THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Lobbyists' Code of Conduct
Consultation

NATIONAL ADMINISTRATIVE LAW SECTION
CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing 37,500 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 the National Administrative Law Section of the Canadian Bar Association, 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 National Administrative Law Section of the Canadian Bar Association.

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I. INTRODUCTION

The National Administrative Law Section of the Canadian Bar Association (CBA Section) is pleased to have the opportunity to comment on the Commissioner of Lobbying of Canada's consultation on possible revisions to the *Lobbyists' Code of Conduct.* The CBA is a national association of over 37,500 lawyers, notaries, students and law teachers, with a mandate to promote improvements in the law and the administration of justice. In preparing this letter, the CBA Section has drawn on the members of its Law of Lobbying and Ethics Committee, who have particular expertise working with and providing advice under the *Lobbying Act*[1] (the Act). Below, we respond to the consultation questions in the order in which they appear in the Consultation Paper; however, we have chosen to answer only the questions that raise the most significant issues from our perspective.

II. RESPONSE TO THE COMMISSIONER'S QUESTIONS

1. What should be the objectives of a lobbyists' code of conduct?

Lobbying (the right to make representations to government) is an ancient right with roots traceable to the *Magna Carta*[2] and the *Bill of Rights* of 1689.[3] However, this right must be exercised in a manner consistent with the Constitution and the rule of law.

As the Supreme Court of Canada has confirmed, the Canadian Constitution embraces both written text and unwritten norms.[4] Three of the foundational, unwritten constitutional principles are the rule of law, democracy and respect for democratic institutions.[5] It is

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1 RSC, 1985, c. 44 (4th Supp.).

2 *Magna Carta* (1215), section 61, confirms the right of barons to petition for the redress of transgressions.

3 1 William & Mary Sess. 2, c. 2: "… it is the Right of the Subjects to petition the King and all Commitments and Prosecutions for such Petitioning are Illegall [*sic*]."

4 *Ref re Remuneration of Judges of the Prov. Court of P.E.I.; Ref re Independence and Impartiality of Judges of the Prov. Court of P.E.I.*, [1997] 3 SCR 3, para 90.

5 *Reference re Secession of Quebec*, [1998] 2 SCR 217, at paras 32, 48.

axiomatic that lobbying cannot be conducted in a manner that compromises the democratic process, undermines respect for democratic institutions, or flouts the rule of law.

Section 10.2 of the Act, mandating that the Commissioner develop a *Lobbyists' Code of Conduct*, does not state the objectives to be served by it. However, the appropriate objectives may be derived from the above-noted constitutional principles and are implicit in the Preamble to the Act:

> WHEREAS free and open access to government is an important matter of public interest;
>
> AND WHEREAS lobbying public office holders is a legitimate activity;
>
> AND WHEREAS it is desirable that public office holders and the public be able to know who is engaged in lobbying activities;
>
> AND WHEREAS a system for the registration of paid lobbyists should not impede free and open access to government …

Each of these four principles has a counterpart objective on which the *Lobbyists' Code of Conduct* should be based.

First, the public interest is paramount. An objective of the Code must be to prevent access to government from being used or misused in a manner that harms the public interest.

Second, the Preamble implies the right of *legitimate* lobbying. As the Supreme Court of Canada has noted,[6] legitimacy requires more than mere adherence to the law. For lobbying, *legitimate* conduct accords with the moral values embedded in our constitutional structure and is consistent with democratic principles. The Code should proscribe conduct that would commonly be viewed as illegitimate, unacceptable or unethical.

Third, consistent with the unwritten constitutional principle of respect for democratic institutions, an objective of the Code must be to ensure that lobbyists' conduct is consistent with public confidence in the integrity of federal institutions and federal decision making. Transparency in lobbying is a critical element in maintaining public confidence.

