules with a code of conduct. When the *Lobbyists Registration Act* was amended in 1995, provision was made for a mandatory code of conduct for lobbyists and the submission of an annual report to Parliament on this code. After extensive consultations with all registered lobbyists and with parliamentarians, journalists and academics, review by the House of Commons Standing Committee on Procedure and House Affairs, and publication in the *Canada Gazette*, the *Lobbyists' Code of Conduct* came into effect on 1 March 1997.

The Code establishes standards of conduct for all lobbyists who communicate with federal public office holders and forms a counterpart to the obligations that federal officials are required to observe in their interactions with the public and with lobbyists. The Code begins with a preamble setting out its purpose and context. This is followed by a series of principles which, in turn, are followed by specific rules. The principles establish the operational parameters of the Code and set the framework through which the Code's goals and objectives are

(18) Under the *Lobbyists Registration Act*, proceedings by way of summary conviction could not be instituted later than two years after the time when the subject matter of the proceedings arose.

(19) The Director of Public Prosecutions is a new position having authority over all federal prosecutions. It was created by the *Federal Accountability Act*.

to be attained, but they do not establish precise standards. The rules provide detailed requirements for behaviour in certain situations. The specific obligations or requirements under the Code can be broken down into three categories: transparency, confidentiality and conflict of interest. The onus to comply with the Code rests with the lobbyist.

The Commissioner of Lobbying is responsible for investigating possible breaches of the Code and as noted earlier, such investigations must be conducted in private. In February 2007, the introductory message to the Code was amended to provide that an investigation may be triggered by the breach of a principle or a rule of the Code. Previously, the Ethics Counsellor held that only the breach of a rule could trigger an investigation. Where a formal investigation has been conducted, the Commissioner shall table a report to Parliament citing the investigation's findings, conclusions and reasons for those conclusions. The *Lobbying Act* does not prescribe penalties for breaches of the Code; neither does it specify how Parliament is to respond to a reported breach of the Code. There is also no limitation period for breaches of the Code.

CONCLUSION

In its 2001 report on the *Lobbyists Registration Act*, the House of Commons Standing Committee on Industry, Science and Technology concluded its study by describing the lobbyists registration system as a "work in progress." The Committee noted that, just as our thinking must continue to evolve on the subjects of transparency and access to government, so too must our legislative framework remain flexible and responsive to change. Certainly, with new legislative changes in the form of the *Lobbying Act*, one can expect that the lobbyists system will continue to be a topic of interest during the 40th Parliament.