
LOBBYIST REGISTRATION LEGISLATION: IMPACT ON ONTARIO CHARITIES AND NON-PROFIT ORGANIZATIONS

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A. INTRODUCTION

Lobbyist registration legislation has been in place in Canada since the passage of federal lobbyist registration legislation some twenty years ago.¹ The *Lobbyist Registration Act* (“Federal LRA”) was the first Canadian legislation to govern the conduct of lobbyists by requiring them to register and file reports to a lobbyist registry. Ontario was the first Canadian province to regulate lobbying activity and the *Lobbyist Registration Act*,² (“Ontario LRA”) was enacted in 1998 with similar provisions and registration requirements to the Federal LRA. Many other provinces have since followed suit and enacted similar legislation.³

The *Federal Accountability Act*⁴ (“FAA”) was enacted in December 2006 in an effort to improve the transparency of lobbying and the accountability of government decision-making. The FAA both amended and renamed the Federal LRA and on July 2, 2008, the *Lobbying Act*⁵ (“Federal LA”) and its accompanying regulations came into force, bringing some new accountability and transparency rules for lobbyists.

¹ R.S.C. 1985, c.44 (4th supp.) as am. by S.C. 1993, c.12, S.C. 1995, c.12, S.C. 2003, c.10 and S.C. 2004, c.7.

² S.O. 1998, c. 27, Sched. C, s. 62.

³ Lobbyist registration legislation also exists in the following provinces: Québec, British Columbia, Alberta (not yet proclaimed), Saskatchewan, Nova Scotia, and Newfoundland and Labrador.

⁴ S.C. 2006, c. 9.

⁵ R.S.C. 1985, c. 44 (4th Supp.) as am. by S.C. 2006, c. 9.

Many charities and non-profit organizations operating in Ontario are involved in lobbying as a part of their activities. Some of these organizations are either unaware of the existence of lobbyist registration legislation or are uncertain of its application to them in the conduct of their programs. This *Charity Law Bulletin* will provide an overview of the Ontario and Federal lobbyist legislation and highlight its significance for charities and not-for-profit organizations in Ontario. This Bulletin will not review the boundaries of permissible political activity by charities or the restrictions on charities in this regard under the *Income Tax Act* (Canada)⁶.

B. OVERVIEW

The importance of free and open access to government is a fundamental democratic right. Indeed the preamble to the federal *Lobbying Act* recognises that “free and open access to government is an important matter of public interest”. While access to government is an important right, the accountability of Canadian democratic institutions also requires transparency so that Canadians can be informed about the factors and influences that affect government decision-making. Lobbyist registration and regulation responds to these concerns.

Lobbyist legislation applies to many sectors of the public, including associations, non-profit corporations, charities, coalitions and interest groups, including their employees and boards of directors. Both the Ontario and the federal legislation make it mandatory for the following types of lobbyists to register and report lobbying activity to each of their respective lobbyist registries. They are:

- a) Consultant Lobbyists: A paid individual who is hired to communicate on behalf of a client. These individuals may be professional lobbyists, e.g. government relations consultants, lawyers, accountants, etc., but could be any individual who, in the course of their work for a client, communicates or arranges meetings with a public office holder.
- b) In-house Lobbyists (Corporation): A person who is employed by an entity that operates for profit, such as a bank or a manufacturer. In this case, the entity is registered by its most senior paid officer as a corporation that lobbies.
- c) In-house Lobbyists (Organization): A person who is employed by a non-profit entity such as a university, a charity or a non-profit association. In this case, the entity is registered by the most senior paid officer as an organization that lobbies.

⁶ R.S.C. 1985, c.1 (5th Supp.), as am.