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6 *Ref re Remuneration of Judges of the Prov. Court of P.E.I.; Ref re Independence and Impartiality of Judges of the Prov. Court of P.E.I.*, *supra* note 5, at para 67.

Fourth, a necessary underpinning to the principle of free and open access to government is the assumption that everyone in Canada has a fair and equal opportunity to influence decision making.[7] An objective of the Code must be to ensure that lobbying does not impinge on others' right of fair, equal and balanced access to government.

In summary, the objectives of the Code should be the following:

1. To prevent access to government from being used or misused in a manner that harms the public interest.
2. To ensure that lobbying activity is legitimate, and to proscribe conduct that is illegitimate, unacceptable or unethical.
3. To ensure that lobbyists' conduct is consistent with public confidence in the integrity of federal institutions and federal decision making.
4. To ensure that lobbying respects the universal right of fair, equal and balanced access to government by neither exploiting, nor attempting to secure access or opportunity that is not universally available.

2a. Should communications between lobbyists and clients be regulated?

A distinction should be drawn between communication from lobbyist to client, and communication from client to lobbyist. We believe the Code should regulate the conduct of lobbyists, including what lobbyists say to their clients, to the extent described below. We do not believe that the Code should apply to what a client tells or instructs its lobbyist.

A significant reason not to apply the Code to what a client communicates to the lobbyist is to avoid an unwarranted intrusion on the ability of clients to convey their legitimate needs to those who will lobby on their behalf, and to avoid an unjustifiable invasion of their privacy.

Where the lobbyist is a lawyer, issues of solicitor-client privilege would also need to be taken into account.

Another reason for this distinction is jurisdictional. The Act does not give authority to extend the Code's reach to clients. Subsection 10.2(1) of the Act limits the Code to "the activities described in subsections 5(1) and 7(1)." In other words, the Code is to apply to consultant

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[7] It goes without saying that access to government is not truly *free* and *open* if one lobbyist is able to assert special privilege or to claim unequal access.

lobbying and in-house lobbying. Subsection 10.3(1) says the Code is binding on consultant lobbyists and in-house lobbyists who must be named in an in-house lobbying registration.

Unless a client engages in in-house lobbying, the Code cannot apply to a client's activity and then only to the extent of the in-house lobbying, Not even the act of retaining a consultant lobbyist should be subject to the Code, because this is not an activity "described in subsections 5(1) and 7(1)" of the Act.

On the other hand, the Act provides authority to apply the Code to those who engaging in lobbying. It is appropriate and desirable to provide that a consultant lobbyist:

- Shall inform the client of the requirements of the Act and the Code.
- Shall not commence performance of an undertaking unless the lobbyist is satisfied that the client understands the nature and implications of the public reporting that will be required of the lobbyist.
- Shall not promise the client that the lobbyist will be able to achieve a particular result of government or parliamentary decision-making.
- Shall communicate honestly with the client.

2b. Should communications between clients and public office holders be regulated?

It is the essence of democracy that citizens be able to participate in the conduct of public affairs and in their own governance either through representatives or through direct contact with government.[8] To the extent that regulating communication between citizens and public office holders would interfere with these basic democratic rights, it is unacceptable. Not all public office holders are accessible due to the nature of their functions, but those who are should be as available to clients as they are to lobbyists.

Clients and lobbyists alike should be cognizant of the public interest and the common good in policy processes.[9] While they may vigorously promote their own positions, clients who contact public office holders directly rather than through their lobbyists should not seek undue and

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8 *International Covenant on Civil and Political Rights*, General Assembly Resolution 2200A (XXI), 16 December 1996, in force 23 March 1976, Article 25.

9 Woodstock Principles – Principles for the Ethical Conduct of Lobbying. Online: http://woodstock.georgetown.edu/resources/papers/papers-Principles-for-Ethical-Lobbying.html

unfair advantage. However, monitoring client contact with public office holders may prove unwieldy, difficult, impractical, unfair and potentially undemocratic.

