Stikeman Elliott

Ottawa Memorandum

To: Keith Martin, Brendan Wycks

From: David Elder / (613) 566-0532

Re: Summary of lobbyist registration requirements

Date: September 23, 2019

You had asked us to prepare a memo summarizing the general framework for lobbyist registration in Canada, including key definitions, thresholds for registration and ongoing reporting requirements, as well as opining on the implications of a recent decision of the Québec Court of Appeal with respect to the interpretation of the lobbyist registration statute for that province.

While some municipalities in Canada also have lobbyist registration by-laws, we have focused our summary only on federal and provincial lobbyist registration requirements, as we understand that only these are likely to be relevant to CAFII.

We have also focused only on the registration/reporting requirements of Canada's lobbyist registration laws, not restrictions or prohibitions on lobbying by former public office holders, or prohibitions on activities that would put elected officials or government employees in a conflict of interest. While some of these latter restrictions/prohibitions are contained in lobbyist registration law, others are covered by a separate lobbyist code of conduct, and many are covered by separate conflict of interest, integrity or public sector accountability legislation.

Overview

There are lobbyist registration laws in each of the provinces, as well as a federal law. By and large, these laws are intended to ensure the transparency of lobbing activities, by creating public registries that allow the public, the media and public office holders to know who is lobbying the government, for what purpose, and, for consultant lobbyists, in whose interests. A number of the laws explicitly recognize lobbying as a legitimate activity.

The following are the lobbyist registration laws in effect in the provinces and federally:

Federal - *Lobbying Act*, R.S.C., 1985, c. 44 (4th Supp.)

Alberta – *Lobbyists Act*, S.A., 2007, c. L-20.5.

British Columbia – *Lobbyists Registration Act*, SBC 2001, c. 42.

Manitoba – The *Lobbyists Registration Act*, C.C.S.M. c. L178

New Brunswick – *Lobbyists' Registration Act*, RSNB 2014, c. 11.

Newfoundland & Labrador – *Lobbyist Registration Act*, SNL 2004, c. L-24.1.

Nova Scotia – *Lobbyists' Registration Act*, SNS 2001, c. 34.

Ontario - *Lobbyists Registration Act*, 1998, S.O. 1998, c. 27, Sched

PEI – *Lobbyists Registration Act*, RSPEI, c. L-16.01.

Québec – *Lobbying Transparency and Ethics Act*, RSQ, c. T-11.011

Saskatchewan – *The Lobbyists Act*, SS 2014, c. L-27.01.

Happily, while there are some differences between these laws, including differences in terminology and additional activities defined to be lobbying, the lobbyist registration regimes across Canada are substantially similar in terms of how they classify lobbyists, and the activities that trigger registration (and reporting, in the case of the federal law.

These laws have separate categories for "consultant lobbyists" (i.e. paid external lobbying consultants) and "in-house" lobbyists. Some of the laws have separate classes of "in-house lobbyists" for non-profit and for-profit organizations, but the differences relate only to the mechanics of reporting. While a core set of activities require registration by both consultant and in-house lobbyists, in most jurisdictions, some activities trigger registration requirements for consultant lobbyists only. CAFII would fall under the "non-profit" category of in-house lobbyist, in jurisdictions where non-profits are recognized separately, and the general in-house lobbyist category elsewhere. To the extent that CAFII retains consultant lobbyists, note that consultant lobbyists are legally responsible for their own registration and reporting, regardless of the identity of the client on whose behalf they are acting. The client has no legal obligation with respect to the reporting obligations of a consultant lobbyist it has retained, although would likely want to ensure itself that the.

To aid in the comparison of these various law, we have attached a matrix comparing each jurisdiction with respect to:

- The activities that trigger registration
- The activities that explicitly do not trigger registration
- The threshold time requirements that apply to registration
- Ongoing reporting or registration renewal requirements
- Registration process basics: who must register and when

Note that both this memo and the attached matrix are summaries only. While there is considerable conceptual similarity between the various legislative regimes, the actual wording of the statutes differs somewhat. In all cases, reference should be had to the relevant statute and related regulations/guidance for the precise requirements for each jurisdiction.

Lobbying

Under each of the laws, registration requirements are triggered by certain defined activities undertaken with respect to public office holders. All but the federal law defines these activities as being "lobbying". The federal does not include a definition of "lobbying" *per se*, but rather, provides that registration is required with respect to certain types of communications ("designated communications") with public office holders. Although not formally defined as "lobbying" under the federal law, it essentially amounts to the same thing. In this memo the term "lobbying" will be used to refer to the activities in all covered jurisdictions that trigger a registration requirement.

a. Public office holders

All of the lobbyist registration laws define lobbying by reference to specified types of communications to public office holders. Although there are some differences in specificity between these various laws, the term "public office holder" is generally defined to include what one would expect: elected officials, ministerial staff, government appointees and employees of the relevant government or its agencies. Some explicitly exclude judges; others exclude officers, directors and employees of designated crown corporations; however, we are not aware of any such exclusions that are likely to be relevant to CAFII.

