

## Lobbying Act

### Complying with Amendments – July 2008

#### KEY POINTS

- ▶ The *Lobbyists Registration Act* has been renamed the *Lobbying Act*.
- ▶ Office of the Registrar of Lobbyists is replaced by Office of the Commissioner of Lobbying.
- ▶ Requirement of greater disclosure from lobbyists, especially in relation to dealings with DPOHs. Registered lobbyists must keep a detailed log of all their communications, taking note of the date of the communication, who they talked to and about what.
- ▶ New class of officials with whom communication must be reported: the “designated public office holders” (DPOHs).
- ▶ New monthly filing requirements regarding oral and arranged communication with DPOHs.
- ▶ New ban on lobbying by DPOHs and the Prime Minister’s transition team members for 5 years after they have left office.
- ▶ Prohibition on contingency fee arrangements.
- ▶ Monetary penalties for non-compliance with the *Lobbying Act* doubled; enforcement limitation period increased to 10 years.

Amendments to Canada’s *Lobbyists Registration Act* (“LRA”), in force as of July 2, 2008, have renamed the LRA the *Lobbying Act* (“LA”) and created significant changes to the regulation of lobbying at the federal level of government. Like its predecessor, the LA is designed to make lobbying transparent by requiring those who communicate with public officials, in a broad range of defined situations, to be listed in a public register. The LA seeks to regulate the activities of lobbyists, rather than simply monitor them by means of a registry system. The following discussion addresses the questions we are most frequently asked about Canada’s amended federal lobbying regulation regime.

#### To whom does the *Lobbying Act* apply?

The LA applies to the same lobbyists as before the amendments. The same classifications of lobbyists remain: consultant and in-house lobbyists.

#### What is the new ban on contingency fees?

Consultant lobbyists are now prohibited from receiving any payment that is wholly or partially contingent on the outcome of any lobbying activities set out in the LA. Likewise, lobbyists’ clients are prohibited from making such payments. Any contingency arrangements in place before July 2, 2008 are permissible if:

- > the arrangement was previously registered under the *Lobbyists Registration Act*; or
- > the arrangement was entered into before July 2, 2008, but did not have to be registered at that time.

#### How is the new sub-class of officials with whom communication must be reported integrated into the regime?

##### *Who are “public office holders” under the existing regime?*

As before the amendments, a public office holder (“POH”) means a federal official – any officer or employee of Her Majesty in right of Canada – and includes:

- > MPs and Senators;
- > Staff members of MPs and Senators;
- > Anyone appointed by cabinet or a minister to any office or body, other than a judge or provincial Lieutenant-Governor;

- > An officer, director or employee of any federal board, commission or other tribunal;
- > A member of the Canadian Armed Forces; and
- > A member of the RCMP.

Under the LA, lobbyists who communicate with a POH must file a return.

***Who are the new “designated public office holders”?***

The amendments have created a new sub-class of POH: the “Designated Public Office Holder” (“DPOH”). The DPOH category includes:

- > Ministers of the Crown, Ministers of the State, and ministerial staff (executive assistants and other assistants appointed by a minister, or a person holding the recognized position of Leader of the Opposition in the House of Commons or Leader of the Opposition in the Senate);
- > Any POHs who occupy the senior executive position in a “department”, as defined in the *Financial Administration Act*. This category includes Deputy Ministers and Chief Executive Officers;
- > POHs who are associate deputy ministers, assistant deputy ministers, or occupy positions of comparable rank;
- > Any individual or class defined by regulation as a DPOH (to date the following):
  - Chief and Vice-Chief of the Defence Staff;
  - Chiefs of Maritime Staff; Land Staff; Air Staff; and of Military Personnel;
  - Judge Advocate General;
  - Any position of Senior Advisor to the Privy Council to which the office holder is appointed by the Governor in Council;
  - Deputy Minister (Intergovernmental Affairs) Privy Council office;
  - Comptroller General of Canada; and
  - Deputy ministers or heads, associate deputy ministers or heads, and positions of equivalent ranks, all appointed by the Governor in Council.

***What does the five year ban on lobbying activities for DPOHs ceasing to hold office entail?***

The amendments seek to ensure that senior-level public office holders do not use advantages and personal connections derived from their government positions for lobbying purposes by making DPOHs subject to a **five-year prohibition on lobbying** the federal government after leaving office.