Both the federal and the Ontario legislation have registration requirements for each of these categories and the requirements vary to some degree. This *Bulletin* will focus on the registration requirements for the In-house Lobbyists (Organization) which pertain to charities and non-profit organizations. For a detailed discussion on the requirements for the different categories, comprehensive information is available at the websites of the Office of the Integrity Commissioner⁷ in Ontario and the Office of the Commission of Lobbying of Canada.⁸

C. SCOPE OF THE ONTARIO AND FEDERAL LOBBYING LAWS

1. What is “Lobbying”?

The Ontario LRA defines “lobby” with reference to *in-house lobbyists* as meaning a communication by an *in-house lobbyist* with a public office holder in *an attempt to influence*.⁹

- ◆ the development of any legislative proposal by the Government of Ontario or a member of the Legislative Assembly;
- ◆ the introduction, passage, defeat or amendment of any bill or resolution before the Assembly;
- ◆ the making or amendment of any regulation;
- ◆ the development, amendment or termination of any policy or program of the Government of Ontario;
- ◆ any decision about privatization or outsourcing; and
- ◆ the awarding of any grant, contribution or other financial benefit by or on behalf of the Crown.

The Federal LA does not specifically define “lobbying”. Instead it refers to any communication (written or oral) by an individual who is paid to communicate with a public office holder on behalf of his or her employer *in respect of*:

- ◆ the making, developing or amending of legislative proposals, bills or resolutions, regulations, policies, programs; or
- ◆ the awarding of grants, contributions, tax credits or other financial benefits.

As can be seen, the main distinction between the Ontario LRA and the Federal LA is that the Ontario LRA defines lobbying to include *an attempt to influence* on the part of the lobbyist while the Federal

⁷ Online at <http://lobbyist.oico.on.ca>.

⁸ Online at <http://www/ocl-cal/gc/ca>.

⁹ *Supra* note 2 s.1(1)(a).

LA requires only that there be a communication (written or oral) by a paid lobbyist with no determination of the lobbyist's motive or intention.¹⁰ While in practice this may be a distinction without a difference, the definition under the Federal LA attempts to capture all communications with a more objective standard.

2. What about Communication Initiated by Government?

The Federal LA extends its registration requirements to include communication initiated by the lobbyist or a public office holder. The Act is triggered by the *fact of communication*, not the circumstances surrounding how the communication arose. In Ontario, it is important to note that the Ontario LRA specifically excludes communications initiated by a public office holder from the application of the Act.¹¹

3. When are you not lobbying?

As noted earlier, not all communication between public office holders and individuals, firms and organizations will constitute lobbying under the Ontario LRA and the Federal LA. For example, communications that are purely consultative to public policy making do not constitute lobbying. Under the Federal LA (which is similar to the Ontario LRA except as noted below) lobbying does not include:¹²

- ◆ oral and written submissions to a committee of the Senate or House of Commons or of both Houses of Parliament or to any person having jurisdiction or powers conferred by or under an Act of Parliament, in proceedings that are a matter of public record;
- ◆ oral and written submissions made to a public office holder about enforcing, interpreting or applying any act or regulation by that public office holder;
- ◆ oral or written communication made to a public office holder by an individual on behalf of an organization if the communication is restricted to a request for information; and
- ◆ oral or written submissions made to a public office holder in direct response to written requests for information (Ontario LRA only).

¹⁰ It is worth noting that the predecessor to the Federal LA was amended in 2005 to remove the words “an attempt to influence” on the part of the lobbyist. The rationale for this change was to broaden the definition by removing the subjective element from the definition. S.C. 2003, c.10 s.4(1).

¹¹ *Supra* note 2 s. 3(2)(c).

¹² *Supra* note 5 s.4(2).

Some examples of communications which do not normally give rise to a registration requirement are as follows:¹³

- ◆ Enquiries to obtain publicly available information;
- ◆ General inquiries about the terms and conditions of programs and application processes;
- ◆ Participation in consultations, hearings, roundtables or like activities when the name of the participants, the government participating organizations and the subject matters are readily available publicly;
- ◆ Communication with respect to the enforcement, interpretation or application by public office holders of any current federal statute or regulation; and
- ◆ Preparation and presentations of briefings to parliamentary committees.

