

CSPG Seminar: Regulating Lobbying in Canada

Lobbying is a legitimate activity within a democratic society. But lobbyists, like politicians, are quite aware that their profession is not always held in high regard by the general population. As one consultant lobbyist joked during her presentation at a recent seminar of the Canadian Study of Parliament Group, “I am the root of all evil.” A recent Canadian Study of Parliament Group seminar explored attitudes toward lobbying in Canada, explained how lobbying legislation and regulations have influenced its development since the 1980s, and asked whether the current system is effective. A final panel of lobbyists discussed how their job is often misunderstood and why their much-maligned reputation is based on outdated notions of influence-peddling and the unethical actions of a few practitioners.

Will Stos

Regulation of Lobbying in Canada

In the first panel of the day, François Bertrand, Director of Registration for the Commissioner of Lobbying, explained how the Commissioner’s role is to enforce the federal *Lobbying Act* so that Canadians can have confidence in their government and know that lobbying is done in a transparent way with high ethical standards. The *Lobbying Act* has been in place since 1989. All lobbyists must report interactions with designated public office holders (all federal decision makers/senior officials) each month. These designated public office holders are banned from lobbying for five years after leaving office. Information filed by lobbyists must include: who is being lobbied, which department, which legislation, the subject of talks, etc. Since 2015, there has been a new Lobbying Code of Conduct. It looks more at conflict of interest and appearance of conflict of interest with a focus on gifts to designated office holders. Would a gift appear to demand an obligation on the part of a designated public office?

In terms of compliance with the *Act*, the onus is on the lobbyist. When the Commissioner is deciding on an investigation, she considers the degree of the breach and if she believes an offence has occurred, she must report her findings to the police. To date, four individuals have been convicted of being in breach of the *Act*. Bertrand concluded by noting that the *Lobbying Act* requires extensive information that is public to ensure transparency is at the forefront of these activities.

Jean-François Routhier, the Commissaire au lobbyisme du Québec, noted there are many similarities between Québec’s *Act* and the federal *Act*. Once again, there is a focus on transparency that includes three tools and one Commissioner: The *Lobbying Transparency and Ethics Act*, the Registry of Lobbyists, the Lobbyists’ Code of Conduct, and the Lobbyists Commissioner.

Québec’s *Act*, adopted unanimously in 2002, is founded on two principles: the legitimacy of lobbying, and the right of the public to know who is trying to influence a public office holder. Furthermore, there are two objectives: transparency and properly conducted lobbying activities. Finally, there is one expected outcome: citizens trust public institutions.

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Moderator Élise Hurtubise-Loranger (left) with panelists François Bertrand (centre) and Jean-François Routhier (right).

Routhier stated that the *Act* implements fundamental rights and freedoms, including: freedom of expression, the right to information, the right to vote, and the principle of responsible government. This legislation is an important tool for three groups: lobbyists (so they can do their work with full legitimacy and have their work recognized as legitimate), public office holders (as a risk management tool that protects them), and citizens (because it provides transparency and trust).

The *Act* defines lobbying as any oral or written communication with a public office holder in an attempt to influence a decision concerning:

- any legislative or regulatory proposal, resolution, policy, program or action plan
- the issue of any permit, licence, certificate or other authorization
- the awarding of any contract (other than by way of a call for public tenders), or of any grant or other financial benefit
- the appointment of certain public office holders

There are three categories of lobbyists under the *Act*: a consultant (who lobbies on behalf of someone else in return for compensation), an enterprise (who lobbies on behalf of their enterprise), and an organization (such as non-profits or one at a parliamentary, government, or municipal levels). Currently, more than 11,500 lobbyists are registered in Quebec. They follow the Lobbyists' Code of Conduct, which complements the Quebec *Act*. It outlines rules about respecting institutions, honesty, integrity and professionalism for lobbyists. The Code is binding and can lead to penalties if it is not respected.

Prohibited acts for lobbyists include: carrying out lobbying activities without being registered in the registry of lobbyists; acting in return for compensation that is contingent on the achievement of a result or derived from a grant or loan; and, awarding a contract or grant to themselves or to their client when the lobbyist receives the mandate to award a contract or a grant from a public office holder. Penalties range between \$500-\$25,000 depending on the offence and other disciplinary measures, including potential bans of up to 12 months and other disciplinary actions for up to 3 years.

Routhier concluded by noting that in order to achieve the objectives of the *Act*, four conditions must be met: continued action by the Commissioner, compliance with the rules by lobbyists, involvement of public office holders, and citizen vigilance.

