Submission on

Lobbyists Registration Act

CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing over 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared with assistance from the Legislation and Law Reform Directorate at the National Office. It has been reviewed by the Legislation and Law Reform Committee and approved by the Executive Officers as a public statement by the Canadian Bar Association.

Submission on
Lobbyists Registration Act

I. INTRODUCTION

The Canadian Bar Association (CBA) is pleased to accept the invitation of the Standing Committee on Industry, Science and Technology to participate in its review of the *Lobbyists Registration Act*[1], and to make suggestions for improving the *Act*.

The CBA last commented on the *Act* in relation to Bill C-43 in September 1994[2], and made submissions to the Holtmann Committee in February 1993[3]. Many of the changes which the CBA recommended in the 1994 submission were made by amendments in 1995[4]. The CBA Taxation Section joined with the Canadian Institute of Chartered Accountants to submit recommendations regarding the *Act* just before it was proclaimed into force in September 1989[5]. Those recommendations were born of the conviction that the requirements of the new *Act* would prove simply too onerous in a variety of hypothetical situations.

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1 R.S.C. 1985 (4th Supp.), c. 44, as am.

2 Canadian Bar Association: *Bill C-43, Lobbyists Registration Act amendments*, September 1994 (the 1994 submission).

3 Canadian Bar Association: *Submission on the Lobbyists Registration Act presented to the House of Commons Standing Committee on Consumer and Corporate Affairs and Government Operations* (the 1993 submission)

4 S.C. 1995 c. 12.

5 *Recommendations on the Lobbyists Registration Act submitted by the CBA/CICA Joint Committee on Taxation*, September 22, 1989, CCH Canadian Tax Reports Special Report No. 917, Extra Edition, and Canadian Government Programs and Services Report No. 103, Extra Edition.

II. GENERAL COMMENTS

Lobbying, if defined as bringing to the attention of decision-makers those facts, arguments and opinions needed for the responsible discharge of their duties, is a valuable activity.[6] Elected representatives and public servants cannot do their work properly if they are deprived of access to the information their reflections demand. In short, decisions are better if well-informed and it is in the interest of all of us that the responsible delivery of this information to decision-makers not be unduly impeded.

The *Act* was meant as a response to public worry, not about lobbying itself, but rather about the propriety of certain kinds of lobbying activities. There was speculation if not outright accusation that some lobbyists' government relations work was more appropriately seen as the marketing of privileged lines of contact and of influence.

It was thought that requirements to register lobbying activities would at least shed light on the contacts being made and allow retrospective verification, in cases of need, of the kinds of lobbying conducted on any particular issue. It was also hoped that anyone tempted to sway governmental decision-making otherwise than by information and argument would be dissuaded by the prospect of having the light of registration (or the penalty for non-registration) fall upon them.

The purpose of this submission is to address whether these hopes have been realized and what might be done to improve the operation of the *Act*.

III. THE SUCCESS SO FAR

A. The Lobbying Industry

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[6] "We are all lobbyists to varying degrees." S. Sarpkaya, *Lobbying in Canada, Ways and Means*, CCH Canadian Ltd., 1988, par. 745, p. 112.

The greatest effect of the *Lobbyists Registration Act* has been an unintended one. It is beneficial to those, like the CBA, who see government relations as an important role in our society, and one which is in the Canadian interest to develop beyond the obscurity and public skepticism of the past.

The greatest effect has been the increase in the availability of information to the lobbyists themselves. As a result of the regular registration of activities in the government relations field, lobbyists now have a wealth of information about their own competitors, about clients they might approach, about issues perhaps needing new government relations efforts, and about the likely evolution of various policy discussions. The periodic reports about registrations also offer to government relations specialists tools for their own marketing.

In short, the *Act* has been the instrument of a greater competition among government relations specialists. That competition has been conducted on the basis of the quality of the work. Successful lobbyists do not market the ability to obtain a quick fix or to market privileged contacts; they market their skill in putting together needed information and delivering it where needed in a digestible and useful form. It is on this basis that they compete against each other.

It has led to more thoughtful presentations to government, a greater awareness of the process within which information must be brought to government decision-makers, and a better appreciation among lobbyists' clients that governmental decision-making is complex and constrained by democratic obligations of consultation.

In short, one might say that the registration required by the *Act* has brought the business of lobbying to a new and welcome maturity.

