
Lobbying and the Public Interest

by André C. Côté

The term lobbying refers to communications by intermediaries for companies or organizations aimed at influencing public office holders in relation to public policy or administrative decisions in which their constituents have a particular interest. In a free and democratic society, certain fundamental freedoms, such as freedom of expression and the right of association, constitute the foundation of a complex interaction among government and individuals, social and economic stakeholders, and civil society groups and organizations. This article looks at certain provisions of the Lobbying Transparency and Ethics Act (Québec) and asks whether there is any contradiction between lobbying and the public interest.

In *Le Petit Robert*, under the term “intérêt” (“interest”), I came across a phrase that beautifully captures the essence of what I want to speak about. The dictionary attributes Balzac with writing, “The law of public interest (...) is destroyed by the law of private interest (...) which gives birth to selfishness.”

I do not know whether Balzac thought that lobbying and the public interest are mutually exclusive. Personally, in a free and democratic society, I see no contradiction between the affirmation and promotion of special interests, and the identification by the government of what is to be decided in the general interest. There is no opposition in principle if the respective roles, duties and prerogatives of the players—lobbyist and public office-holder—are clearly understood and exercised correctly, and are respectful of the rights and prerogatives of the others affected by the decision.

While the existence of stakeholders with privileged access to the holders of power is as old as the exercise of power itself (consider, for instance, the courtiers surrounding the absolute monarch in olden days), it was not surprising to see that unofficial channels of communication to which certain kinds of intermediaries, with partic-

ular knowledge or skills, could facilitate access, developed and thrived, along with open and structured relations between the government and the governed, or the Administration and the administered.

Similarly, the enormous complexity of the political and administrative structures of the modern State and the level of political and government intervention in all areas of our individual and collective life have created a need for a new kind of expertise, and to make services providing strategic monitoring, situational analysis and interventions planning, of the capacities of analysis of the situations and planning of the interventions, as well as accompaniment and representation services, available to individuals or groups.

Internally, companies or special-interest groups may have to obtain the same services or develop the same skills if they are planning to express their interests or points of view to authorities in order to shape decisions that interest or matter to them.

This is essentially the field occupied by lobbying. I think it has become an inevitable reality in our modern-day society. Does this mean we must basically acknowledge that lobbying exists and support its development, or should we repress it as though it were a social shift or a perversion of the system? There is no simple answer to this question.

In any discussion of influence with government authorities, there is certainly a clearly established zone of

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proscription for anything having to do with corruption and influence peddling. If these atypical situations are excluded, we end up straight away discussing another issue, ensuring that government management procedures have a foundation of integrity, legality and credibility, and are carried out in compliance with the rights and prerogatives of the various social stakeholders.

If we look at the question from the point of view of the lobby groups or other entities which want to sway political or administrative decisions to their own benefit, lobbying can be seen as a way of exercising one's rights or of expressing one's views effectively within the framework of a free and democratic society. In this regard, the *Lobbying Transparency and Ethics Act*¹ leaves no room for ambiguity: its opening words uphold the principle that "lobbying is a legitimate means of access to parliamentary, government and municipal institutions".

It should be noted incidentally that, by confirming lobbying's legitimacy, parliamentarians implicitly recognized that it can contribute to enlightened decision-making by public office holders.

The question can also be considered from the viewpoint of a third party, i.e. other parties who receive influence or, more generally, citizens who grant legitimacy to the political and administrative institutions that are directly or indirectly accountable to them. It is then easy to see how much discomfort and suspicion is aroused by the activities of lobbyists with public authorities. This suspicion is an expression of the fear of undue influence, of an awkward promiscuity between the public decision-makers and those representing special interests, and even of a subtle diversion of the mission of the public institutions to the benefit of these special interests.

When there is reason to believe these suspicions are founded, which unfortunately does happen from time to time, the resulting deficit in confidence toward the institutions can easily degenerate into a form of cynicism which illustrates feelings of alienation and impotence.

While it may be futile and unrealistic to look for a way to isolate authorities from lobbying, Québec's parliamentarians have I think shown a healthy pragmatism by setting out certain rules of the game for influence communications and, especially, by imposing transparency. In this regard, the principle of transparency goes to the root of the very causes of the suspicion and lack of confidence. It is the only way of restoring balance and of creating the conditions that will allow for the "democratizing of influence," to borrow from the title of a conference that was held last year in France.²

Transparency by itself may guarantee that lobbying, by or on behalf of specific interests, will not be to the disadvantage of the rights of the other parties involved in a

decision-making process of public interest. I would even go so far as to say that in lobbying between the representative of special interests and the public office, there is in theory no such thing as a right to secrecy or privacy.³ It is in fact the reverse which seems to me to be the rule and it is precisely what parliamentarians intended in passing the *Lobbying Transparency and Ethics Act*. In fact, section 1, which recognizes the legitimacy of lobbying, states explicitly "that it is in the interest of the public that it be able to know who is attempting to influence [parliamentary, government and municipal] institutions."