During a discussion period, members of the audience highlighted potential loopholes for post-employment restrictions. One attendee noted there is nothing to prohibit former designated office holders from providing strategic advice about what to do or how to lobby.

A retired Health Canada official posed a question about citizen vigilance. Since most citizens likely have no idea about the processes, he asked the presenters what should be done to encourage the public to participate and understand? Routhier explained that the Commissioner provides a lot of training in municipalities, but citizens may not be aware of processes. Still, there are more comments on social media by citizens and perhaps more awareness



Moderator Michel Bedard (left) with panelists Guy Giorno (centre) and Sean Moore (right).

than previously. Some citizen questions may lead to investigations even if they aren't aware an offence may have occurred. Bertrand mentioned there is training to public office holders to encourage them to check the registry and, also, training with some university programs. He says the office tries to get the message out to the public through Twitter and newspapers.

Effectiveness of Current System

Guy Giorno, a partner and practice lead for Government Ethics, Transparency and Political Law at Fasken Martineau DuMoulin LLP, outlined lobbying laws across Canada. Currently, only Prince Edward Island and Canada's territories do not have them – though in some cases legislation is before assemblies. Quebec's law includes municipalities and Newfoundland and Labrador's law covers St. John's. Some Ontario municipalities have their own ethics rules that cover lobbying.

Giorno suggested the most aggressive enforcers of these laws are British Columbia, Quebec, the federal government, the City of Toronto, and Ontario. On the other end of the spectrum, he stated that Nova Scotia lacks enforcement, education and outreach, and general support for its law. Giorno asked if compliance without enforcement is effective? In British Columbia's system he noted that self disclosure leads to vast majority of contraventions or infractions. Giorno compared this to 'weigh stations' on highways – if there is no enforcement, what if drivers just don't stop? The only convictions under these laws have come from Quebec and federally, with one in British Columbia and a couple in the City

of Toronto. The difference is that Quebec and federal enforcement go after failure to register cases, not delays in registering.

In terms of punishment, administrative monetary penalties have been withheld from regulators in certain jurisdictions. Only four western provinces have these, and only British Columbia has used them. Another common remedy is lobbying bans. These are available in most of the country and have been used federally, in Quebec, and in the City of Ottawa. They are not available in Manitoba, New Brunswick and Nova Scotia. But Giorno compares this punishment to scofflaws: "Driving without a licence? We're not going to give you a license."

He also discussed thresholds for in-hour lobbying (percentage of time or number of days/hours spent lobbying). These date back to the first federal legislation which was unsure of the extent of administration burden. Giorno says some companies find it's actually more of a burden to track their time rather than just to record all.

In concluding his presentation, Giorno spoke about public office holders role in these systems. He joked about a favourite quote from *The Simpsons*: "It takes two to lie: one to lie and one to listen." He stated that public office holders are not terribly keen to be part of the reporting process, though some jurisdictions have this system in place (Northwest Territories). Nevertheless, Giorno suggested the problem with the NWT approach is that it has been used instead of a lobbyist register.



From left: Moderator Marie Danielle Vachon and panelists Lauren Dobson-Hughes and Alayne Crawford listen to Michele Austin during the Evolution of Lobbying Strategy panel.

Sean Moore, the founder and principal of Advocacy School, told attendees that among lobbyists there is a much better community of informed interests since the early days of these laws; yet there are still big gaps of understanding (and especially nuance of understanding). Many lobbyists howl at the amount of paperwork required, he said. But provided you know what the rules are and are organized internally it's not a big deal.

Moore focused his presentation on recent attempts to amend lobbying rules. Does the existing system strike the right balance? Moore wondered if thresholds should they be done away with to avoid ambiguity. Should all corporate employees doing lobbying be recorded in the company's registration even if they aren't lobbying for 20% of their job? He also asked if there should be more information in communication reports concerning who was present in the meetings. The president of companies may only be present for a few of many meeting on behalf of a corporation. Moore suggested the question is who else is present and how often?

In terms of the Commissioner of Lobbying investigations remaining private, Moore said he believed this was a good idea on balance, provided there is some reporting mechanism to parliament. Some lobbyists receive an administrative review letter – a way to examine their lobbying activities 'before it becomes an formal investigation.'

