THE CANADIAN BAR ASSOCIATION

L'ASSOCIATION DU BARREAU CANADIEN

Statutory Review of the *Lobbying Act*

CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing 37,000 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 by a working group of CBA members, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the Canadian Bar Association.

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I. INTRODUCTION

The Canadian Bar Association (CBA) welcomes the opportunity to assist Parliament in its statutory review of the *Lobbying Act* (Act).[1] In 2006, the CBA provided extensive comments on Bill C-2 – the *Federal Accountability Act*[2] – including comments on amendments to the *Lobbyists Registration Act*, the predecessor of the current Act. In 2010, the CBA provided the Commissioner of Lobbying (Commissioner) with an opinion on Rule 8 of the *Lobbyist's Code of Conduct (*Code*)*.[3]

The CBA is a not-for-profit organization directly affected by the Act. It is also an organization with specialized legal expertise on how the Act affects the administration of justice and the rule of law. To develop this submission, the CBA has drawn on its members who have particular expertise working with and providing advice under the Act.

The Act only applies to individuals who are compensated for certain communications, e.g. lobbying for changes to legislation, with public office holders. In many ways, paid lobbyists are in a privileged position in society. They are paid to gain access to and influence Parliamentarians and senior public servants. In most cases they do not advance their own interests but rather the interests of the individual or entity paying for their services. Ordinary citizens engaging in the same type of communications with public office holders who are not being paid or compensated to do so do not fall under the Act. Paid lobbyists arguably have more access to government decision-makers and more ability to influence decisions.

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1 *Lobbying Act,* R.S.C. 1985, c. 44 (4th Supp.).

2 *Federal Accountability Act*, S.C. 2006, c. 9.

3 Canadian Bar Association, *Opinion Respecting the Constitutionality of Rule 8 of the Lobbyists' Code of Conduct*, June 2010 (See: http://www.cba.org/CBA/submissions/pdf/10-40-eng.pdf). The CBA expressed concerns with the imprecise and vague wording of Rule 8 which could result in a finding that the rule violated section 2(b) of the *Charter* and might not be saved by the *Charter's* section 1. The opinion noted that the wording had caused confusion for lobbyists who felt compelled in some cases to withdraw from any form of political activity or expression.

Canadians, through their MPs, determined that to preserve the principles of democracy, the rule of law, government transparency and accountability, and confidence in the integrity of government decision-making, paid lobbyists should be accountable to the public and Parliamentarians for their lobbying activities through the reporting requirements of the Act.

The Act must, however, strike a balance by, on the one hand, promoting transparency and accountability in government decision-making while at the same time not inadvertently creating barriers – real or perceived – to communications between MPs and their constituents, including the general public, corporations and other organizations. A healthy and vibrant democracy depends on a free exchange of ideas, dialogue and debate among all members of society.

The CBA, being a strong proponent of the rule of law and democracy, supports the Act. Our submission agrees with many of the recommendations presented by the Commissioner, in particular, the removal of the so-called "significant part" test and an additional authority permitting the Commissioner to impose administrative monetary penalties (AMPs) for contraventions of the Act.

The submission also identifies and recommends a number of additional amendments which would result in greater transparency and improve the administration of justice. We believe these changes would assist the Commissioner in the interpretation, application and enforcement of the Act.

II. ELIMINATE SIGNIFICANT PART TEST

Clause 7(1)(*b*) of the Act requires corporations and organizations to register their in-house lobbying activities by way of a return if they employ one or more individuals whose lobbying duties constitute a "significant part" of their duties or, if those duties would constitute a "significant part" of the duties of a single person if they were performed by only one employee.

The Commissioner has explained that this provision is difficult to interpret and enforce. It has increasingly become a means by which some corporations and organizations avoid registering their lobbying activities. Moreover, the "significant part" threshold means that a former designated public office holder can avoid the five-year lobbying ban by working as an in-house

lobbyist for a corporation whose employees cumulatively lobby less than the threshold, i.e., 20% of one employee's time.

The CBA recommends that clause 7(1)(*b*) be removed from the Act. In our view, both types of entities should be required to file in-house lobbyist registrations if they employ any individuals who lobby the federal government without any minimum threshold.

By removing the "significant part" threshold, the Act would more accurately capture all lobbying activity directed at the federal government by paid lobbyists. In our view, the potential administrative burden this amendment might impose on entities that do not currently register would be vastly outweighed by the enhanced degree of accountability and transparency that would necessarily result.

