

Agenda Item 5(a)
August 13/19 EOC Teleconference Meeting

Summer 2019 Update: Lobbying, Election Finance and Conflict of Interest Reform

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July 17, 2019

There have been considerable recent regulatory and legislative changes with respect to lobbying and conflicts of interest regimes at the federal level and in each of British Columbia and Quebec.

FEDERAL REGISTRATION

Recent jurisprudence may have widened the category of registration under the federal *Lobbying Act* (Act). Former federal Lobbying Commissioner Karen Shepherd decided not to investigate the allegation that Prince Shah Karim Al Hussaini had breached the *Lobbyists' Code of Conduct* (Lobbyists' Code) by hosting Prime Minister Justin Trudeau because Hussaini was not paid and therefore not subject to the Act. A federal court challenged the decision and determined that payment could include benefits from a volunteer position.

In its reasons, the court held that the Act applies to anyone who is lobbying for payment and that the definition of "payment" in the Act is wider in scope than "remuneration" in return for a service and may include other benefits. This interpretation would create considerable uncertainty for unpaid advocates.

The case is currently on appeal and more information will be provided as a decision is made.

FEDERAL GUIDANCE ON MITIGATING CONFLICTS OF INTEREST

On April 2, 2019, the Office of the Commissioner of Lobbying of Canada (Office) updated the basis on which the Lobbyists' Code will be interpreted and applied. The new guidance, which applies to registered federal lobbyists, focuses on mitigating conflicts of interest related to the rules on lobbyists' relationship with public office holders (also called "preferential access") (Rules 7 and 8), political activities (Rule 9) and gifts (Rule 10).

The new guidance expands on the types of relationships that risk creating a perception of preferential access and thus are prohibited under the Lobbyists' Code. The prohibition of lobbying a family member has been expanded beyond immediate family members to include parents, siblings, children, children of a spouse or partner, grandparents, grandchildren, first cousins, aunts, uncles, nieces and nephews who may be public office holders. The prohibition on lobbying a business partner has also been clarified to mean a public office holder with whom the lobbyist shares an ownership, fiduciary, or monetary interest in a business.

The cooling-off period under Rule 9, which prohibits lobbyists from lobbying a public office holder for whom they have undertaken political activities, has been reduced from five years to a "full election cycle", which is generally four years. In addition, some political activities that were previously classified as "at risk" are no longer listed in the guidance. For instance, serving on the board of directors of an electoral district association except as an officer and serving in a paid position on campaign staff, except holding a strategic position or working in a "war room", are no longer considered "at risk" political activities.

Gifts provided as a normal expression of courtesy or within the customary standards that typically accompany the public office holder's position do not create a sense of obligation and are thereby deemed appropriate under the new guidance. The new guidance also confirms that under Rule 10, it is appropriate to provide a working meal or refreshments of minimal value during a meeting with public office holders. This, however, does not extend to the wining and dining of public office holders. It also confirms that it is appropriate to provide other gifts of minimal value as a token of appreciation when the public office holder serves as a speaker, moderator or in a ceremonial role. Promotional gifts of minimal value are now permitted and receptions providing food and refreshments are now evaluated on a case-by-case basis, considering whether the value of the hospitality is "reasonable" and whether a public office holder would feel a sense of obligation to the host.

BRITISH COLUMBIA

The City of Surrey voted on February 11, 2019 to adopt a motion directing staff to consider additional accountability measures in the form of an independent ethics commissioner and an enhanced lobbyist registry.

The city is looking to strengthen its Lobbyist Registry by adopting a by-law that makes registration – which is now completely voluntary – mandatory for some types of lobbying. It is also proposed that a Council Code of Conduct containing rules relating to, among other things, gifts, contact with lobbyists and disclosure of business relations, be established.

QUEBEC

On February 13, 2019, the legislature introduced Bill 6, *An Act to transfer responsibility for the registry of lobbyists to the Lobbyists Commissioner and to implement the Charbonneau Commission recommendation on the prescription period for bringing penal proceedings* (Bill 6), which proposes amendments to the *Lobbying Transparency and Ethics Act* (LTE Act). Among other changes, Bill 6 transfers the responsibility of the registry of lobbyists to the Lobbyists Commissioner and increases the prescription period for bringing penal proceedings from one year to three years. An exemption to the new prescription period is also provided for offences under section 62 of the LTE Act, which penalizes persons who hinder the work of the Lobbyists Commissioner or an authorized person. Amendments to the prescription period are currently in effect.

Bill 6 comes into force on December 19, 2021, or on an earlier date that may be set by the government on the Commissioner's recommendation, except sections 18, 24 to 26 and 28, which came into force on June 19, 2019.

Lobbyists registered in Quebec should ensure that, within 60 days after June 19, 2019, all information contained in the returns and notices filed that appear in the registry is accurate, complete and up to date. Any necessary amendments must be made within the same 60-day period. For further information on Bill 6 and other regulatory changes to Quebec's lobbyist regime, please see our June 2019 [*Blakes Bulletin: Quebec's Lobbyists Commissioner Calls for Complete Overhaul of Lobbying Transparency and Ethics Act*](#).

