

SUMMARY

Under section 68 of the *Lobbying Transparency and Ethics Act*,¹ unanimously enacted in 2002, a review of the Act must be done after five years. The Minister of Justice submitted his report on implementation of the Act and the Code of Conduct of Lobbyists² to the National Assembly last October 23.

Appointed by the National Assembly to monitor and control lobbying activities, the Lobbyists Commissioner also wishes to share his experience of the first five years under the Act, suggest some areas to consider, recommend legislative amendments and describe actions to better implement the objectives of transparency and the proper conduct of lobbying activities.

The monitoring of lobbying activities is not an exclusively Quebec phenomenon. In Canada, apart from the federal law, the provinces of British Columbia, Alberta, Ontario, Nova Scotia and Newfoundland and Labrador all have laws regulating lobbying activities. There is much debate over the regulation of lobbying at the international level. In the United States, where lobbying regulation started, the debate is over tightening the rules. The European Union has begun a serious reflection about whether to monitor lobbying and how the rules would be set up. So have many individual European countries. The Organization for Economic Co-operation and Development (OECD) is also studying the subject and intends to suggest principles for reinforcing transparency in lobbying activities in the next few months.

Support for the monitoring of lobbying activities is increasing throughout the Western world, which also lends legitimacy to such activities. Lobbyists make an undeniable contribution to the quality of public discussion, and with the complexity of decisions that public institutions have to make, they rely more and more on the outside expertise that lobbyist can provide.

Transparency and proper lobbying practices contribute to maintaining and strengthening the trust that citizens have in their public institutions. Compliance with the *Lobbying Act* will make lobbying legitimate and acceptable to citizens who, according to the Act, are entitled to know who is trying to exert influence over public institutions. For lobbyists, compliance with the *Lobbying Act* is a positive contribution to the quality of our democracy.

Monitoring of lobbying practices is also part of a broader approach aimed at promoting ethical considerations in public administration. Knowing that lobbying is essentially aimed at influencing their decisions, public officials can hardly ignore the phenomenon, and must think through how best to relate to lobbyists. Although the Act only creates obligations for lobbyists, it does have the objective of making decision-making processes in the public interest more transparent. For public officials, helping to implement the *Lobbying Act*'s objectives equates to maintaining trust between citizens and their public institutions.

How does the balance sheet of the first five years under the *Lobbying Act* look? The first observation, based on a wide consensus, is this: the objectives of transparency and proper lobbying practices amply justify the law's existence. But a second observation has to be

¹ R.S.Q., chapter T-11.011, (hereinafter cited as: « *Lobbying Act* » or « the Act »).

² (2004) 7 G.O. II, 1259 [c. T-11.011, r. 0.2], (hereinafter cited as: « Code of Conduct » or « the Code »).

made too: despite significant and sustained efforts to publicize the Act, many lobbyists are still not meeting their obligations to register; this may or may not be deliberate. Although nearly 1,200 lobbyists have been entered in the Registry of Lobbyists since 2002, this number does not reflect the lobbying phenomenon in its entirety.

The Lobbying Transparency and Ethics Act

Any oral or written communication made in an attempt to influence decisions of parliamentary, government or municipal institutions constitutes lobbying. According to the Act, lobbyists carry out such activities in relation to public officials, namely elected representatives such as MNAs, ministers, mayors, municipal councillors, or their staff members or employees in the civil service, government agencies or government and municipal enterprises.

The *Lobbying Act* sets out three distinct categories of lobbyists: consultant lobbyists, enterprise lobbyists and organization lobbyists.

- Consultant lobbyists are those who lobby on behalf of someone else in return for compensation. They may be specialists in government relations or public affairs, lawyers, engineers, accountants, urban planners, architects or any other professional acting on behalf of a client.
- Enterprise lobbyists are people for whom a significant part of the job or function within a commercial enterprise consists in lobbying on behalf of the enterprise.
- Organization lobbyists are people for whom a significant part of the job or function consists in lobbying on behalf of an association or other non-profit organization. However, some non-profit groups are exempt from the Act. The Act only covers associations formed for management, union or professionals interests, or organizations that are mainly made up of commercial corporations or their representatives. Charitable organizations and groups working for the environment and health, for example, can lobby but are not obliged to register in the Registry of Lobbyists or follow the Code of Conduct of Lobbyists.