Moore said he believes the current federal lobbying restrictions among designated public office holders

is "a bit over the top." He suspects current lobbyists are probably happy about this cooling off period because it restricts the pool of new lobbyists, but notes: "I don't see anything wrong with people who know what they're doing going into lobbying." There is also another side to the problem: parliamentarians may not be getting quality political staff they would otherwise due to the ban.

When thinking about why people hire lobbyists, Moore suspects that while a company/organization can train and do most of lobbying on their own internally, they often hire externally (a consultant lobbyist) in order to tell the CEO "we did everything we could."

During a Q&A period, an attendee inquired about the extent of unregistered lobbying and how it's discovered. Giorno said this varies by jurisdiction, but federally and in Quebec investigators do environmental scans in the media and check against the registry if a topic is under discussion. He said that inviting complaints is a legitimate way to investigate unregistered lobbying, but Moore cautioned that many invited complaints have been from ideological or business competitors.

Evolution of Lobbying Strategy

A final session explored changes in lobbying strategy over time.

Alayne Crawford, of the Government Relations Institute of Canada, explained that her organization

is a recognized national voice of government relations professionals (the lobbyists' lobbyist). When thinking about what lobbyists do, Crawford says the answer depends on who you ask. "According to my kids, I do lunch," she joked, noting that she sees herself more like the character Olivia Pope on TV's *Scandal*. Lobbyists are translators, problem solvers and advocates. Crawford divides lobbyists into three categories: consultant lobbyists, in-house lobbyists (corporations), and in-house lobbyists (organizations).

In terms of the evolution of lobbying, she celebrated the development of women practitioners and the shift away from perceptions of an old boy's club of lobbyists where discussions take place on golf courses or in bars. She also highlighted the Canadian Advocacy Network. Launched in 2012, this group wants to ensure public policy making is accessible to all in a manner similar to the *pro bono* work lawyers often do.

Lauren Dobson-Hughes, a consultant in Strategic Advocacy and Government Relations, provided two examples of lobbying work she was involved in: the G7 commitment of \$2.8 billion to maternal child health in 2010; and AIDS/Malaria funding. She said she hoped these examples dispel myths, noting that she lobbies for the poorest of the poor, yet her work as a lobbyist is the same as other lobbyists. "This isn't about schmoozy lunches," she said. "This is detailed policy work."

Dobson-Hughes explained that formulating 'the ask' is half a science and half an art. "Can this funding make the government look good/help its reputation?" she asked. For the G7 commitment, Dobson-Hughes said lobbyists framed the proposal as one demonstrating the values of compassionate conservatism that was important to the government of the day. In hopes of getting a commitment for AIDS/Malaria funding they did sponsored travel for MPs to show them what access to AIDS prevention/medication looks like. "Yes, this is 'sponsored travel' too," she explained. Dobson-Hughes concluded by noting that increasingly governments need to see a thanks or support from grassroots to be receptive to these types of requests.

A final presenter, Michele Austin, a senior advisor at Summa Strategies Canada, explained some recent

trends that lobbyists are observing as they do their work. Canadians are increasingly turning to digital media and young people are especially likely to be using Youtube and videos. Youtube is Canada's second largest search engine and Canadians use it more often than Americans. Austin said lobbyists can help clients to know how many characters it takes to get your message across over social media platforms. For example, you have about 40 characters to make an impact on Facebook, 100 on Twitter, and about three minutes on Youtube. Pictures are also important on these media – especially for millennials.

Austin stated that authentic relationships are important with consumers. Eighty-four per cent of millennials don't trust traditional advertising. They are more apt to listen to influencers because they are giving more authentic endorsements. Influencers extoll the virtues of a product because they like it, not because they get compensation.

During a Q&A period, one audience member asked if lobbyists' reputations could ever recover. Austin said she doubts it because lobbyists have not done a good enough job educating people about what they do. She notes it will be more difficult in the future to promote a positive image because the democratization of journalism has made news media very competitive. 'Gotcha stories,' including ones about unethical lobbyists, are what drives people to consume news.

"I think we make for very good antagonists," Crawford added, "but that's healthy. It requires us to be transparent. When the Kady O'Malleys of the world write about bad behaviour, we hope they don't delegitimize the activity itself."

Dobson-Hughes offered an optimistic note, suggesting it may be possible that things are improving. She said old attitudes about calling up friends or the 'Old Boys Club' are disappearing and unethical behaviour is being increasingly called out by other lobbyists.

"The client is the most powerful advocate for their own issue," she concluded. "The politicians don't want to see our faces. Lobbyists are not actually influential – they are the strategists for the clients."