B. The Public

It is undeniable that the public, and enforcement agencies interested in the ethical behaviour of public servants or in the criminal behaviour of those dealing with them[7], now have vastly more information at their disposal than they had prior to the *Act*, particularly in its amended form.

Those communicating with public office holders, or even arranging a meeting with one, in order to influence legislation, regulation, policy formation or the awarding of contracts or grants, must disclose on a public register:

- all information sufficient to identify the client and the subject matter of the approach;
- the branch or agency of government approached;
- particulars to identify with precision the legislative or regulatory issue in question;
- information as to whether the lobbyist is to be paid depending on outcome[8];
- information as to mass communication strategies also used in order to influence the decision-makers, and so on[9].

It is difficult to imagine that more would be needed to ensure that lobbyists and public servants will know that their activities are not hidden to the public. The public seems well served. For example, they managed to access electronically 219,400 pages of information in the 1999-2000 fiscal year alone. (It is interesting that, in the previous year, only 173 callers were seeking information from the registry, and 34% of those were government officials. Similar call records are not reported for 1999-2000.)[10]

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7 The *Criminal Code* provides for very severe penalties for corruption of public servants or for their solicitation of advantages.

8 Karl Salgo wondered in 1989 why all fees were not disclosable ("Les subtilités du lobbyisme", CA Magazine, May 1989, p. 36 at 39) but this subject appears not to have been raised since.

9 Section 5.

10 Industry Canada: *1999-2000 Annual Report by the Registrar* and *1998-99 Annual Report by the Registrar.* It is not disclosed how many inquiries come from lobbyists curious

The Canadian Bar Association believes that little is called for in the way of change to the current regime[11], save one matter to which the CBA attaches great importance.

IV. SUGGESTIONS FOR CHANGE

There have been suggestions for change to the lobbyists registration regime and we consider some of them here.

A. Solicitor-client confidentiality

The CBA has twice recommended[12] that measures must be taken to avoid any potential conflict between the disclosure requirements under the *Act* and a lawyer's duty[13] of confidentiality to clients. Solicitor-client privilege is a fundamental principle arising from the common law[14], and is the foundation on which rest a number of human rights now enshrined in our *Charter of Rights* but recognized and enforced long before the *Charter*.

The CBA has never recommended an exemption of lawyers from the *Act* and does not do so now. Lawyers who perform lobbying activities ought to comply with all the obligations of lobbyists, save only when the required disclosure would tread on professional obligations of confidentiality.

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about other lobbyists.

[11] Even before the 1995 amendments, one scholarly commentator concluded that "(c)urrent legislation under Bill C-82 largely takes care of (the) abuses". S. Sarpkaya, *Lobbying in Canada, Ways and Means*, CCH Canadian Ltd., 1988, par. 745, p. 113.

[12] In both the 1993 submission and the 1994 submission.

[13] Reference to "lawyers" includes Quebec notaries, who are subject to similar ethical requirements.

[14] It is so well established in Canada that the Supreme Court of Canada said seventy years ago that there was no need to prove its existence: *Descôteaux* v. *Mierzwinski*, [1931] 1 S.C.R. 860 at 870.

The CBA continues to recommend, though, that the *Act* be amended to make clear that a lawyer's obligation of non-disclosure must be paramount over general requirements to disclose, if conflicts do arise.

A simple addition to section 4(2) to clarify that the *Act* does not apply where confidentiality is required by law would accomplish the purpose.

RECOMMENDATION:

The Canadian Bar Association recommends that paragraph 4(2) of the Lobbyists Registration Act be amended as follows:

(2) The Act does not apply in respect of . . .

(c) any oral or written submission made to a public office holder by an individual on behalf of any person or organization where confidentiality is required by law.

Lawyers operate under ethical requirements which do not apply to non-lawyers. Those ethical requirements exist not for the protection of lawyers but for the protection of the citizen, a protection our society has long seen as essential. Provincial and territorial law societies[15] dictate what the ethical obligations of lawyers are and are not.

The proposed amendment would not, we submit, interfere with the proper administration of the *Act*, nor hamper in obtaining the desired result. It would merely recognize that there will be occasions when lawyers might be faced with the dilemma of a federal statute calling for a disclosure which would violate their most fundamental ethical obligation.

We submit respectfully that there can be no serious objection to the proposed amendment. Any objection could easily be overcome by a requirement that

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15 Reference to "law societies" includes all governing bodies of the legal profession, including the *Barreau du Québec* and the *Chambre des Notaires*.

lawyers not disclosing information on ethical grounds would instead indicate their non-disclosure on those grounds in their filing with the Registrar.

