New Obligations of MPs Under the Lobbying Act

W. Scott Thurlow

In response to a debate about the access that former MPs have in the corridors of power, Treasury Board President Stockwell Day announced that the rules for designated public office holders would be expanded to include MPs, Senators, and the senior staff in the Office of the Leader of the Opposition in the House of Commons and in the Senate. After a comparatively short public comment period, the new rules went into effect in concert with the return of Parliament on September 20th, 2010. This article looks at the results of some of the changes.

Members of Parliament and Senators now have very specific obligations under the *Lobbying Act*, which apply to all designated public office holders (DPOHs). The three "R"s of Lobbying in Canada are: Register, Record and Report. Only the second applies to DPOHs. MPs and Senators do not have to report on their activities and who they have met with. MPs and Senators are required to keep records about what pre-arranged oral communications they have with registered lobbyists. They are required to keep these records so that they can verify the reports of lobbyists when asked by the Lobbying Commissioner. Lobbyists are the only ones who are obligated to register their lobbying activity and subsequently report their pre-arranged meetings.

MPs do not, for example, have to record 'chance meetings.' Recently, I got an email from an MP who asked if they had to report bumping into them at a local restaurant. This is emblematic of the confusion with the lobbying rules in general, and that confusion has already led to a chill in what are supposed to be open and frank exchanges between stakeholders and their elected officials.

The recent changes were imposed by Order-in-Council, and some have argued that this constitutes a breach of Parliamentary Privilege. This breach could give rise to a constitutional issue since Parliamentarians govern their affairs and hold the Government to account, not the other way around. The argument is that Parliament itself can impose rules on its Members, but the Crown cannot.[1] I share the view that this creates a valid constitutional issue but this is not the first time that lobbying rules have affected constitutional rights, nor is it likely to be the last.

Two different problems emerge from the new state of play in Ottawa and these new rules being implemented. On the one hand, there are MPs who now completely avoid meeting with lobbyists. This is undoubtedly bad for the democratic process and will significantly curtail the effectiveness of MPs. On the other hand, there are MPs and their staff who are becoming regimental about what they think the requirements under the *Lobbying Act* are. In many cases, MPs and their staff are requiring all potential petitioners to register before they meet with them, even if the people in question are not required to register under the Act.

On its face, this seems like a perfectly reasonable request. However, it is not required by the *Lobbying Act* in any way. First of all, the Act applies to people who are paid lobbyists. Volunteer lobbyists and constituents who are not paid for their communications with public office holders are not required to register. Secondly, the act exempts people/companies who do not have significant lobbying activities as part of their day-to-day duties. So, a person who works for a company which rarely ever lobbies is not required to register

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under the Act. Finally, and this may seem trite, the Act provides ten days for would be lobbyists to register under the act after their lobbying activity commences. In other words, there is no requirement to register in advance of the commencement of lobbying activities.

Registration under the *Lobbying Act* is required when one of the two types of lobbyists – consultant or in-house – communicate with a public office holder (not to be confused with a DPOH) for the purpose of influencing legislation, regulations, the development of a policy or program, the awarding of a grant, and, in the case of consultant lobbyists, arranging a meeting between a public office holder and another person. Without exception, consultant lobbyists who, in exchange for payment, approach the government on behalf of a third party, must register under the Act.

The Act requires registration of a company where, pursuant to section 7(1)(b), lobbying constitutes a "significant part of the duties of one employee," or "would constitute a significant part of the duties of one employee if they were performed by only one employee." According to Canada's Commissioner of Lobbying, "significant part of the duties" means that 20 per cent of one full-time employee's time (or equivalent) is dedicated to lobbying activities.[2]

So, if you have one employee who spends 19 percent of their time lobbying, your company does not have to register. Similarly, a company with 19 employees spending one per cent of their time on lobbying, would not have to register. However, if one of those same 19 employees were to spend 2 percent of their time on lobbying, the company would fall within the 20 percent threshold. Regardless of this requirement, my advice is to always register. If the RCMP starts an investigation, the last thing you want to be doing is math on the back of an envelope to determine if the Act applies to your company. The Chief Executive Officer, or senior ranking employee of a company, is responsible for ensuring that registration is complete.

Suffice it to say, MPs' offices have taken it upon themselves to act as the watchdog of registrable, reportable and recordable activity. This is not their role. And the examples listed above are only the more predominant problems, as each MP's staff professes a unique expertise on the rules. Stakeholders are provided with an unattractive dialectic choice – disagree with the interpretation and risk not meeting with the MP, or acquiesce to their requests despite the fact that they are not grounded in the law or regulations.

In my view the changes to the government's accountability legislation and regulations will frustrate the ability of constituents to communicate with their elected representatives. This is yet another example of law-abiding citizens being subjected to additional regulation as a result of the illegal activities of a few bad actors. Sadly, it is also an example of the government introducing regulations to solve a perceived problem, which will ultimately do nothing to address the issue at hand. While adding to the paper burden of companies who are engaged in the public policy debate, the regulations do not stop those who fail to register and report their contact with MPs. It does, however, give the people who already flaunt the law more laws to flaunt.

Notes

1. See, Bea Vongdouangchanh, New Lobby Regulation Breaches MPs' Rights, *The Hill Times,* October 11, 2010
2. Office of the Commissioner of Lobbying of Canada, *Interpretation Bulletin: A Significant Part of Duties ("The 20% Rule")*, July 2009.