In contrast, examples of communication which would require registration under the Federal LA are:

- ◆ Enquiries about a specific application for a grant, contribution, tax credit or contract;
- ◆ Communication to determine what additional information is required to have an application approved;
- ◆ Negotiations and terms related to a specific financial benefit.

4. Who is a Public Office Holder?

The meaning of a “public office holder” under the Ontario LRA is broad and includes an officer or employee of the Crown, a member of the Legislative Assembly and their staff, a member of bodies appointed by the Lieutenant Governor, cabinet ministers, officers of Crown agencies, boards or commissions, and a member of the Ontario Provincial Police Force. A public officer holder does not include judges, justices of the peace and officers of the legislative assembly such as Ombudsman, Information & Privacy Commissioner.

Under the Federal LA a “public office holder” is also defined broadly as any officer or employee of the Canadian Government. This includes:

- ◆ Members of the Senate or of the House of Commons (Senators, Members of Parliament, Ministers) and their staff;
- ◆ Persons appointed to an office by a Minister of the Crown or the Governor in Council;

¹³ See Office of the Commissioner of Lobbying of Canada, *Communicating with Federal Public Office Holders*, (June 2005) online: <http://www.ocl-cal.gc.ca/epic/site/lobbyist-lobbyiste1.nsf/en/nx00109e.html>.

- ◆ An officer director or employee of any federal board, commission or other tribunal;
- ◆ Members of the Canadian Armed Forces;
- ◆ Members of the Royal Canadian Mounted Police; and
- ◆ Employees of federal departments.

“Designated public office holders” constitute a category within the broader group of federal officials defined as public office holders by the Federal LA. Designated public office holders include:

- ◆ Ministers
- ◆ Ministerial Staff
- ◆ Deputy Minister and Associate Deputy Ministers
- ◆ Assistant Deputy Ministers
- ◆ federal officials of comparable Deputy Minister or Assistant Deputy Minister rank
- ◆ Members of PM’s Transition Team...and anyone else designated by Cabinet

Designated public office holders have two mandatory requirements. They must respond to enquiries by the Commissioner of Lobbying and must respect a 5-year post-employment prohibition on lobbying the federal government. Assistant deputy ministers and individuals occupying comparable ranks are exempted from the post-employment prohibition. The prohibition takes effect on January 2, 2009.

5. What is the Threshold for Registration by a Charity and Non-Profit?

Lobbyist registration may be required under the Ontario LRA and Federal LA (as the case may be) when on behalf of a charity or non-profit organization, an employee communicates with a government official about certain types of government decisions referred to above. In Ontario, communication with a public office holder may require registration if it is made *in an attempt to influence* such a government decision.

However, not just any amount of lobbying by an employee of a charity or non-profit will trigger the registration requirement. Each of the Federal LA and Ontario LRA require registration only where lobbying comprises *a significant part of the duties* of the employee/employees.¹⁴ This means:

¹⁴ *Supra* note 2 s. 6(5) and *Supra* note 5 s 7(1)(b).

- a) at least 20 per cent of the duties of any single employee consists of registerable activity involving government officials of that jurisdiction; or
- b) all of the registerable activities of all the charity's employees taken together would amount to the equivalent of 20 percent of one individual's duties.¹⁵

The term *significant part of the duties* under the Ontario LRA is measured over a three (3) month period. As a result, the threshold is reached when the accumulation of lobbying activities over a three (3) month period reaches the threshold of 20 per cent for either an individual employee's time, or the combined times of more than one employee.¹⁶ The *Ontario Guide to the Lobbyist Registration Act* cautions that if the in-house lobbyist knows that he/she will be meeting the 20 per cent threshold before 3 months have elapsed, he/she should register these activities immediately and not wait for a three-month lapse.

But what does this mean in practice? For example, do registerable activities include only actual time spent by an employee on communicating with public office holders or do they also include time spent on preparation such as researching, drafting and planning?

