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LAWYERS WHO LOBBY ON BEHALF OF CHARITIES AND NON-PROFITS*

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A. INTRODUCTION

Lobbying legislation in Canada has been in place since 1988. On July 2, 2008, the federal lobbying statute was amended by the *Federal Accountability Act* and was renamed the *Lobbying Act*. Various provinces also have lobbyist registration legislation. The province of Ontario's *Lobbyist Registration Act* has been around since 1998.

Although there are differences between these statutes (such as what constitutes lobbying, when registration is required, etc.), both of them apply to charities and non-profits. Many charities and non-profits are not aware of the existence of these statutes, or are uncertain that some of their programs constitute lobbying and therefore requiring them to register under these statutes.

Where a charity or a non-profit engages in lobbying activities, registration is required only where the lobbying activities of the organization constitute a significant part (i.e. 20%) of the duties of at least one paid employee (referred to as "the 20% rule"). However, lobbying conducted by volunteers would not require lobbying registration.

Not only do these statutes apply to charities and non-profits, persons paid to lobby on their behalf are also required to register as "consultant lobbyists." Consultant lobbyists are those who are hired to communicate with public office holders on behalf of a client. They may be professional lobbyists or those who, in the course

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of their work, communicate or arrange meetings with a public office holder. Examples of consultant lobbyists include government relations professionals, lawyers, notaries, engineers, accountants or other professional advisors who provide lobbying services. At the time of writing, the online registry indicates that there are 863 consultant lobbyists (out of a total of 4713 active lobbyists) who have filed 2276 registrations (out of a total of 3061 active registrations).

Consultant lobbyists include members of charities and non-profits who are paid (not as employees) for engaging in lobbying activities for these entities. In the case of directors of non-profits, where a chairperson or a member of a board of directors communicates with federal public office holders in the course of his/her duties, the person would be required to register as a consultant lobbyist if the person is an outside director who is paid for his/her services beyond reimbursement of expenses. If the person is a lawyer by profession, it would be necessary for the lawyer to distinguish whether the lobbying is in the context of his/her law practice or in his/her position as an officer for the non-profit. Technically, this issue would not arise in situations involving charities, since directors of a charity are considered to be quasi-trustees for the purposes of managing and investing its charitable property and are prohibited at common law from receiving any direct or indirect benefit from the charity.

All lobbying activities conducted by consultant lobbyists would trigger compliance with lobbying legislation, and the 20% rule that applies to the lawyers' charitable and non-profit clients would not apply. Lobbying activities are defined in the statutes. Generally, they include communicating with public office holders with respect to changing laws, regulations, policies or programs; obtaining a financial benefit such as a grant or contribution; obtaining a government contract; and, for consultant lobbyists, arranging for a meeting with a public officer holder.

In their representation of their clients, special issues may arise for lawyers as a result of the Rules of Professional Conduct. In addition, where lobbying is conducted on behalf of charitable and non-profit clients, additional issues may also arise.

B. COMPETENCE

The Rule requiring lawyers to provide competent advice to clients would require a lawyer to review with the charitable/non-profit client whether the intended lobbying activity is within the client's authority. While the constating documents for for-profit companies often do not contain any provision that may limit the extent of

activities that may be engaged in by the business, this may not be the case for charities and non-profits. Charities and non-profits are established to achieve specific objects set out in their constating documents. Some charities and non-profits may include a provision in their constating document that the organization does not engage in certain activities, such as political or lobbying activities.

Another issue that the lawyer would need to review with a charitable client, but not non-profit clients, is whether the intended lobbying activity may violate the prohibition under the *Income Tax Act* (Canada) on registered charities from engaging in certain political activities. In general, charities cannot engage in partisan political activities (i.e. activities which involved the direct or indirect support of, or opposition to, any political party or candidate for public office). However, a charity may engage in non-partisan political activities if they are connected and subordinate to the charity's purposes, provided that the charity devote substantially all (i.e. 90% or more) of its resources to charitable activities. The definition of political activities at common law is not the same as the statutory definition of lobbying activities under lobbying legislation. Some political activities are lobbying activities, while some lobbying activities are political. Therefore, although charities are not permitted to engage in political activities, it is possible that some of their charitable activities could be recognized as lobbying and therefore would require registration under the lobbying legislation. Therefore, lawyers acting for charities should review the intended lobbying activity with their client to determine whether the charitable status of the client might be jeopardized.

