Some Observations on the State of Lobbying in Canada

by W. Scott Thurlow

Lobbying is a legal activity and indeed an important part of the democratic right of individual Canadians to petition the government. In so doing, Canadians inform debate from many different perspectives and this should lead to better public policy. Concerns about the influence of lobbyists have led to considerable regulation of lobbying including changes stemming from the Federal Accountability Act. This article looks at some of the issues facing lobbyists and those who regulate lobbying.

There are two types of lobbyists – consultant lobbyists and in-house lobbyists. Without exception, consultant lobbyists who, in exchange for payment, approach the government on behalf of a third party to seek specific government action must register under the *Lobbying Act*. For in-house lobbyists, the *Lobbying Act* requires the registration of all companies who are seeking certain specific government action, and it is the Chief Executive Officer of the company who is responsible for ensuring that the registration is complete.

There are examples of communicating with government by companies which does not require registration. Seeking information, seeking an interpretation of an existing rule, or appearing at a parliamentary committee are all explicitly divorced from the operation of the Act.

Other areas are less clear – like the 20% rule which applies to in-house lobbyists for companies and trade associations. The part which is least understood is the fact that it is not a rule as much as it is an interpretation bulletin. The Act requires reporting by any company whose employees "as a significant part of their duties" communicate with the government "with respect to" a laundry list of activities that require registration. In this case, "significant" has been interpreted to mean 20% of their duties by the Commissioner of Lobbying. For companies that have multiple employees who lobby, the interpretation is broadened to mean the equivalent of 20% of any one full time employee. So, if you have 10 employees, and all of them spend 2% of their time lobbying, that adds up to the equivalent of 1 full time employee doing 20% of their time lobbying, and your company is required to register.

My advice is always "register," because the last thing you want to do is defend yourself using time sheets. Since the purpose of the registry is to promote public accountability, you are simply telling the world what you want the government to do, or not do, as the case may be. I am always suspect of companies who start doing math to avoid their registration. The legislative solution is to remove the "significant time" proviso in the Act and require all companies that communicate with the government to seek policy change to register with the Commissioner.

Registrable Activity v. Reportable Activity.

The *Lobbying Act* requires monthly reporting for all pre-arranged oral communications with a designated public office holder (DPOH) initiated by the lobbyist. This is separate and apart from registration, which needs to occur even if you never talk to a DPOH but seek to change policy. The tongue-in-cheek test that I have for reportable activity is "does the person you have had communication with have the word Minister in their title?" With the exception of Ministerial drivers, who probably have the most up to date information anyway, this is a pretty good test. Chief of Staff to the

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Minister, Deputy-Minister, Associate-Deputy Minister – and so on.

It is admittedly, an imperfect test because there are DPOH's whose titles do not correspond perfectly with a Ministry – like the President of the Treasury Board, Vice President of the CBSA, Chief of Defence Staff or a ranking official at a Crown Corporation. Some of these people have been listed as DPOHs as a result of regulation, others have not. Luckily, there is an Interpretation Bulletin on that as well. All you have to do is ask the person who you are meeting with how much they make or rank and who they report to. If they are EX-4 (or higher) or make more than $141,200.00 and report to a DPOH, they are DPOHs. I have been in this industry for a long time, but I have yet to figure out how to slip that into the conversation without seeming rude.

The registry is replete with examples of over-reporting, and the most egregious example is that people report meetings with Members or Parliament. MPs are not DPOHs unless they are Ministers. But who can blame these people for over-reporting? There is no penalty for over-reporting. Journalists who report on the story often fail to get the rules straight – and who can blame them – they are complex and lend themselves to complication if you do not know them intimately. DPOHs and "ordinary" public office holders themselves often do not understand what obligations they have – and who can blame them – as they themselves do not always know if they are designated public office holders let alone if they are meeting with a company that needs to register, or not. It is an identity crisis in the making, to be sure, and the solution needs to be radically improved internal government communications.

The people above are not the problem – they are making honest mistakes while trying to comply with the law. The most over-used axiom amongst the chattering class is the expression "illegal lobbyists" who do not report their meetings or register to lobby, or are wilfully blind to the rules as they apply to them (or do not as the case may be). The sad news is that the reporting system, as currently set up, cannot possibly ever catch those illegal lobbyists. How could it if the system is based on the lobbyist reporting? If the onus was on the government officials to report their lobbying contacts monthly, and those reports did not align with what was in the registry, there would be clear evidence of a subject to be investigated.

All the while, there are thousands of lobbyists who go back and forth with the Commissioner of Lobbying in an honest attempt to try and register in a way that complies with the Act's requirements. You cannot blame the Commissioner – it was Parliament that created this paper tiger. The registry of lobbyists is many things, but it is without a doubt the most effective tool ever created for doing opposition intelligence gathering on any given issue. Within seconds, I can find out who is registered on an issue of interest, and most importantly, who in the senior ranks of the government they have spoken to.

What Lobbyists are not allowed to do?

Unless a would be lobbyist has been a DPOH in the past five years, or has received an exemption under the *Lobbying Act*, lobbyists can register under the Act to communicate with the purpose of influencing public policy. If we are planning on participating in the democratic process – then we have to govern ourselves accordingly.