Lobbying and Public Interest

As trustees of the public good, public office holders must take their decisions in light of the public interest.

The public interest is an abstract concept, and one that is difficult to define. In the political sphere, finding the public interest involves arbitrating between the various points of view and legitimate interests of the parties involved in a decision, between short, medium and long-term considerations, and between various competing political, economic and social imperatives. In the administrative sphere, the enforcement of standards is of course subject to respect for procedural equity and legality, but often a public office entails delegated or discretionary authority that must also be exercised according to this same public interest requirement.

As Pierre Issalys and Denis Lemieux pointed out:

There is an absolute presumption that every law is passed to promote the general interest. This concept of general interest is in opposition to a private or specific interest. Consequently, it is impossible to think that discretionary authority can be exercised solely for the benefit of private interests since this would go against the legislation enabling the authority (...). It is acknowledged that an administrative instrument must always be motivated by the public interest.⁴

A point of equilibrium rather than an objective standard, the public interest is not a combination of specific interests. This being so, the issue should be considered from the standpoint of accountability.

In his 2000-2001 Report to the National Assembly, Québec's Auditor General stated that:

Accountability consists, in fact, in reporting on the actions taken and the decisions made in order to reach the goals pursued by the organization, as well as on the results achieved. Transparency in the decision-making process is one of the key elements of the ethics infrastructure and accountability confirms transparency. While accountability traditionally deals with the three Es—economy, efficiency and effectiveness—it will have to include from now on a fourth E, according to the

OECD, “ethics,” to show that the organization has not achieved its results using any means necessary.⁵

The OECD document to which the Auditor General referred expresses the view that the role of the State in fostering integrity and the prevention of wrongdoing encompasses the development and implementation of interdependent mechanisms such as adequate monitoring, direction and management systems.⁶ The OECD advocates the establishment of the components and functions necessary for a sound “ethics infrastructure”—and framework for public service that encourages high standards of behaviour and that promotes the integration of values specific to the public administration.

There are certainly values that are common to all administrations, such as legality, efficiency, integrity, and responsibility. There are however other values which take on a special or even specific connotation in the context of public service, such as impartiality, accessibility, equality, equity, and transparency.

These reference values, like those related to the imperatives of economy, effectiveness and efficiency, underlie accountability processes. The degree of respect these values receive will determine the conviction among citizens that the orientations and the actions of the authorities have been motivated by this will to seek out what is advisable to do in the public interest. Conversely, any suspicions about compliance with these values can only lead to a further lack of confidence and those feelings of cynicism and impotence which come out again and again with regard to our political and administrative institutions.

The *Lobbying Transparency and Ethics Act* is a bold stroke toward furthering the integration of these public service values. It sets out the rules of the game and a new code of ethics⁷ for influence communications. But the most drastic change it makes lies specifically in the obligation for transparency among lobbyists. In so doing, the legislation adds a new dimension to the right of citizens to information guaranteed by section 44 of the *Quebec Charter of Human Rights and Freedoms*.⁸

In a study entitled *Le droit du public de savoir qui cherche à influencer le gouvernement : un droit fondamental*, Henri Brun and Guy Tremblay described the connection between this new aspect of the right of citizens to information and the conditions for effectively exercising democratic rights in the following words:

Whether it be direct or representative, institutional or participative, democracy can only exist if the sovereign people are informed about the state of the public good (of the republic) and the focus of the choices with which the State is confronted. This information assumes general

access to information, but also that citizens have the right to transparency: that the government’s activities are only kept secret when strictly necessary. And the heart of this essential right to information must be the right of the sovereign people to know how decisions are made and therefore to know who is trying, through lobbying, to exert influence on the government’s decision-making process.

“This bond between democracy and the control of lobbying, and the right to information, means that the lobbying legislation has numerous constitutional foundations [...].⁹

The listing by the authors of these fundamental rights which the *Lobbying Transparency and Ethics Act* aims at promoting shows the extent of the issues at stake:

The lobbying legislation exists to give effect to the right to information in section 44 of the Quebec Charter, the right to freedom of expression in section 2b) and section 3 of the Canadian and Quebec charters, the right to vote in sections 3 and 22 of these same charters, the underlying democratic principle in the Constitution, the principle of responsible government and finally the criterion of the democratic society found and the limiting clauses—sections 1 and 9.1 of the Canadian and Quebec charters of rights.¹⁰

Given that the legislator added this new dimension to the right of citizens to information, clandestine or atypical practices in influence communications practices covered by the lobbying legislation are violations not only of this right to information, but also to the other fundamental rights that are meant to be effectively promoted by the legislation.