Lobbying consists of communications aimed at influencing decisions concerning:

- the development, introduction, amendment or defeat of any legislative or regulatory proposal, resolution, policy, program or action plan;
- the issue of any permit, license, certificate or other authorization;
- the awarding of any contract, otherwise than by way of a call for public tenders, or of any grant or other financial benefit;
- the appointment of some public officials.

In addition, the arranging by a lobbyist of a meeting between a public official and another person is also considered a lobbying activity.

The Act requires lobbyists to register in the Registry of Lobbyists. This Registry is maintained by the Lobbyists Registrar who is accountable to the Minister of Justice. Lobbyists must also respect certain prohibitions set out in the Act and follow the rules of the Code of Conduct of Lobbyists. Many sanctions can be imposed on lobbyists who do not comply with either. The Lobbyists Commissioner, responsible for monitoring and controlling lobbying, has the power, among other things, to carry out checks or inspections, conduct inquiries and impose disciplinary measures. However, the Commissioner cannot initiate penal proceedings.

The Lobbyists Commissioner

The Commissioner took office on August 5 2002. The first few months of his mandate were spent building up the team qualified to support him in his duties of monitoring and controlling lobbying. As of March 2007, the Commissioner had 25 people on staff. For 2007-2008 the National Assembly has allocated credits of \$2,640,500 to his office.

During his first five years in office the Commissioner carried out 864 inspections. Without his efforts, there would certainly not be close to 1,200 registered lobbyists today.

Eight inquiry reports, setting out 47 breaches of the Act, have been sent to the Attorney General or the Director of Public Prosecutions. Infraction notices covering 25 charges have been served on seven lobbyists. Three of them pleaded guilty.

The Commissioner has issued 7 confidentiality orders in the past five years. These are orders designed to mask information contained in an entry in the Registry of Lobbyists when it relates to an investment project of the client or enterprise of a consultant lobbyist, the disclosure of which could seriously prejudice that client's or enterprise's economic or financial interests.

The Commissioner has regular contact with public officials in order to become familiar with their activities and offer them the support they need. He has also begun work on a lobbying chart, which will show the areas where lobbying activities are concentrated and provide a list of administrative actions that the Act manifestly targets. An inventory is being made of all decisions made by institutions in the context of laws or regulations that could be affected by lobbying. The Commissioner also maintains contact with his federal and provincial counterparts, participates in activities of the Council on Government Ethics Laws (COGEL), a North-American organization of leaders of institutions responsible for government ethics and the monitoring of lobbyists, works with a group of OECD experts, and attends many conferences. The Commissioner contributes to the activities of the new Chair of Democracy and Parliamentary Institutions set up together by the National Assembly and Université Laval.

In 2004-2005 the Commissioner began an assessment of the program related to the effects of the *Lobbying Transparency and Ethics Act*. He has also updated an integrated monitoring tool for lobbying and information management (VIGIL).

In the area of communications, over 5,400 people who might be carrying out lobbying activities have been reached directly through various public relations initiatives. Awareness campaigns have reached close to 5,700 public officials in parliamentary, government and

municipal institutions. Lastly, many individuals have learned that they are entitled to know who is trying to influence public decision makers.

Communication channels have been set up in particular with a network of ethics respondents in ministries, with directors and professors in institutes of higher learning, and with representatives of Quebec's public library networks. Over 455 public relations initiatives have been carried out. Several communications tools were designed to make it easier to spread information about the Act. More than 72,000 pamphlets have been distributed at conferences and different meetings. A newsletter addressed to 4,000 people is published four times a year since 2007, and is also accessible on the Commissioner's website. That website is also a significant source of information for lobbyists, public officials and citizens.