III. HARMONIZE RULES FOR CORPORATIONS AND ASSOCIATIONS

The CBA's second recommendation is closely related to its recommendation to remove the "significant part" threshold for in-house lobbyist registration. Clause 7(3)(*f*) of the Act currently provides that organizations must list in their return the names of every employee any part of whose duties involves lobbying public office holders. We believe that this same standard should be applied to corporations.

Under the existing statutory framework, the rules governing which employees should be listed in a corporation's in-house return are different from those for organizations. A corporation must maintain two lists: the first contains the names of each senior officer or employee "a significant part of whose duties" involve lobbying public office holders; and the second contains the names of each other senior officer "any part of whose duties" involves lobbying.

This distinction is both arbitrary and creates unnecessary confusion. The interpretation, application and enforcement of the Act would be greatly facilitated if the returns filed by organizations and corporations were the same.[4] The CBA supports an amendment of subsection 7(3) requiring corporations to list the name of every employee any part of whose duties involves lobbying.

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4 This is the case in Quebec under *the Code of Conduct for Lobbyists*, R.Q., c. T-11.011, r. 0.2, s.13.

IV. TREATMENT OF BOARD MEMBERS, PARTNERS AND SOLE PROPRIETORS

The provisions of the Act related to in-house lobbyist registrations – both for corporations and organizations – do not expressly deal with board members, partners in a partnership or sole proprietors. Rather, the Act requires "employees" and "senior officers" of organizations and corporations to be listed in in-house registrations. This has caused significant confusion.

The Commissioner has issued an advisory opinion that Board members who are not employees of the corporation or organization must register as consultant lobbyists if they communicate with public office holders on behalf of the corporation or organization. The treatment of partners in a partnership and sole proprietors is less clear, but presumably the Commissioner would follow a similar approach.

If the president of Company 'X' filed an in-house lobbyist registration for the corporation, it would only list the senior officers and employees who lobby on behalf of the company. If the Chair of the Board of Company 'X' were to engage in lobbying activities, assuming they were not an employee of the company, their name could not be included in the in-house return. Rather, they would have to register as an individual consultant lobbyist for the company.

The CBA believes that the Act should be amended to allow Board members, partners and sole proprietors to be treated and listed as in-house lobbyists for their respective organizations or corporations. Where their lobbying activities are restricted to communications made on behalf of those organizations or corporations, this change would more accurately reflect the nature of their work and increase transparency and accountability. It would better allow the public to know who is lobbying on behalf of whom.

Finally, this change would shift the administrative burden of registration and reporting from individual directors to the corporations and organizations on whose behalf the directors are lobbying, where the burden more appropriately belongs.

V. IMPROVE TRANSPARENCY OF MONTHLY REPORTS

The Act and the *Lobbyists Registration Regulations*[5] set out the circumstances in which consultant and in-house lobbyists must file monthly reports of their oral and arranged communications with designated public office holders (DPOHs). Under the current regime, however, the monthly reports list only the names of the DPOHs who participated – not the names of the in-house lobbyists or other government officials.

In-house lobbyists file reports in the name of the organization or corporation, and are not required to identify the specific individuals who participated. (This is not an issue for consultant lobbyists, as their reports are filed on an individual basis.) The CBA endorses the position advanced by others, including the Commissioner, that monthly reports should include the names of the in-house lobbyists who attended the meetings.

Secondly, the report must only identify the DPOHs. Yet, reportable communications often include more than DPOHs. For example, a meeting with a Deputy Minister might also involve a Director General. The CBA believes that accountability and transparency would be enhanced if the reports list all, both lobbyists and public office holders, who participate.

VI. CREATE ADMINISTRATIVE MONETARY PENALTIES

The CBA supports the Commissioner's recommendation that she and her successors be given the authority to impose AMPs for contraventions of the Act or the Code. The CBA believes that the use of AMPs would improve the administration of Act and better ensure compliance with both the Act and Code.

If, however, the Commissioner is given the power to impose AMPs for contraventions of the Act and Code, the CBA believes that the Act should be amended to offer some form of review or appeal process. A process that allows a lobbyist to challenge the imposition of an AMP, or the amount of the penalty, would ensure the proper administration of justice.

i. Contraventions of the *Lobbying Act*

Currently, if the Commissioner determines that an individual or entity has committed a statutory offence, she is required to refer the matter to the Royal Canadian Mounted Police

5 *Lobbyists Registration Regulations,* SOR/2008-116.