Again, the Code's impact on clients is also limited by statute. The Commissioner does not have jurisdiction to extend the Code's reach to a client unless the client has engaged in a lobbying activity under subsections 5(1) and 7(1) of the Act.

3. Does the current *Lobbyists' Code of Conduct* need more clarity?

The CBA Constitutional and Human Rights Law Section previously explained[10] that the Commissioner's guidance on the interpretation of Rule 8 in relation to political activity by lobbyists is unacceptably vague. The CBA submission focused on the guidance accompanying Rule 8 and not the text of the rule itself. Rule 8 provides, "Lobbyists shall not place public office holders in a conflict of interest by proposing or undertaking any action that would constitute an improper influence on a public office holder." Other Canadian lobbying laws contain a provision similar to Rule 8.[11] We continue to believe that the application of Rule 8 requires clarity, but not that it should be discarded.

However, the Code should be more explicit in identifying and expressly prohibiting the ways in which a lobbyist could place a public office holder in a conflict of interest. Not only would this respond to our concern about vagueness, it would better serve the public interest and advance the rule of law. Specific language is suggested below in response to question 4. Adopting this specific language would require that the Commissioner's existing guidance related to Rule 8 and political activity be revisited.

4. What are the top 10 rules you would like to see in a code of conduct?

In our view, the three most important new, expanded or clarified elements in the Code should be: (1) rules governing what lobbyists shall and shall not communicate to their clients and employers; (2) rules clarifying how lobbyists must not place public office holders in a conflict of interest; and (3) rules to ensure that lobbyists do not seek or accept preferential access.

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10 Canadian Bar Association, *Opinion Respecting the Constitutionality of Rule 8 of the Lobbyists' Code of Conduct,* (June 2010), online: http://www.cba.org/cba/submissions/pdf/10-40-eng.pdf

11 See, for instance: *Lobbyist Registration Act* (Newfoundland and Labrador), subs. 31(3); *Lobbyists' Registration Act* (Nova Scotia), subs. 18(3); *Lobbyists Registration Act* (Ontario), subs. 18(4)-(6); *Code of Conduct for Lobbyists* (Quebec), s. 9; City of Toronto *Municipal Code*, Chapter 140, §145-B.

Below are our specific suggestions for revisions under each heading:

1. Rules governing what lobbyists shall and shall not communicate to their clients and employers.
    - A consultant lobbyist shall inform the client of the requirements of the *Lobbying Act* and the *Code*.
    - A consultant lobbyist shall not commence an undertaking unless satisfied that the client understands the nature and implications of the public reporting that will be required of the lobbyist.
    - A lobbyist shall not promise the client that the lobbyist will be able to achieve a particular government or parliamentary decision.
    - A lobbyist shall communicate honestly with the client or the employer.

2. Rules clarifying how lobbyists must not place public office holders in a conflict of interest.
    - A lobbyist shall not, in anticipation of lobbying, in the course of lobbying, or following lobbying, provide a gift, hospitality or other benefit except a token of nominal value to a public office holder.
    - A lobbyist shall not make a political contribution or encourage the making of a political contribution in an attempt to influence a public office holder's decision.
    - A lobbyist shall not ask or encourage a public office holder to give preferential treatment to the lobbyist or the lobbyist's client.
    - A lobbyist shall not lobby a public office holder if a reasonable person would conclude that the public office holder feels a sense of obligation to the lobbyist or to the lobbyist's client.
    - A lobbyist shall not ask a public office holder for information that is not publicly available.[12]
    - These rules should supplement, not replace, the existing text of Rule 8.

3. Rules to ensure that lobbyists do not seek or accept preferential access.
    - A consultant lobbyist shall not arrange for another person a meeting with a public office holder who is a relative or friend of the lobbyist or has financial or business dealings with the lobbyist.
    - A lobbyist shall not lobby a public office holder who is a relative or friend of the lobbyist or has financial or business dealings with the lobbyist.