In addition to defining what is a public office holder, the federal law also uniquely defines the term "designated public office holder" which is a subset of public office holders that includes only Ministers and their office staff and senior civil servants at the DM, ADM and CEO level or equivalent.[1] Under the federal regime only, following lobbyist registration, communications to designated pubic office holders (but not other public office holders) are reportable on a monthly basis.

b. Legislation and policy-making

As noted, each of the jurisdictions shares a core set of activities that are considered to be lobbying, each of which involves communication intended to influence the legislative or policy-making process. These apply in all jurisdictions, for both in-house and consultant lobbyists. These may be summarized as communications made to public office holders in the relevant government with respect to:

- The development of any legislative proposal by the government, an elected member or, federally, a Senator
- The introduction, passage, defeat or amendment of any Bill or resolution in a legislative assembly (including the Senate, federally)
- The making or amendment of any regulation
- The development or amendment of any government policy or program

A majority of the jurisdictions add to this core list any communications that seek to influence a government decision to privatize any government institution, including a crown corporation, that provides services to the public,[2] although arguably, even without such an explicit provision, such activity would likely also be caught by communications made with respect to a change to legislation or government policy.

c. Contracts, permits, appointments and meetings

In addition to the foregoing core lobbying activity, to varying degrees, the covered jurisdictions also require registration respecting communications directed at the awarding of contracts, issuing of government authorizations or appointment of public officials. They also require registration for arranging a meeting between a public officer holder and any other person.

All the covered jurisdictions treat communication respecting the awarding of government contract, or the terms of tender prior to the awarding of a contract, as "lobbying" although a slight majority of the jurisdictions include this as a registration trigger for consultant lobbyists only.

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[1] As well as other individuals designated by regulation.

[2] Only the federal law and the laws of Manitoba and Québec do not treat this activity as "lobbying". Of the remaining provinces, all except Ontario include decisions to both transfer assets and to outsource government functions to the private sector; Ontario's law covers only transfers of government assets to the private sector.

All the jurisdictions also include as reportable activity communications with public office holders the arrangement of a meeting between a public office holder and any other person, although in only four provinces (Newfoundland & Labrador, PEI, Québec and Saskatchewan) is this activity reportable for in-house lobbyists.

Only Newfoundland and Québec include communications respecting the appointment of a public official as reportable activity. Only Québec includes communications respecting the issuance of any permit, licence, certificate or other organization.

d. Exclusions

For greater certainty, the lobbyist registration laws, to varying degrees, also explicitly exclude certain common interactions with government stakeholders (to the extent that they might be otherwise reportable[3]). Even where not explicitly excluded by statute, the body responsible for interpreting and enforcing the lobbyist registration requirement has issued guidance to a similar effect. Many of these relate to requests for information or submissions in public proceedings.

All jurisdictions exclude, either by statute, regulator guidance, or necessary implication, the following from requiring registration:

- the making of written or oral submissions to committees of a legislative body, or other persons or bodies where proceedings are a matter of public record.
- Communications with respect to enforcement, interpretation or application of any federal law or regulation
- Submissions to a public office holder concerning the implementation or administration of any policy, program directive, etc.
- Communications that are restricted to a request for information from the government
- Submissions in direct response to a public officer holder's request for comments
- Submissions made to an elected official by a constituent, with respect to a personal matter (in some cases, not excluded if the submission relates to a private bill for the benefit of that constituent)
- Making submissions in judicial or adjudicative proceedings, or in other public proceedings
- Making submissions in the negotiation of a contract, including a collective agreement

Registration threshold

a. General

While all lobbying activities by consultant lobbyists require registration, all the covered jurisdictions require registration by in-house lobbyists only when a certain threshold of materiality has been met or exceeded (or is anticipated to be met or exceeded). Lobbying activity falling below the established threshold does not require registration. As can be seen in the attached chart, these thresholds vary from

[3] Indeed, on a proper interpretation of the activities that are designed to constitute "lobbying", many of these activities would not be reportable anyway,

jurisdiction to jurisdiction, but would generally cover organizations that would do little in-house lobbying in the jurisdiction in question.

Some statutes include an explicit time-based registration threshold. Other laws just make in-house lobbyist registration requirements subject to a general "significant part of the duties" threshold, although, when this is the case, regulators have issued guidance that indicates what time-based threshold would constitute a "significant part of the duties" of in-house lobbyists (although, see below re Québec). For the most part, time-based thresholds are calculated either with respect to an actual individual employee or on the basis of a "virtual person". For example, in the case of the federal law, where the Commissioner of Lobbying considers registration to be required when lobbying activity exceeds 20% of a person's time, this threshold is met when the time spent by all employees of an organization cumulatively exceed one day per week of what would be a single person's time, if a single person carried out all the lobbying activities in question. This obviously avoids having organizations avoid registration by dividing up lobbying activity amongst its employees.