(RCMP) for further investigation. It is left to the RCMP and the relevant provincial Crown Attorney to determine whether charges should be laid. In the history of the federal lobbying regime, no charges have ever been brought.

If an individual or entity were convicted of an offence under the Act, the Commissioner may "if satisfied that it is necessary in the public interest, taking into account the gravity of the offence and whether the offence was a second or subsequent offence under this Act" prohibit that individual or entity from engaging in any registerable lobbying for a period of not more than two years. Again, however, the individual or entity must first have been convicted of an offence.

As the Commissioner has noted, the existing remedies are insufficient. While she has referred certain matters to the RCMP in the past, the cases have not proceeded for a variety of reasons. Serious incidents of non-compliance with the Act have therefore not resulted in any practical consequences for lobbyists. This is not to say, however, that any contravention – no matter how trivial – should result in prosecution.

There is a legitimate public policy question about whether an individual or entity that has made a relatively minor or technical violation of the Act should be subject to further investigation by the RCMP and, ultimately, prosecution. The CBA believes that, in such cases, the imposition of an AMP may be sufficient to enforce compliance with the Act.

The CBA does not, however, endorse the view that the statutory offences should be removed from the Act. In the case of serious or repeated contraventions of the Act by lobbyists, it may be appropriate for the RCMP and Crown authorities to take further action. This should be reserved for those cases that the Commissioner considers particularly egregious.

ii. Contraventions of the *Lobbyists' Code of Conduct*

The Act does not empower the Commissioner to impose any penalty on a lobbyist who contravenes the Code. If the Commissioner determines that a lobbyist has contravened the Code, her only course of action is to submit a report to Parliament which details her findings. Neither the Code nor the Act contemplates what further action, if any, could be taken by Parliament upon receipt of a report.

While the Commissioner has noted that reports to Parliament are a "key compliance tool," insofar as they offer both specific deterrence as well as general deterrence to the profession as a whole, there are no practical consequences apart from the potential reputational damage. The CBA thus recommends that the power to impose AMPs be extended to cover contraventions of the Code as well.

In making this recommendation, however, the CBA endorses the view expressed by both the Commissioner and the lobbying community as a whole that a comprehensive review of the Code must be undertaken either concurrent with, or immediately following, the statutory review of the Act. The CBA has publicly expressed its concerns that the Code, as currently written, is insufficiently clear.[6]

While the Act requires lobbyists to comply with the Code, it does not form part of the Act, and, as currently drafted, it is too vague and open to multiple interpretations. If non-compliance with the Code could potentially result in the imposition of AMPs, for reasons of transparency and the proper administration of justice, the Code should be redrafted for clarity and incorporated into the Act.

VII. ENSHRINE ADMINISTRATIVE REVIEW PROCESS IN THE ACT

Section 10.4 of the Act provides that the Commissioner shall conduct an investigation if she has reason to believe it is necessary to ensure compliance with either the Act or Code. It further provides that when conducting an investigation the Commissioner has the power to compel a person to give oral or written evidence under oath, as well as to compel a person to produce any documents that she considers relevant to the investigation.

In practice, however, the Commissioner does not initiate a formal investigation until she has completed an "administrative review" of a given matter. As the Commissioner has frequently explained, an administrative review is a "fact gathering" or "fact finding" process. To that end, it is during this process that her officials generally interview witnesses and seek the production of relevant documents. The CBA's concern is that this process is not contemplated by the Act.

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6 Supra note 3.

Recognizing that it may not be necessary or appropriate for the Commissioner to initiate a formal investigation in response to every allegation, it is nevertheless important that she and her officials have a solid statutory basis on which to interview witnesses and seek production of documents. Consequently, the CBA recommends that the Commissioner's administrative review process be enshrined in the Act.

Not only would this provide the Commissioner with the statutory authority to undertake administrative reviews, it would also provide lobbyists and the public with greater certainty and clarity about the process that the Commissioner will follow in every case. In addition, enshrining the administrative review process in the Act would better safeguard the legal rights of those who may be subject to an investigation in respect of their lobbying activities.

VIII. PROHIBIT CONFLICTS OF INTEREST

Unlike a number of provincial regimes, the federal Act does not restrict an individual or entity from lobbying a public office holder on a subject matter on which that individual or entity also has a contract to provide advice or legal representation to the federal government . The CBA believes this prohibition should be added to the Act to prevent potential conflicts of interest.