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Quebec's Lobbyists Commissioner Calls for Complete Overhaul of Lobbying Transparency and Ethics Act

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June 12, 2019

BACKGROUND

In a report entitled *Simplicité, Clarté, Pertinence, Efficacité – Réforme de l'encadrement du lobbyisme* (Report), Quebec's Lobbyists Commissioner (Commissioner) turned the spotlight on the legal framework applicable to lobbying activities and called for an overhaul of the *Lobbying Transparency and Ethics Act* (Act).

The Act, which has been in effect since 2002, sets out a regime designed to foster transparency in the lobbying of municipal and provincial public office holders and ensure that lobbying activities are properly conducted. Under this regime, any enterprise or consultant lobbyists must be registered in the registry of lobbyists.

On February 12, 2019, Bill 6 proposed amendments to the Act. Bill 6 aims to transfer the responsibilities of the registry of lobbyists to the Commissioner and to increase the prescription period for bringing penal proceedings from one year to three. These amendments are not currently in effect.

REPORT

The Report provides an overview of the various issues raised regarding the Act. It also introduces 34 recommendations and considerations, in four sections, in order to enhance the current regime and address these issues.

Below, we discuss the noteworthy elements in each section (except those currently covered by Bill 6) and highlight the significant differences from the current regime.

1. Scope of the Act

The first section of the Report focuses on the principles deemed appropriate by the Commissioner to enhance the scope of the Act, including activities, institutions, individuals and entities.

No Minimum Threshold Requirement for Registration

The Commissioner considers the removal of minimum thresholds of activities which apply to lobbyists under the current Act and proposes to eliminate the current requirement whereby registration is only mandatory for employees for whom lobbying activities comprise a significant part of their jobs.

Furthermore, the Commissioner proposes that all consultant lobbyists (i.e., those not employed by a company or organization) be required to register in the registry, including those who receive no compensation for their activities. At present, registration is not required for consultant lobbyists who receive no compensation for their lobbying activities.

Application of the Act to All Public Institutions

According to the Commissioner, the Act should apply without exception to all provincial and municipal public institutions, including Quebec's public education institutions, which are currently not covered by the Act.

Application of the Act to All Types of Lobbyists

The Commissioner recommends that the Act apply to any individual or entity carrying out lobbying activities, regardless of their nature. In 2015, Bill 56 (which died on the order paper) contained a similar proposal requiring that not-for-profit organizations also be subject to the Act.

2. Responsibility and Obligations Regarding Lobbying Activities

The second section of the Report introduces principles that, according to the Commissioner, would clarify certain obligations and responsibilities pertaining to lobbying.

Joint Responsibility of Entities and Their Representatives

The Commissioner underlines the necessity of assigning to enterprises the responsibility of registering their representatives, disclosing their lobbying activities and ensuring compliance with the Act, rather than simply assigning such responsibility to their most senior officer or the representatives, as is currently provided for in the Act.

Appointment of an Institutional Representative

The Commissioner recommends that a provision be added to the Act requiring that each public institution appoint a representative responsible for the application of the Act. The *Act respecting Access to documents held by public bodies and the Protection of personal information* includes similar measures with respect to freedom of information requests.

Restrictions During and After Public Office

The Commissioner recommends the establishment of ethical principles and obligations that would apply to elected officials and heads of public institutions during and after their terms. He also opens the door to certain "pre-employment" restrictions. These would differ from the current regime under which such rules only apply to certain elected officials or heads of public institutions once their term of office has ended.

3. Disclosure

The Report's third section sets out principles that would enable the development of an efficient disclosure process for lobbying activities in Quebec.

Timely Disclosure

The Commissioner underlines the need for an effective, mandatory and open disclosure system to ensure more timely disclosures of information and the following up of all lobbying activities.

According to the Report, this objective could be achieved by adjusting the registration and disclosure periods (which are currently set at 30 days for consultant lobbyists and at 60 days for enterprise lobbyists following their respective lobbying activities) and by adding certain follow-up requirements.

Relevance of Disclosed Information

The Commissioner recommends that all relevant information be disclosed to the public. The Report lists, in a non-exhaustive manner, certain additional information that may be deemed relevant, such as (i) the recipients of lobbying activities; (ii) the nature and frequency of communications between parties; (iii) amounts spent on lobbying; and (iv) lobbyists' potential political links.

4. Compliance with the Legislative Framework, Responsibilities, Powers and Duties

The final section of the Report focuses on administrative and technical aspects of the Act, including the Commissioners' powers and duties as well as the penalty regime.

Introduction of an Administrative Monetary Penalty Regime

The Commissioner calls for a rethinking of the types of penalties that may be imposed in the event of an offence under the Act. Currently, the Act provides for penal, disciplinary and civil penalties, although the latter option is rarely used.

To this end, the Report mentions that granting the Commissioner the power to impose administrative monetary penalties would foster better management of public funds and eliminate the need for the Commissioner to alert the Director of Criminal and Penal Prosecutions of offences under the Act.

CONCLUSION

The progress of Bill 6 in the national assembly and the publication of the Report by the Commissioner demonstrate a real desire for the modernization of the current system, now in its 17th year. It remains to be seen whether the Government of Quebec will hear the Commissioner's call for change and address some of the concerns raised in the Report.

In any case, the Act in its current form remains in effect. As such, any business or individual that interacts with municipal or provincial public office holders should be familiar with the current regime and comply with the applicable requirements.

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