Proposed amendments to the *Lobbying Act*

The principal amendments that the Lobbying Commissioner's report proposes can be summarized as follows:

Make the Act applicable to more non-profit organizations. Organization lobbyists currently covered by the Act are those whose job or function consists of lobbying for organizations pursuing financial or professional ends. Many non-profit organizations that are well structured and often have significant resources for lobbying are exempt from the Act. Such is the case for instance of some organizations that are active in the environmental or health fields. Apart from the fact that this is unfair to lobbyists who are covered by the Act, it makes it harder to achieve the objectives of transparency and proper lobbying practices. The Commissioner does not suggest that the *Lobbying Act* apply to all non-profit organizations, but he does recommend a review of the ones that are currently excluded, so that certain interest groups become obliged to register their activities in the Registry of Lobbyists and comply with the Code of Conduct of Lobbyists and the post-mandate rules. The Commissioner also points out that while more organizations should be covered, the registration formalities should be made more flexible.

Give the Lobbyists Commissioner the power to institute penal proceedings and claim the consideration received for lobbying activities carried out in breach of the Act or the Code of Conduct. The Commissioner has to submit to the Director of Public Prosecutions all inquiry reports in which he determines that a provision of the Act or the Code of Conduct has been breached. It is up to the Director of Public Prosecutions to decide whether further action should be taken. For the proper fulfilment of his responsibility for monitoring and controlling lobbyists, the Commissioner should have the power to initiate penal proceedings. That power would confer on the commissioner the independence he needs in order to do his job, and would give him a public image of complete independence from the executive branch. For the same reasons, the *Lobbying Act* should also be amended to allow the Commissioner, instead of the Public Prosecutor, to claim the money that lobbyists receive or are owed for activities in breach of the Act or the Code of Conduct.

Provide a prescription period of 5 years for penal proceedings, disciplinary measures or claims. All penal actions are prescribed by one year from the date the offence was committed. This is far too short a time period, because very often the offence only becomes known long after the prescription has run. In addition, the time needed to complete an investigation and issue charges will often take longer than a year. In line with federal

legislation on lobbying, the prescription period for initiating penal proceedings under the *Lobbying Act* should be set at five years from the time the offence was known, and no longer than ten years from the date the offence was committed. Moreover, the different prescription periods in the Act should all be the same. The three-year prescription for imposing disciplinary measures or for claiming the consideration that lobbyists receive from activities in breach of the Act of the Code of Conduct should therefore also be extended to five years.

Prescribe shorter deadlines for producing an initial return, renewing a return and registering any changes. Consultant lobbyists must register within 30 days of their first lobbying activities on a subject matter. Organization lobbyists have 60 days. These deadlines are quite long, and are hard to reconcile with the Act's objective of transparency. Consultant lobbyists should have 10 days to produce their initial returns, and organization or enterprise lobbyists 30 days. Renewals for all lobbyists should be within 10 days of the anniversary date of the initial return; currently it is 30 days for consultant lobbyists and 60 days for organization and enterprise lobbyists. Lastly, any changes to the content of a return should be registered within 10 days of the change instead of the current 30.

Provide that the lobbyist's return must include the names and addresses of organizations forming a coalition. Coalitions are covered by the *Lobbying Act* to the extent that they are organizations formed for management, union or professional interests or if the majority of their members are profit seeking enterprises. All coalitions, regardless of their purpose, should be obliged to register in the Registry of Lobbyists if they carry out lobbying activities. The Act should also state that a return regarding lobbying activities carried out on behalf of a coalition must include the names of the organizations forming that coalition and their addresses. Without such amendments it will still be difficult to find out who really benefits from a coalition's lobbying activities.