C. LOBBYISTS' CODE OF CONDUCT

Consultant lobbyists are required to comply with the Lobbyists' Code of Conduct developed by the Commissioner of Lobbying. The Code provides that its purpose is to assure the Canadian public that lobbying is done ethically, with the highest standards, and with a view to conserving and enhancing public confidence and trust in the integrity, objectivity and impartiality of government decision-making. Therefore, lawyers who lobby would have a duty to comply with both the Code and the Rules. In a number of respects, the Code and the Rules are consistent with each other, e.g. section 4 of the Code requires consultant lobbyists not to divulge confidential information, unless the informed consent of the client is obtained or disclosure is required at law. However, where there is a conflict between the Code and the Rules, it is possible that the lawyer may be put in an awkward position and may have to decline to act for the client. For example, a lawyer is required under section 1 of the Code to disclose the identity of the organization on whose behalf the lawyer lobbies, whereas the Rules require a lawyer to maintain confidentiality for the client.

D. CONFIDENTIALITY AND SOLICITOR/CLIENT PRIVILEGE

Both the federal and Ontario lobbying legislation require a lawyer who engages in lobbying activities on behalf of a client to have a personal duty to file returns under the lobbying legislation. This filing requirement may be at odds with the Rule requiring lawyers to maintain confidentiality in respect of their clients.

The information filed is maintained in an online registry and is available to the public. The purpose of the registry is to ensure transparency of lobbying activities, so that the general public, the media and public office holders may know who is lobbying the government, for what purpose and in whose interest.

The information that is required to be included in the initial disclosure will require the lawyer to disclose solicitor-client privileged information, including the identity of the client, anyone that controls or directs the client's activities and has a direct interest in the outcome of the lobbying, whether the client receives government funding and the amount of the funding, the subject matter of the lobbying, the government department or institution being lobbied, and the communication techniques used (including meetings, telephone calls, grass-roots lobbying, i.e. encouraging individual members of the public or organizations to communicate directly with public office holders in an attempt to influence government decisions). The lawyer is also required to provide monthly updates of the information contained in the initial disclosure, as well as monthly returns on communications made in the context of lobbying. A six-month return is also required where there is no reporting in the previous five months.

In order to comply with the Rule on confidentiality, the lawyer would need to obtain consent from the client before the lawyer agrees to undertake the lobbying. However, many charities and non-profits may not wish to attract publicity to their lobbying activities and therefore may not be willing to provide the necessary consent to the lawyer. If this were the case, the lawyer may be put in a difficult situation, since the lobbying legislation imposes penalties on the consultant lobbyist for failure to comply with the filing requirements. As such, the lawyer may have no alternative but to decline acting for the client.

There may be situations where the client consents to the lawyer's initial disclosure and monthly returns, but refuses to provide consent to the lawyer to disclose further information requested by the Commissioner of Lobbying. In that case, the lawyer may have to refrain from acting further.

E. CONFLICT OF INTEREST BETWEEN COMPETING CLIENTS

Section 6 of the Code requires consultant lobbyists not to represent conflicting or competing interests without the informed consent of those whose interests are involved. This is similar to the Rule requiring lawyers to avoid conflicts of interest. Where a law firm is involved in lobbying a particular branch of the government on behalf of a charity or non-profit, but also provides advisory services to the same government department, an issue arises as to whether the law firm can avoid a conflict of interest in this situation. In these situations, the Commissioner of Lobbying recognizes that a conflict of interest can be avoided, provided that Ethical Walls are put in place in that law firm that follow the guidelines set out by the Canadian Bar Association in 1993. This would mean that the law firm would need to provide for different people, separate files and internal undertakings to ensure that everyone within the firm agrees and complies, and to obtain the informed consent of both clients.

F. NO CONTINGENT FEES

Although the Rules permit lawyers to be remunerated based on a contingent fee arrangement, the federal lobbying legislation expressly prohibits consultant lobbyists be paid on a contingent basis.

Although some of the issues that must be addressed by lawyers who lobby for charities and non-profits are no different from those faced by lawyers who lobby for for-profit clients, there are special issues that the lawyers have to address where the clients are charities and non-profits. Having a general knowledge of the legal framework faced by these entities (such as corporate governance, the regulatory system under the *Income Tax Act*, fundraising and public relations issues, etc.) would be helpful when assisting charities and non-profits in their lobbying activities.

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