While some may argue that conflicts of interest are adequately addressed in the context of the *Lobbyists' Code of Conduct*, the CBA believes that this prohibition should be clearly stated in the Act. This would provide greater clarity and specificity, and aid in the administration and enforcement of the Act. The Alberta, British Columbia, Manitoba and Quebec statutes provide different examples of how this prohibition could be drafted.[7]

To be clear, the proposed provision would not prohibit individuals from lobbying and advising the government at the same time on different subject matters. For example, if a lawyer were to advise the Department of Justice on a specific claim against the government, they would not be

[7] See Alberta's *Lobbyists Act,* S.A. 2007, c. L-20.5, subsections 6(3) and (4): "No person shall lobby on a subject-matter if that person, or a person associated with that person, is holding a contract for providing paid advice on the same subject-matter." "No person shall enter into a contract for providing paid advice on a subject-matter if that person, or a person associated with that person, lobbies on the same subject-matter as that of the contract." See also British Columbia's *Lobbyist Registration Act*, S.B.C. 2001, c. 42, subsection 2.1(2): "A person must not do either of the following: (a) lobby on a matter in relation to which the person, or a person associated with that person, holds a contract for providing paid advice; (b) enter into a contract for providing paid advice on a matter in relation to which the person, or a person associated with that person, is lobbying."

precluded from lobbying the Department on an unrelated policy matter. The restriction would apply only where the same subject matter was at issue.

IX. THE "FIVE YEAR BAN"

Among the changes to the Act that resulted from the passage of the *Federal Accountability Act* was the establishment of a five year restriction on lobbying by former DPOHs. This prohibition originally applied only to Cabinet Ministers, their staff and specified categories of senior public servants. As a result of regulatory changes made in 2010, the restriction now applies to all Members of Parliament and Senators, as well as specified Opposition staff.

The CBA believes that post-employment restrictions on public office holders should be consistently applied and enforced. To this end, the CBA believes that to the greatest extent possible post-employment restrictions on public office holders should be interpreted and administered by a single authority.

The Conflict of Interest and Ethics Commissioner (Ethics Commissioner) is responsible for the interpretation and administration of the *Conflict of Interest Act*[8] as well as the *Conflict of Interest Code for Members of the House of Commons*.[9] Both establish conflict of interest rules and post-employment restrictions on former senior government officials and MPs, outlining what they can and cannot do after leaving office.

The *Conflict of Interest Act* prohibits "reporting public office holders", which includes many of the same officials who are DPOHs, from making "representations" on behalf of any other person or entity to any federal government department or organization with which they had direct and significant official dealings for two years after leaving office.

If it were alleged that a former Cabinet Minister or senior government official lobbied their former department within two years of leaving office, separate investigations would be initiated by both the Lobbying Commissioner and the Ethics Commissioner under their respective statutory regimes for the exact same matter. This greatly increases the risk of separate and inconsistent decisions.

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8 *Conflict of Interest Act,* S.C. 2006, c. 9, s. 2.

9 *Conflict of Interest Code for Members of the House of Commons*, See: http://www.parl.gc.ca/About/House/StandingOrders/appa1-e.htm

This is not a hypothetical situation. In the past three years some former public office holders have had to consult both the Lobbying and Ethics Commissioners to ensure compliance with both regimes. The CBA believes that the administration of justice would be better served if these advisory and enforcement functions were placed within the exclusive jurisdiction of a single authority.

Although outside the scope of this review, the CBA would also support a move to harmonize the post-employment restrictions on registerable lobbying under the Act, with the restriction on "representations" in the *Conflict of Interest Act*. The restriction in the former, as noted, is five years, while the restriction in the latter is two years. The CBA favours a single common restriction for both.

X. SUMMARY OF RECOMMENDATIONS

1. **Remove the 'significant part' test threshold for in-house lobbyists.**
2. **Eliminate the distinction between in-house lobbyists (corporations) and in-house lobbyists (organizations).**
3. **Allow board members (corporation and association directors), partners and sole proprietors to be included in in-house lobbyist's returns.**
4. **Ensure that monthly communications reports contain the name of all in-house lobbyists who attended oral pre-arranged meetings.**
5. **Empower the Commissioner to impose AMPs.**
6. **Enshrine the administrative review process in the Act.**
7. **Prohibit an individual or entity from lobbying the government on a subject matter, if they have a contract to provide advice to a public office holder on the same subject matter.**
8. **Post-employment restrictions on former public office holders should be interpreted and administered by a single authority.**

XI. CONCLUSION

The CBA trusts these comments and recommendations will assist the Standing Committee in its review of the Act. We would be pleased to respond to questions and to provide further information regarding any of the issues raised in this submission.