In looking at the issue from this point of view, it is easier to understand the reasons for the feelings of impotence and cynicism that citizens express so spontaneously when they have the conviction, or even the impression, that, in managing the public good, decisions are made behind closed doors, under some hidden influence from specific interests and that therefore their democratic rights are not being respected.

The question then arises about the impact of such a law for public office holders, who are the centre of attention of these representations and who are consequently party to communications aimed at influencing their decisions.

The system set up to guarantee the transparency of influence communications with public office holders imposes on the lobbyist who initiates them the obligation to disclose information according to methods provided in the Act. At first sight, the legislation does not seem to place any official obligation on public office holders. Does this mean that the very people who must interpret the meaning of public interest by performing their duties are not involved?

Here again, it is necessary to look at the issue from the point of view of accountability, which brings us back to the considerations mentioned above. It is not just the nature or the objective value of the decision made that will convince citizens that the decision was made in the public interest, but citizens must also be assured that the decision-making process was permeated by respect for the public service values and chiefly transparency.

During the Gomery Commission hearings, the commissioner often challenged witnesses who acknowledged quite frankly that they had not complied with the requirements of the federal lobbyists registration legislation,¹¹ although these people were clearly acting as lobbyists. In his final report, the Commissioner made the following observation:

(...) the Government's duty to enforce the requirements of the *Lobbyists Registration Act* has not been fulfilled, and public speculation that there is no political will to enforce compliance is justified.¹²

How can we not see in this concise assertion a confirmation of the fact that the government is, in its procedures, accountable for respecting the fundamental rights of citizens, including their right to information as defined specifically in the *Lobbying Transparency and Ethics Act*.

Conclusion

Given the connections which must be made between democracy and transparency, do we have the information we need to answer the question: Do lobbying and public interest go hand-in-hand?

While the legitimacy of the lobbying is correctly acknowledged as a means of intervention for expressing points of view or special interests and thus of influencing decisions made by public office holders, this legitimacy is subject to the imperatives of transparency, legality and a code of ethics. It is under these conditions that we can reasonably state that lobbying and public interest can go together.

If these conditions of transparency and compliance with the rules of the game are not imposed and are not observed in lobbying activities, then the danger to which Balzac referred in the sentence quoted in the introduction remains.

Notes

1. R.S.Q., c. T-11.011 (S.1).
2. Xavier Delacroix (ed.), *Influencer la démocratie, démocratiser l'influence : enjeux et perspectives d'un lobbyisme démythifié*, Association française des conseillers en affaires publiques, Paris, 2004.
3. See *Re Gillis and Chairman of the New Brunswick Electric Power Commission*, [1981] 130 D.L.R. (3d) 558. The Court of Appeal of New Brunswick ordered that the terms of a contract between a private firm and the provincial government be made public under access to information legislation, and stated that, "If a person or firm wishes to keep their contracts secret, then such should not do business with the provincial Government. What a government does is public business as it is the money of the public which is being expended."
4. Pierre Issalys and Denis Lemieux, *L'action gouvernementale : Précis du droit des institutions administratives*, (2e éd.) , Éditions Yvon Blais, Montreal, 2002, p. 67.
5. Auditor General of Quebec, *Rapport à l'Assemblée nationale pour l'année 2000-2001*, volume 1, para. 3.92.
6. Organization for Economic Co-operation and Development, *Building Public Trust: Ethics Measures in OECD Countries*, 2000, pp. 25-26.
7. These rules are codified in the Act, in sections 25 to 32, and in the *Code of Conduct for Lobbyists* (c. T-11.011, r. 0.2) adopted under section 37.
8. R.S.Q., c. C-12. This right of citizens to information "to the extent provided by law" was already entrenched in the *Act respecting Access to documents held by public bodies and the Protection of personal information*, R.S.Q., c. A-2.1 and in the *An Act to govern the financing of political parties*, R.S.Q., c. F-2. In recognizing the public's right to find out who is trying to exert influence over parliamentary, government and municipal institutions, the *Lobbying Transparency and Ethics Act* adds to the scope of this right to information that is guaranteed under the Quebec charter.
9. Henri Brun and Guy Tremblay, "Le droit du public de savoir qui cherche à influencer le gouvernement : un droit fondamental" in *Les développements récents en matière de lobbyisme*, report of the mini-conference by the Barreau du Québec, Service de la formation permanente, Montreal, February 4, 2005, p. 3.
10. *Idem*, p. 22.
11. *Lobbyists Registration Act*, LRC 1985, c. 44 (4th supp.).
12. *Restoring Accountability: Recommendations*, Final Report of the Commission of Inquiry into the Sponsorship Program and Advertising Activities, Ottawa, 2006, p. 190.