The *Ontario Guide to the Lobbyist Registration Act*¹⁷ specifically notes that the definition of *significant part of the duties* applies to time actually spent lobbying, not creating research papers or doing related work. Based on the Guide, it appears that what is caught under the 20% threshold is the time spent in the act of communicating whether oral or written and not the time spent in preparation for the communication.

Federally, the situation is quite different in that the time spent by employees is *not* limited to the act of communicating and many more duties of employees appear to be caught within the scope of the legislation. Pursuant to an interpretation bulletin issued by Office of the Commissioner of Lobbying of Canada entitled "*A Significant Part of Duties ("The 20% Rule")*",¹⁸ the determination of whether or not lobbying constitutes a significant part of the duties of employees who communicate with public

¹⁵ Ontario Regulation 722/98 as am., s.6(2) and See Office of the Commissioner of Lobbying of Canada, *A Significant Part of Duties ("The 20% Rule")*, (November 2007) online: <http://www.ocl-cal.gc.ca/epic/site/lobbyist-lobbyiste1.nsf/en/nx00111e.html>.

¹⁶ Ontario Regulation 722/98, s. 6 (4).

¹⁷ See Office of the Integrity Commissioner, *A guide to the Lobbyist Registration Act* (January 1999), online: [http://lobbyist.oico.on.ca/LRO/GeneralSettings.nsf/vwEnHTML/ActGuide.htm/\\$FILE/LRAguide.pdf?OpenElement](http://lobbyist.oico.on.ca/LRO/GeneralSettings.nsf/vwEnHTML/ActGuide.htm/$FILE/LRAguide.pdf?OpenElement).

¹⁸ See Office of the Commissioner of Lobbying of Canada, *A Significant Part of Duties ("The 20% Rule")*, (November 2007) online: <http://www.ocl-cal.gc.ca/epic/site/lobbyist-lobbyiste1.nsf/en/nx00111e.html>.

office holders and who are subject to the 20% rule can be carried out using various approaches. The Bulletin states as follows:

In the case of corporations or organizations, the officer responsible for filing the return must determine whether or not lobbying constitutes a significant part of the duties of those employees who communicate with public office holders and who are subject to the 20% rule. This can be done using various approaches. One way is to estimate the time spent preparing for communicating (researching, drafting, planning, compiling, travelling, etc) and actually communicating with public office holders. For instance, a one-hour meeting may require nine hours of preparation. In this case, the time related to lobbying with a public office holder would be the total, 10 hours. In situations where the time related to lobbying is difficult to estimate, the officer responsible for filing will have to estimate the relative importance of lobbying within the various duties for which the employee is responsible and determine the proportion related to lobbying activities. Both methods may be used in conjunction if the situation is not clear. In any case, the officer responsible will be accountable for the decision as to whether or not a registration is necessary.

In order to provide a time basis for estimating the relative importance of lobbying activities, a six-month estimation period, should be used. In any given six-month period, be it the last six months or the six months coming, if the total amount of time spent lobbying by all paid employees equals 20% or more of the employment time of one employee, this would be considered a significant part of duties and the corporation or organization must register. In addition, if the 20% threshold is reached during any given 30-day period during the six-month period, then registration would also be required.¹⁹

The Bulletin provides some specific examples of organizational activities that would be exempt from the requirement to register and should not be factored into a calculation of significant part of the duties as follows:

- ◆ Communications restricted to a straightforward request for publicly available information,
- ◆ Preparation and presentation of briefings to parliamentary committees,
- ◆ Employees making submissions to federal public office holders on the employer's behalf with respect to the enforcement, interpretation or application by that official of any existing federal statute or regulation, and
- ◆ Routine dealings with government inspectors and other regulatory authorities.²⁰

¹⁹ *Ibid.*

²⁰ *Ibid.*

Finally, in the context of charities and non-profit organizations, it is important to remember that a requirement to register is triggered only when lobbying is done by a *paid* lobbyist who is *employed* by the organization. As a result, unpaid volunteers who lobby on behalf of organizations will not bring the charity or non-profit within the scope of the legislative requirements. However, it is important to be wary since if a director or member of a non-profit organization should change from being a volunteer to being paid by the organization, this would trigger a requirement for the individual to register as a consultant lobbyist and possibly for the organization to register under the category of in-house lobbyist (organization) if the individual becomes an employee.