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[12] This recommendation, and the subsequent recommendation regarding receipt of information from a public office holder that is not publicly available, are not intended to affect participation in official government consultations on draft policy or legislation (which may occur on a confidential basis).

- If a lobbyist receives information from a public office holder that is not publicly available, the lobbyist shall neither use nor disclose the information, and if the information is in a form that can be returned, shall return it.

Given that lobbying consists of interaction with public office holders, there should be reciprocal obligations. However, in all jurisdictions, including the federal jurisdiction, lobbyist conduct and public office holder conduct are governed by different laws or codes, which in most cases are interpreted by different authorities. For example, the Commissioner of Lobbying and the Conflict of Interest and Ethics Commissioner oversee the conduct of federal lobbyists and MPs and Conflict of Interest Act public office holders, respectively. These authorities should strive for consistent, predictable and stable interpretation of parallel rules.

7. Should a code of conduct apply to both lobbyists and clients?

The Act does not authorize extending the Code's reach to clients unless the clients themselves engage in lobbying. Section 10.3 states that the Code applies only to consultant lobbyists and in-house lobbyists who are required to be named on an in-house lobbying return.

If Parliament wanted to address the conduct of clients, it would have made this clear in the statute. Other federal legislation, such as the *Criminal Code*, already addresses improper behaviour, such as bribery and counselling illegal action.

9. Is it well understood that failure to comply with the Act may also result in a breach of the *Lobbyists' Code of Conduct*?

With respect, we believe it must first be asked whether it is appropriate to treat a breach of the Act as a breach of the Code. Parliament has determined that a breach (or alleged breach) of the Act is to be dealt with through a process of investigation, charge, trial, conviction and sentence. There is no indication that Parliament intended the *Lobbyists' Code of Conduct* to provide an alternate mechanism to address breaches of the Act.

If an individual has been tried and acquitted of an offence under the Act, it would be improper to determine, through an investigation under the Code, whether the Act was contravened. For public policy reasons, the same conclusion applies when an investigation under the Act does not lead to charges, and even when no investigation under the Act is conducted.

Once the Commissioner's administrative review results in a referral to the RCMP for possible prosecution for a breach the Act (which requires the Commissioner's office to suspend further investigation), the Commissioner should not subsequently be able to reopen that investigation for the same alleged offence, conclude there has been a breach of the Code, and present a detailed report to Parliament and the public. Once an alleged violation is referred to the RCMP, the Commissioner should not subsequently be able to consider a breach of the Code on the same basis as the alleged infraction.

To use the Code as a "back door" mechanism to enforce the Act strays from Parliament's intention. Parliament has established an explicit mechanism to handle breaches of the Act. In the face of that *explicit* mechanism, it is impossible to conclude that an alternative means of enforcing the Act is implicit in section 10.2, which gives rise to the Code.

10. Should the client have an obligation to ensure the lobbyist they hire complies with the *Lobbyists' Code of Conduct*?

Clients should not engage any lobbyist with a view to breaking the rules and should be clear before retaining that person or company that those who have broken the rules and been found to do so will not do so again. From a moral standpoint, clients have an obligation to be aware of how their lobbyists will conduct themselves on their behalf. However, it is difficult to envisage a realistic means of enforcing this obligation through monitoring clients, nor do we believe that the Act confers authority on the Commissioner to make the Code apply to the activities of clients (except to the extent that the clients themselves engage in lobbying).

One potential method of monitoring is to require lobbyists to make full disclosure to their client of their obligation under the Act and the Code. We suggest this in our commentary above. A lobbyist may easily discharge a duty of disclosure by using standard retainer agreements with clauses containing this information.

III. CONCLUSION

The CBA Section would like to thank the Commissioner of Lobbying for the chance to contribute to the consultation on the *Lobbyists' Code of Conduct*, and would welcome the opportunity to elaborate on any element of our submission.