Note that the various jurisdictions calculate their time-based thresholds over different periods of time. For example, under the federal law, the threshold for in-house registration is 20% of one person's time, calculated monthly; whereas in BC it is 100 hours per year, and in PEI, it is 50 hours over a three-month period.

It is also important to note that what types of activity is to be counted toward the time threshold as "preparation". For example, only Saskatchewan and the federal government require travel time to be included. Ontario explicitly excludes preparation time from the calculation of the time-based threshold. The Atlantic provinces don't offer any guidance at all as to whether preparation should be included (which suggests that it should not be included as, strictly speaking, preparation time would not fit within the definition of "lobbying" for most regimes).

b. Developments in Québec re registration threshold

Like several other Canadian jurisdictions, the statutory threshold for registration by in-house lobbyists[4] under Québec's law is where lobbying constitutes a significant part of the duties of an employee. In 2005, the Commissioner of Lobbying had issued guidance indicating that a time-based threshold of 12 days per year of time spent lobbying would constitute a "significant part of the duties" and would therefore trigger the registration requirement.[5]

However, in April 2017, the Québec Court of Appeal ruled in the case of *Cliche c. Directrice des poursuites criminelles et pénales*, 2017 QCCA 668, that a time-based threshold alone cannot be used to determine the threshold for registration by in-house lobbyists; rather, all relevant factors must be considered, including the job functions of employees engaged in lobbying, in determining what would constitute a significant part of duties.

In guidance issued following the decision[6], the Commissioner of Lobbying now does not slavishly apply any quantitative criteria in assessing the requirement to register (although will still consider such indicia), but will instead focus on an analysis of more qualitative criteria, such as the regularity and intensity of a person's lobbying activities. The new approach mentions a number of potentially relevant factors such as formal designation by title of having lobbying responsibilities, nature of the tasks undertaken by an individual and the extent of their involvement in a project, etc. Accordingly, unlike the case of the other

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[4] In fact, the Québec law classifies in-house lobbyists as either "enterprise lobbyists" (for profit organizations) or "organization lobbyists" (not for profit organizations).
[5] Notice n° 2005-07 of the Commissioner of Lobbying concerning the interpretation of the expression "a significant part"
[6] https://www.commissairelobby.qc.ca/fileadmin/user_upload/Ruling_Court-Of-Appeal-Of-QuebecNotice2005-07.pdf

provinces, a determination by CAFII of the requirement to register will have to take into account a broad variety of potentially relevant circumstances, beyond the amount of time spent lobbying. For example, to the extent that the Co- Executive Directors are tasked, as a key part of their duties, to engage in lobbying activities with government stakeholders, this would tend to suggest registration is more likely to be seen to be required. Given the vagueness of the current approach to the test, we would recommend consulting with the Commissioner in Québec in any cases where the obligation to register may not be clear.

Registration

With the exception of PEI[7], for in-house registration, all Canadian jurisdictions provide that it is the most senior paid officer of a corporation/organization that is responsible for completing and filing the registration on behalf of the organization. In CAFII's case, we understand that this would be either of the Co-Executive Directors.

Thresholds vary somewhat in terms of deadlines for registration, although for in-house registrations, most regimes require registration with 2 months/60 days of undertaking lobbying activity (i.e. getting instructions/deciding to do so). However, Newfoundland allows only 10 days for such registrations to be made. Québec ties its registration deadline to the date on which lobbying activity was actually commenced, not just undertaken.

The process for registration varies from jurisdiction to jurisdiction, but most registrations are done on line, requiring first that an account be set up with the designated registration body. Once set up, registrants must complete online forms that require varying levels of information and detail. Generally, the registration must include the names of all senior paid officers of the organization who perform lobbying activities, as well as the names of any employees who individually would exceed the registration threshold for that jurisdiction. The return must also include the names of all departments lobbied and a general description of the subject matter of the lobbying activity. The drafting of the latter is considered to be somewhat of an art for some, with the objective of meeting registration requirements while not giving away too much detail to competitors or other stakeholders that may review the registration once made. In some regimes, like the federal one, registration may be subject to a vetting process, to ensure adequacy of the disclosures made in the registration forms.

Reporting/Updating

After registration all regimes require that in-house registrants notify the applicable registrar within a fixed period (generally 30 days) of any changes in the registration, such as the ceasing of lobbying activity by the organization or by one or more employees. Organizations must also renew (or withdraw) registrations at least every 6 months, to ensure some currency of the public register.

In the case of the federal regime only, monthly communications reports must also be filed (within 15 days of the end of the month) with respect to any prescribed communications between a registered lobbyist and a designated public office holder (as described above, the senior most officials in government).

Accordingly, under the federal law, while initial registration is required with respect to lobbying communications directed to public office holders generally (subject to the 20% rule); monthly reporting is required only for lobbying communications with more senior public office holders, but without any reference to the 20% rule (i.e. even a single hour of communication with a Minister in a given month would be reportable.

[7] For for-profit organizations, PEI places registration responsibility on each individual registrant; however, also requires registration by the most senior paid officer in respect of non-profit organizations.