6. What are the Registration and Filing Requirements?

Under the Ontario LRA, the most senior paid officer of the charity or non-profit that meets the threshold requirements referred to above must register and file a return within 2 months of meeting the definition of “in-house lobbyist”, and within 30 days after the expiration of each 6 month period after the filing of the previous return.²¹

The senior officer (whether or not the senior officer is lobbying on behalf of the organization), must disclose detailed information to the Lobbyist Registration Office, including the following²²:

- ◆ a description of the organization’s membership (but not personal names of members) and the names of officers or directors of the organization;
- ◆ the source and amount of any government funding received by the organization;
- ◆ the name of any non-government entity or organization which, in the fiscal year prior to the date of filing a registration, provided \$750 or more to the organization in support of the lobbying activity;
- ◆ the name of each in-house lobbyist employed by the organization;
- ◆ the subject matter of the lobbying during the period of the return and for the following six-month period;
- ◆ specific information regarding the undertaking such as relevant legislative proposal, bill, resolution, regulation, etc., as defined in the Act;
- ◆ the name of any ministry, agency, board or commission that will be lobbied;
- ◆ whether an MPP or staff member of an MPP was or is to be lobbied;
- ◆ the name of any in-house lobbyist who has been identified in the last return filed and has ceased to be an in-house lobbyist or to be employed by the organization; and

²¹ *Supra* note 2 s. 6(1) and (5).

²² *Ibid.*, s. (6)(3).

- ♦ communication techniques used including *grass-roots lobbying*, which is a communications technique that encourages individual members of the public or organizations to communicate directly with public office holders in an attempt to influence government decisions.²³

Under the Federal LA, the most senior paid executive employed by the organization (usually the executive director or chief executive officer) is responsible for completing and filing an in-house lobbyist (organization) return within two (2) months after the need to register arises (that is, when the 20 per-cent threshold is reached) with the Commissioner of Lobbying.²⁴

Under the initial return to be filed, the responsible officer is required to disclose the name of all of the organization's paid employees who perform lobbying activities on behalf of the organization. If the most senior officer also undertakes lobbying activities on behalf of the organization, his or her name will need to be listed as an in-house lobbyist for the organization. The return must include other detail such as the following.²⁵

- ♦ A description of the organization's membership and any other information to identify its membership that is prescribed;
- ♦ If the employer is funded in whole or in part by a government or government agency, the name of the government or government agency, as the case may be and the amount of the funding received;
- ♦ Particulars to identify the subject-matter of any communication that any employee named in the return has made or is expected to make with a public officer holder;
- ♦ If any employee named in the return is a former public office holder, a description of the offices held, which of those offices, if any, qualified the employee as a designated public office holder and the date on which the employee ceased to hold such a designated public office.
- ♦ Particulars to identify any relevant legislative proposal, Bill, resolution, regulation, policy, program, grant, contribution or financial benefit;
- ♦ The name of any department or other governmental institution in which any public office holder with whom any employee named in the return communicates or expects to communicate; and
- ♦ Particulars to identify any communication technique used or to be used, including grass-roots communication.

²³ This type of lobbying usually relies on media or advertising and results in mass letter writing and fax campaigns, telephone calls to public office holders and public demonstrations.

²⁴ *Supra* note 5s. 7(2).

²⁵ *Supra* note 5 s. 7(3).

Thereafter, lobbyists must carefully review their activities at the end of every month to determine whether a return is required for that month. A lobbyist may be required to file a return not later than 15 days after the end of each month, if any of the following four (4) conditions exist:

- (1) Communication with a designated public office holder took place during the month being reported (see *Lobbying Act Implementation Notice #5 – Communication with a Designated Public Office Holder*²⁶).
- (2) Information contained in an active return is no longer correct or additional information that the lobbyist became aware of should be included in an active return.
- (3) The lobbying activities have terminated or in the case of in-house lobbyists' activities, no longer require registration.
- (4) Five (5) months have elapsed since the end of the last month for which a return was filed (a total of 6 months since it was filed).

