
THE OTTAWA REGION CHARITY LAW SEMINAR

Ottawa – February 11, 2009

Lobbyist Registration Legislation: Impact on Charities and Non-Profit Organizations

By Jane Burke-Robertson

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BACKGROUND

- Many Ontario charities and non-profits are involved in lobbying activities but are unaware of the requirements of either the Ontario or Federal lobbying legislation
- 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

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APPLICABLE LOBBYING LEGISLATION

Federal

- The old *Lobbyist Registration Act* was passed in 1985 and was the first Canadian legislation to govern the conduct of lobbyists by requiring them to register and file reports to a lobbyist registry
- The *Federal Accountability Act* was enacted in December 2006 in an effort to improve the transparency of lobbying and the accountability of government decision-making

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- The FAA amended and renamed the Federal LRA and on July 2, 2008, the *Lobbying Act* and its accompanying regulations came into force, bringing some new accountability and transparency rules for lobbyists

Ontario

- Ontario was the first Canadian province to regulate lobbying activity under the *Lobbyist Registration Act* which was enacted in 1998

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OVERVIEW AND SCOPE OF ONTARIO AND FEDERAL LOBBYING LAWS

- Both jurisdictions make it mandatory for certain categories of lobbyists to register and report lobbying activity to the respective Ontario or federal lobbyist registries.
- These categories are the same in both jurisdictions. They are:

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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

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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

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1. What Is Lobbying?

Ontario LRA

- A communication by an *in-house lobbyist* with a **public office holder** in *an attempt to influence*:
 - 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

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- The development, amendment or termination of any policy or program of the Government of Ontario
- Any decision about privatization or outsourcing
- The awarding of any grant, contribution or other financial benefit by or on behalf of the Crown

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Federal LA

- The Federal LA does not define “Lobbying” but instead 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
 - The awarding of grants, contributions, tax credits or other financial benefits

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- While the Ontario LRA defines lobbying to include a lobbyist’s *attempt to influence*, the Federal LA requires only that there be a communication (written or oral) by a paid lobbyist with no determination of the lobbyists motive or intention
- The Federal LA is more expansive and appears to capture all communications with a more objective standard

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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 legislation specifically excludes communications initiated by a public office holder from the application of the Act

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3. When Are You Not Lobbying?

- **Lobbying does not include:**
 - Under Ontario LRA only: Oral or written submissions made to a public office holder in direct response to written requests for information
 - 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

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- 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
- Some examples of communications which do not normally give rise to a registration requirement are as follows:
 - Enquiries to obtain publicly available information;

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- 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
- Preparation and presentations of briefings to parliamentary committees

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- 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

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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

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- Under the Federal LA a “public office holder” is also defined broadly as any officer or employee of the Canadian Government. Note that 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
- 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

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- 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

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- 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
 - They 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 took effect on January 2, 2009

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

- Each of the Federal LA and Ontario LRA require registration only where lobbying comprises *a significant part of the duties* of the employee/employees

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- This means:

- 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

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Ontario LRA

- *Significant part of the duties* 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

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- The *Ontario Guide to the Lobbyist Registration Act* specifically notes that the definition of *significant part of the duties* applies to time actually spent lobbying, not creating research papers, etc.
- Therefore, 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 in preparation for the communication

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Federal LA

- Under the *Lobbying Act*, the time spent by employees is not limited to the act of communicating. Many more duties of employees appear to be caught within the scope of the legislation
- The determination of whether or not lobbying constitutes a significant part of the duties of employees who communicate with public office holders and who are subject to the 20% rule can be carried out using various approaches

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- An interpretation bulletin issued by Office of the Commissioner of Lobbying of Canada entitled “*A Significant Part of Duties (“The 20% Rule”)*” recommends estimating the time spent preparing for communicating (researching, drafting, planning, compiling, travelling, etc.) and actually communicating with public office holders
- The Bulletin suggests that a six-month estimation period be used in order to provide a time basis for estimating the relative importance of lobbying activities within an organization

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- In any given six-month period, 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

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- It is important to remember that the 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, if a director or member of a non-profit should change from being a volunteer to being paid by the organization, this would require the individual to register as a consultant lobbyist

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6. What are the Registration and Filing Requirements?

Ontario

- Under the Ontario LRA, the most senior paid officer of the charity or non-profit that meets the minimum threshold requirements 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

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- The senior officer must disclose detailed information to the Lobbyist Registration Office, including (but not limited to) the following:

- 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 each in-house lobbyist employed by the organization

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Federal LA

- The most senior paid executive employed by the organization is responsible for completing and filing an in-house lobbyist (organization) return within two (2) months after the need to register arises with the Commissioner of Lobbying
- Under this initial return, 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

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- The return must include other detail such as (but not limited to) the following:

- 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 any communication technique used or to be used, including grass-roots communication

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- 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
 - 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

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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

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7. 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

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– 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

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- Like the Ontario LRA, the Federal LA places the responsibility (and liability) directly 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 fine for all other offences under the Act have doubled to \$50,000

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- 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
- 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

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CONCLUDING COMMENTS

- The lobbying laws 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 knowledgeable about these laws or they may risk substantial penalties in the event of failure to comply
- If uncertain about the application of the laws, the office of the Commissioner of both lobbyist registries may be contacted and/or legal advice sought to understand the implications and scope of the lobbyist registration requirements

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- Charities are cautioned that the registration and reporting requirements under federal and Ontario lobbying laws are 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" is a good starting place for reviewing these income tax requirements as they relate to registered charities. See Charity Law Bulletin No.25, available online at <http://www.carters.ca/pub/bulletin/charity/2003/chv1b2-5-03.pdf> for a detailed commentary on the policy statement

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