On November 6th, 2009, the Commissioner of Lobbying issued an Interpretation Bulletin to provide guidance on Rule 8 of the Lobbyists Code of Conduct. The Commissioner's bulletin was in response to the Federal Court of Appeal's decision in *Democracy Watch v. Campbell and the Attorney General of Canada* decision released in March 2009.

The decision vacated a March 2002 interpretation of Rule 8 of the Lobbying Code of Conduct relating to conflict of interests and how a lobbyist should conduct themselves in relation to the object of their lobbying activities. In reviewing the reasonableness of the decision, the Federal Court of Appeal forced the Commissioner to re-examine Rule 8, and as a result, she expanded the instances where a lobbyist could potentially create a conflict of interest for a public office holder. In her bulletin, the Commissioner noted that in addition to providing a direct financial interest to a public office holder, a lobbyist creates a conflict of interest by engaging in political activity that may benefit, or appear to benefit, that public office holder.

In other words, the Commissioner has greatly expanded what type of activity would give rise to a real or perceived conflict of interest and in so doing, broadened her own investigatory powers to look closely at the everyday activities of registered lobbyists. The new interpretation is an indirect affront to the core right associated with a liberal democracy: the right to engage in political activity. The lobbying industry is left wondering what political activity means. Does it mean putting in a lawn sign? Does it mean making a constitutionally protected campaign contribution to a candidate, party or nomination contestant?

While it is true that as individuals lobbyists retain the ability to participate in the political process, they must now be aware of what it may mean down

the line. In this case, it is not the right to participate which is in jeopardy, but the Section 6 right to earn a living and engage in employment. This is in and of itself a limitation on political activity. If a citizen is wary to engage in any political activity because of the repercussions that may accrue, that potential adverse impact is an affront to those rights, and directly impacts an individual's ability to inform their own vote and the votes of others. Anything that will give a citizen pause before they engage in political activity is a *de facto* violation of Section 3 Charter Rights. Courts are often forced to balance rights against each other, but this is a limitation of one right over another, with no attempt to minimally impair the rights in question.

The Supreme Court has repeatedly held that the right to vote is about more than voting – it touches on the right to free speech, the right to an informed vote, and the right to freely assemble. It is only under the most exceptional circumstances that those rights should be qualified. There is no justification presented by the Commissioner that would allow for someone's career options to be limited because they wanted to participate in the political process.

The Commissioner's interpretation also significantly expands the current test for what constitutes a conflict of interest. While certainly within her purview, this interpretation is a significant departure from the main governing authority – the *Conflict of Interest Act*. It is true the actions taken to attain political office by election are subject to those rules – but the current view is based entirely on the finances associated with contributing to that election, and not non-financial activities.

So, what does create a conflict of interest? Presumably, if the original standard of review and interpretation of the code of conduct was rejected by the Federal Court of Appeal, we can infer that the activity that gave rise to the appeal would constitute a conflict of interest. To that end, the only bright line that lobbyists can benchmark against is that organizing a fundraiser for a public officer holder whom they are registered to lobby is in fact a violation of the code of conduct.

But the Commissioner's ruling did not set the bright line there – far from it. In fact, it suggests that simply engaging in political activity could give rise to a conflict of interest, or the appearance thereof, in the future. That appearance is, of course, in the eye of the beholder. Does anyone really believe that a $200.00 contribution to a candidate is enough to create that conflict? Or is it knocking on 40 doors, or calling 100 constituents during an election campaign? Is it hammering in 312 lawn signs, or 313?

The sword of confusion could be sheathed with clarity – a bright line test which could define both what is the appearance of impropriety, and the specific political activity which could give rise to it. By casting the net as widely as possible, the Commissioner would prevent the possibility of an egregious conflict of interest otherwise covered by the criminal law by threatening to scrutinize all political activity of an unknown class of would be future lobbyists. This action is not only disproportional to the so-called harm to be remedied, but the rights in question are not minimally impaired. In fact, short of taking away democratic rights, there could be no greater impairment to the rights of those who choose to help others work with the government. And it is not just the rights of lobbyists – by impairing the democratic rights of one class of citizens, the democratic rights of the entire citizenry are similarly imperiled.

Conclusion

While the irony may be too subtle for most observers, the very individuals who are regularly castigated in the news media for undermining the transparency of the system are now the victims of their supposed success. It used to be that individuals whose interests and success were directly tied to a specific individual or political party would govern themselves accordingly to avoid possible repercussions when the government changed. Now, it is the possibility that helping a Minister ascend to their position is what will limit an operative's options in the future. If the purpose of the *Lobbying Act* is to ensure transparency and public accountability, we have to question whether or not these goals are best achieved by targeting democratic rights of otherwise compliant and regulated lobbyists as opposed to those who flaunt the law by failing to register on behalf of their clients or report their meetings. The Commissioner's view on what constitutes a conflict of interest is so vague as to be constitutionally impermissible – and that can only undermine the purposes of the Act.

We should also lament how cracking down on lobbyists seems to be the national pastime in Ottawa. Every time someone violates the *Lobbying Act* and attracts media attention, the entire industry is examined by the government and smeared by the opposition. Instead of doing that, why not dedicate additional resources to enforcing existing rules and punish the people who are not registering under the Act or reporting their meetings? The most egregious behaviour that has been reported in the media over the past dozen years has been, without exception, illegal. Making things that are already illegal, "illegaler," does not solve the problem.