B. The two-year limitation period

Summary conviction proceedings may not be instituted more than two years after an alleged violation, be it failure to file or filing false or misleading information[16]. However, proceedings by way of indictment are subject to no such limitation. Some have suggested that the two-year prescriptive period be lengthened.

In the Canadian Bar Association's view, violations sufficient to warrant proceedings by way of indictment are properly the subject of prosecution even later than two years after the offence. Violations which do not justify such prosecution, however, are in all likelihood not serious enough to warrant investigation and prosecution after two years have gone by.

C. Ensuring ongoing accuracy of registry information

Many lobbyists appear to overlook the requirement to advise the registrar of changes appropriate to any filing, including termination of the lobbying undertaking[17]. As a result, the registry tends to reflect a number of lobbying undertakings as ongoing when they have, in reality, ceased. The Minister has suggested an amendment explicitly requiring periodic updates of filings.

The CBA suggests that the goal can be achieved, particularly in this age of e-mail and internet-site submissions[18], by simple periodic reminders to registrants to

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[16] Section 14 (3).

[17] Section 5 (3) and (4).

[18] Tools for a "user-friendly" interaction between the Registrar and lobbyists already exist. From the *1999-2000 Annual Report by the Registrar*, *supra,* note 10: "Of the total registrations received as of March 31, 2000, 98 percent of the consultant lobbyists actively lobbying continue to register electronically. This year, 97.5 percent of both organizations and in-house lobbyists (corporate) filed their registrations electronically, an

verify that their filings are up to date[19]. In this way, the weight of legislative amendment is avoided and a more frequent reminder to lobbyists of their obligations under the *Act* would be achieved.

D. Qualitative as well as quantitative thresholds

Under the current Act, employees must register their lobbying activities if they constitute more than 20% of the employee's duties. Should the criteria by which lobbyist employees decide whether to register their activities be qualitative rather than quantitative? Should the duty to register arise if the lobbying would have an important impact on the client's goals or business, for example?[20]

The Canadian Bar Association thinks not. Individuals are liable to fines of up to $25,000[21] for any contravention of the *Act*[22], and to imprisonment for false or misleading returns[23]. It would be an injustice to expose them to prosecution for a failure to assess the true importance of a question or of lobbying on the question. Exposure of individuals to such penalties should be based on criteria which are objectively verifiable.

E. Conflicts of interest

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increase of 1.5 percent since last year." A quick look at the web site shows how easy it is: **http://strategis.ic.gc.ca/lobbyist**

19 This is done: *1999-99 Annual Report by the Registrar*, *supra*, note 10, p. 10.

20 Both the *1998-99* and *1999-2000 Annual Reports by the Registrar*, *supra,* note 10, concluded that this was a matter best left to review by the Standing Committee on Industry.

21 These are "severe penalties" according to the *1998-99 Annual Report of the Registrar*, *supra*, note 10, p. 2.

22 Section 14 (1).

23 Section 14 (2).

Some have wondered whether lobbyists ought to be prohibited from advising government departments and at the same time representing clients having business with those departments. Others have wondered whether such cumulations of mandates ought somehow to be regulated.

The Canadian Bar Association suggests that regulation along these lines would not be valid regulation under the current *Act*. The purpose of the *Act* is to ensure public knowledge of who is seeking to influence governmental decision-making. It is not to develop a binding code of ethics for those engaged in government relations.

In any event, it would clearly be at odds with principles of the independence of the Bar and of the law societies' obligation to regulate their own members for any such code of ethics to apply to the legal profession[24] which is already subject to particular and demanding regulatory regimes. Further, the standard to which the legal profession is held by the governing bodies and the courts is a very rigorous one.

F. Imposing obligations on public servants

Some have suggested that public servants ought to be required to disclose when they had been lobbied, or to refuse even to meet the lobbyist without proof that the lobbyist had complied with the *Act*[25], but experience with the *Act* now suggests that this intrusion onto public servants' time is not necessary. It might also negatively affect the public servant's willingness to make himself or herself available to citizens who justly require such access.

V. CONCLUSION

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[24] This point was made as well in the 1994 Submission, and the idea of a legislated code of ethics for lobbyists was then abandoned. There is clearly even less call for one now than then.

[25] The CBA also suggested this in its 1994 Submission.

The Canadian Bar Association submits these comments and recommendations respectfully.