More specifically, the five year ban applies to the following activities by DPOHs:

- > **Former DPOHs acting as consultant lobbyists** cannot communicate with a POH regarding the development of any legislative proposal, the introduction, passage, defeat, or amendment of any Bill or resolution before either House of Parliament; make or amend regulations; develop or amend any policy or program of the Canadian Government; award any contract by or on behalf of Her Majesty in right of Canada; or arrange meetings between a public office holder and any other person;
- > **Former DPOHs acting as in-house lobbyists working for organizations** also cannot perform the above-listed activities, with the exception of the arrangement of meetings between a public office holder and any other person.
- > For **former DPOHs acting as in-house lobbyists working for corporations**, the same restrictions apply as for former DPOHs acting as in-house lobbyists working for organizations. However, these restrictions apply only if such lobbying duties would constitute a significant part (interpreted at 20% or more) of their work.

***What is the role of the new Commissioner of Lobbying?***

The Registrar of Lobbyists is now replaced by the Commissioner of Lobbying, an independent officer accountable directly to Parliament. In contrast to the powers of the previous position of Registrar, the Commissioner has greater investigative and reporting powers. While the Registrar of Lobbyists had the power to investigate only possible breaches of the *Lobbyists’ Code of Conduct* (“Code”), the Commissioner may now investigate both

violations under the Code *and* the LA. Moreover, under the new regime, the Commissioner shall conduct an investigation “if he or she has reason to believe...that an investigation is necessary to ensure compliance with the Code or this Act, as applicable.” Thus, the threshold for commencing an investigation is now lowered from the belief that a breach has occurred to the belief that an investigation is necessary to ensure compliance. Furthermore, in addition to the power to summon witnesses and compel the production of documents, the Commissioner now has the power to contact present and former DPOHs to verify information provided by lobbyists in filing returns, and to ask lobbyists to clarify or correct the information provided.

## What activities trigger reporting requirements under the LA?

### Initial Return

As before the amendments, reportable “lobbying” includes **communications** in any form – telephone calls, meetings, emailing, etc. – with any POH regarding any of the activities in the table below the heading “Monthly Return”. (Note that DPOH category always falls within the POH class.) However, while consultant lobbyists must file reports regarding all the activities below, in-house lobbyists are exempt from reporting communications regarding the award of any Crown contract. In addition, a consultant lobbyist must file a return when he or she undertakes, for payment, to **arrange a meeting** between a public office holder and any other person.

As before the amendments, registration of communication with a POH is required even if the communication is initiated by the POH. For example, it is considered lobbying if you reply to an oral or written request from a POH or you are invited to a round-table discussion or other stakeholder consultation on a policy proposal by the POH. The exceptions would be a communication restricted to a simple request for information or an invitation to an open forum that is a matter of public record.

### Monthly Return

Registered lobbyists will now also be required to file additional returns on a monthly basis if there have been “prescribed” communications with any DPOH. The “prescribed” communication requiring monthly reporting is oral, arranged in advance and not initiated by a DPOH. This would include “arranged” meetings and telephone conversations. Written correspondence (e.g., letters, emails, faxes, BlackBerry PIN communications) and spontaneous communications – lobbying that occurs without prior arrangement, such as at a sporting event, reception, or restaurant – do not require a monthly return. It is only such communication on or after July 2, 2008 that needs to be reported.

To trigger the monthly reporting requirements, the oral and arranged communications must relate to any of the activities in the following table, depending on whether one is a consultant lobbyist or an in-house lobbyist, and on whether the communication was initiated by a POH.

	CONSULTANT LOBBYIST		IN-HOUSE LOBBYIST	
The development of any legislative proposal by the Government of Canada or any MP or Senator	Initiator: POH	<input checked="" type="checkbox"/>	Initiator: POH	<input checked="" type="checkbox"/>
	Initiator: Not POH	<input checked="" type="checkbox"/>	Initiator: Not POH	<input checked="" type="checkbox"/>
The introduction of (or any attempt to pass, defeat or amend) any Bill or resolution in either House of Parliament	Initiator: POH	<input checked="" type="checkbox"/>	Initiator: POH	<input checked="" type="checkbox"/>
	Initiator: Not POH	<input checked="" type="checkbox"/>	Initiator: Not POH	<input checked="" type="checkbox"/>
The making or amendment of any regulation	Initiator: POH	<input checked="" type="checkbox"/>	Initiator: POH	<input checked="" type="checkbox"/>
	Initiator: Not POH	<input checked="" type="checkbox"/>	Initiator: Not POH	<input checked="" type="checkbox"/>
The development or amendment of any policy or federal program	Initiator: POH	<input checked="" type="checkbox"/>	Initiator: POH	<input checked="" type="checkbox"/>
	Initiator: Not POH	<input checked="" type="checkbox"/>	Initiator: Not POH	<input checked="" type="checkbox"/>
The awarding of any grant, contribution or other financial benefit on behalf of the Crown	Initiator: POH	<input checked="" type="checkbox"/>	Initiator: POH	<input checked="" type="checkbox"/>
	Initiator: Not POH	<input checked="" type="checkbox"/>	Initiator: Not POH	<input checked="" type="checkbox"/>
The awarding of any Crown contract	Initiator: POH	<input checked="" type="checkbox"/>	Initiator: POH	<input checked="" type="checkbox"/>
	Initiator: Not POH	<input checked="" type="checkbox"/>	Initiator: Not POH	<input checked="" type="checkbox"/>