The information contained in the return is accessible to the public. Access to this information will permit any registered organization to monitor the lobbying activities of other organizations.

7. Are there Penalties for Failing to comply with the Federal LA or Ontario LRA?

Under the Ontario LRA penalties for contravention of the Act include fines of up to a maximum of \$25,000. The senior officer of the charity or non-profit may be held *personally liable* where:

- ◆ Lobbying activities are being conducted and the senior officer does not file a return within the timeframe provided in the Act;
- ◆ The senior officer does not provide the required information in a return as stated in the Act;
- ◆ The senior officer fails to provide the Lobbyist Registrar with changes to a return, new information or clarification of information requested by the Lobbyist Registrar;
- ◆ The senior officer makes false or misleading statements;
- ◆ The senior officer knowingly places a public office holder in a position of real or potential conflict of interest.

The Federal LA substantially increases the monetary penalties for lobbyists who contravene the legislation and like the Ontario LRA, the *Lobbying Act* places the responsibility (and liability) directly

²⁶See Office of the Commissioner of Lobbying of Canada, *Lobbying Act Implementation Notice #5 :Communication with a Designated Public Office Holder*, (June 1 2008) online:[http://www.ocl-cal.gc.ca/epic/site/lobbyist-lobbyiste1.nsf/vwapj/implementation_Notice5.pdf/\\$FILE/implementation_Notice5.pdf](http://www.ocl-cal.gc.ca/epic/site/lobbyist-lobbyiste1.nsf/vwapj/implementation_Notice5.pdf/$FILE/implementation_Notice5.pdf).

on the officer of the charity or non-profit organization who is responsible for filing the returns or providing the information required under the Act. The penalties are:

- ◆ Maximum fine for offence of knowingly making a false or misleading statement or failing to file a return is doubled to \$50,000 (summary conviction) and \$200,000 (indictment).
- ◆ Maximum prison sentence is unchanged: six (6) months (summary conviction) or two (2) years (indictment).
- ◆ All other offences under the Act remain subject only to summary prosecution and conviction. Maximum fine for these offences doubled to \$50,000.
- ◆ Commissioner will be able to impose a two-year ban on lobbying by a person convicted of an offence under the Act.
- ◆ Commissioner may make public the nature of the offence, the name of the person who committed it and the punishment imposed.

D. SUMMARY

The lobbying laws in place in Ontario and federally can be a trap for the unwary charity or non-profit organization. It is important for senior officers, boards of directors and others to be familiar with these legal requirements or risk substantial penalties in the event of failure to comply with the legislative requirements. This bulletin provides a general overview of the lobbyist registration provisions under both the Ontario FLA and the Federal LA. A detailed review of both Acts and interpretation guidelines provided by the office of the Commissioner of both lobbyist registries should be conducted in order to understand the full scope of lobbyist registration requirements in both jurisdictions.

Finally, Ontario charities are cautioned that the registration and reporting requirements under federal and Ontario lobbying laws are completely separate from any determination of what constitutes political activity under the *Income Tax Act* (Canada). In this regard, Canada Revenue Agency's policy statement on "Political Activity"²⁷ is a good starting place for reviewing these income tax requirements as they relate to registered charities. A detailed commentary on the policy statement is also available in Charity Law Bulletin No.25.²⁸

²⁷ See Canada Revenue Agency, *Policy Statement CPS-022, "Political Activities"* (September 2, 2003) online: < <http://www.cra-arc.gc.ca/tx/chrts/plcy/cps/cps-022-eng.html>.

²⁸ Available online: < <http://www.carters.ca/pub/bulletin/charity/2003/chylb25-03.pdf>>.