Provide that the lobbyists' returns must include the names of every individual, enterprise or organization that contributes to lobbying activities, whether financially or otherwise. Information contained in a lobbyist's return must indicate who really benefits from the lobbying activities. Consultant lobbyists must give information about their clients in the return. They must also give the name of any individual, company or association that has a direct interest in the results, but only if such individual, company or association controls or directs the activities of the lobbyist's client. It is not unusual for an organization to be interested in the lobbying activities of a particular interest group and to contribute financially, but without controlling or directing the group's activities. For example, a pharmaceutical company might give financial support to lobbying activities carried out by a group of health professionals who want to promote certain policies favourable to the interests of the pharmaceutical company. The Act should be amended to state that lobbyists' returns must give the names of any individual, enterprise or organization that contributes to lobbying activities, whether financially or otherwise.

Require lobbyists to declare whether they intend to use "grassroots lobbying" as part of their communications strategy. The return should indicate what methods of communication the lobbyist has used or intends to use. The Registry will thus indicate whether communications will be made at meetings, in written form or by phone. The federal and some provincial legislations require lobbyists to also specify whether they intend to use or have used "grass-roots lobbying." Lobbyists can make such appeals directly to the public, or go through media with wide circulations. They appeal to the public to contact a public

official directly in order to pressure him/her into supporting a particular point of view. The Quebec law should require lobbyists to state whether they intend to use “grassroots lobbying.”

Give the Lobbying Commissioner a mandate for education. The Commissioner is convinced that the implementation of the *Lobbying Act* will not be complete unless additional efforts are devoted to educating lobbyists, public officials and citizens. He recommends that the Act be amended in order to provide the Commissioner with a clear mandate to draw up and implement education programs to make the target audience more aware of the requirements of the *Lobbying Act* and the Code of Conduct of Lobbyists.

Responsibility for the Registry of Lobbyists

In his five-year report, the Minister of Justice recommends a study as to whether the Commissioner should be in charge of the Registry of Lobbyists rather than the Registrar. Such a transfer of responsibility should obviously not be made without a prior analysis of the impacts in terms of human, financial and material resources and the operational impacts. Such analysis should include the costs of improving and promoting the current Registry. It is hard for the Lobbyists Commissioner to make a definite decision on the Minister of Justice’s suggestion without such information. However, the Commissioner does feel that that the Registry should be substantially overhauled in order to make it more user-friendly and simplify the way lobbyists are registered. His interest in taking over from the Registrar will largely depend on the means he is given to ensure continuity and undertake the changes.

Ensuring greater compliance with the *Lobbying Act*

As of December 31 2007, 1,189 lobbyists were registered in the Registry of Lobbyists, of whom 678 were carrying out at least one mandate. Of that number 116 are consultant lobbyists, 325 are organization lobbyists and 237 are enterprise lobbyists.

Of course, the number of registrations in the Registry of Lobbyists could be higher. The consultant lobbyists are clearly underrepresented. Although professionals who call themselves consultants in government relations or public relations seem to have met their obligations to register in greater numbers, it should also be acknowledged that many other professionals such as lawyers, accountants, architects, urban planners and members of other professional associations do not at first identify themselves as lobbyists. Yet many of their interactions with institutions are clearly lobbying activities. In addition, many large enterprises appear to be lobbying but are not registered in the Registry. The same is true of some professional orders and associations who carry out lobbying activities.

Several things could be done in order to ensure better implementation of the objectives of transparency and proper lobbying practices.

Intensify communication activities. Many lobbyists fail to register their activities in the Registry simply because they do not know they are acting as lobbyists. Others perceive lobbying as a suspect activity they would never want to be associated with. The negative connotations associated with lobbying must be countered by adequate information. Public officials must also be informed of lobbyists’ obligations. Over 75% of public officials in

government institutions or municipalities with over 100,000 inhabitants are familiar with the Act. But in municipalities with less than 100,000 inhabitants, only 44% of public officials are. The Commissioner's information activities must also be aimed at citizens.

Intensify inspection and inquiry activities. In view of the many awareness campaigns in place, the development of information management tools on lobbying activities, and greater familiarity with the areas where influence is exerted, it is to be expected that the number of inquiries leading to penal proceedings should increase over the next few years.

Have the Act apply to more non-profit organizations. Are we to believe that some lobbyists refuse to register in the Registry of Lobbyists on the grounds that the Lobbying Act is unfair toward them because it exempts many other non-profit organizations? Is it acceptable that activities aimed at influencing the contents of a draft bill on the environment, for example, must be registered in the Registry if they are carried out by an enterprise, whereas the same type of activities aimed at the same bureaucrats need be subject to no transparency if they are carried out by an interest group in the environment field? By making the Act apply to a greater number of interest groups, the legislator will give greater scope to the peoples' right to know who is attempting to exert influence over public institutions.

Simplify the way information is registered in the Registry of Lobbyists. Many lobbyists, whether or not they are registered, believe that the registration procedure is a major irritant. According to the current procedure, lobbyists who wish to register online must first obtain an electronic digital signature from a notary accredited as an identity verification officer by the Conseil du Trésor. The lobbyist has to go to a notary to have his/her identity verified, at a cost of several hundred dollars. The complexity and cost of registering online have put many people off, and the Commissioner is convinced that some lobbyists are dropping out along the way to registration. The Commissioner suggests repealing the obligation that lobbyists obtain a digital signature after having their identity verified.

Make sure that certain groups cooperate. Many consultant lobbyists belong to professional orders, e.g. engineers, urban planners, lawyers, forestry engineers, accountants, architects, agronomists... But the Registry of Lobbyists does not come close to reflecting the intensity of their lobbying activities. Professional orders or associations should act as conduits and inform their members of their obligations under the Lobbying Act and the Code of Conduct of Lobbyists. Cooperation would also be desirable from some professional groups that lobby for their own causes and whose members might also act as lobbyists.

Get government institutions to apply the Act. Although the Act says nothing about the obligations of public officials, it does affect their behaviour. How can we hope for greater trust in our political and administrative institutions unless public officials fully endorse the objectives of the Lobbying Act? The growing importance of ethical values within organizations requires public officials to think through their relationships with the lobbyists. How should a public official behave toward a lobbyist who is not registered in the Registry of Lobbyists or does not respect the provisions of the Code of Conduct? Some departments have taken concrete steps to encourage the implementation of the Act and the Code of Conduct in their own sphere, either by checking that lobbyists who deal with them are registered in the Registry, by sending information on the Act to their staff, or by identifying sectors or programs where the activities would be susceptible to lobbying. These efforts are praiseworthy, but the Commissioner feels that there is still much work to be done to make

public officials in government aware of the *Lobbying Act* and to get them to work proactively toward the objectives of transparency and proper lobbying practices. The following steps could be taken in order to reinforce transparency in lobbying and ensure proper lobbying practices in government institutions, using an ethical approach:

- Conduct an information and awareness campaign among public officials in government departments, agencies and enterprises.
- Draw up a guide describing the attitudes that public officials could take when dealing with lobbyists.
- Encourage institutions to recognize the lobbying phenomenon in their domain and identify activities that could be susceptible to lobbying.

Have a better understanding of the reality of municipalities. The Quebec law on lobbying is the only one in Canada to subject all municipalities to the rules of lobbying oversight. Although the values of democracy, transparency and the common good are just as valid for municipal institutions as for parliamentary and governmental ones, the municipal context cannot be compared to that of the other public organizations. In the same way, the reality of large cities differs considerably from that of small towns. There would be no point in trying to implement the *Lobbying Act* uniformly within the municipalities without taking their realities into account. Although the municipalities do not object to the relevance of transparency with respect to lobbying activities conducted at that level, it should be noted that municipal public officials are not well aware of the *Lobbying Act*. The Commissioner of course intends to continue spreading information and awareness to the municipalities. More could be done, however. A serious effort must be made to work together with municipal officials and the many organizations that represent them to ensure that the Act is more fully applied in the municipal sphere.