## **What kinds of communication are not caught by the LRA?**

As before the amendments, among the kinds of communications that continue to be explicitly excluded from the reach of the LA are:

- > oral or written communications made to a public office holder with respect to the enforcement, interpretation or application of any statute or regulation by that public office holder;
- > oral or written submissions to Parliamentary committees (or to any body or person having jurisdiction or powers conferred by or under an Act of Parliament) in proceedings that are a matter of public record;
- > communications that are merely requests for information;
- > communications by members of provincial, municipal and certain Aboriginal governments, their staffs and employees; and
- > communications by foreign diplomatic representatives and officials of the UN and other international organizations that are granted privileges and immunities by Parliament.

In addition, nothing in the LA can be construed as requiring the disclosure of the name or identity of any individual if such disclosure could reasonably be expected to threaten the safety of that individual.

## **Who must file the return?**

There is no change to the individuals responsible for filing. A consultant lobbyist must file his or her return with the Commissioner under the Act. In the case of a corporation or organization employing in-house lobbyists, the return must be filed by the most senior paid officer, who in the case of the corporation will generally be the CEO, COO or president.

Members of boards of directors of entities (both corporations and organizations) who are remunerated by such entities to lobby as part of their duties have been advised by the Registrar of Lobbyists to register as consultant lobbyists. This has not changed although reports generated by a search of the Registry of Lobbyists will indicate the person's role as a board member.

## **How must returns be filed?**

Whereas previously filing could be made either electronically or in paper format, all returns will now need to be filed electronically using the Lobbyists Registration System ("LRS"). Paper filing, however, is still permitted if the person filing (1) has difficulty filing the return in electronic format due to a disability, or (2) does not have access to a computer system.

## **Does the person submitting the return have to certify it?**

Yes. Every individual who submits a return or other document to the Commissioner of Lobbying pursuant to this LA must certify that the information contained in the document is true to the best of his or her knowledge and belief.

## **What are the LA offences and penalties for non-compliance?**

In addition to the existing offence of knowingly making a false or misleading statement in any return or document submitted to the Commissioner, the amendments also make it a strict liability offence to fail to file a required return. This new offence also attaches to instances where a return was filed, but where there was a failure to file accurately, completely, or on time. (Note that a strict liability offence means that it is no defence to state that the inaccurate or incomplete filing did not occur knowingly.) Moreover, the LA doubles the maximum monetary penalties for lobbyists who are found guilty of breaching the LA requirements.

- > Anyone who fails to file a required return (strict liability) or knowingly makes a false or misleading statement in any return or other document submitted to the Commissioner under the LA is guilty of an offence that, on a summary conviction, can result in a fine of up to \$50,000 and/or imprisonment for up to 6 months. If the Crown proceeds by way of indictment, the maximum fine increases to \$200,000 and the maximum prison term to 2 years (and again, both fine and imprisonment can be imposed).
- > Anyone who contravenes any other provision of the LA, including its Regulations, is liable on summary conviction to a fine of up to \$50,000.

If a person is convicted of an offence under the LA, the person may also be prohibited from lobbying for up to 2 years.

The amendments now extend the limitation period for enforcement proceedings in the case of summary conviction proceedings from 2 to 10 years. Specifically, the proceedings may be instituted no later than 5 years from the time when the Commissioner becomes aware of the matter, but no later than 10 years after the day on which the subject-matter of the proceedings arose. Another potentially punitive effect of the legislation, in addition to the penalties it mandates, is the prospect of the Commissioner deciding to make public details surrounding the offence.

### **What is the “Lobbyists’ Code of Conduct”? How does it fit into the regulatory regime?**

The Lobbyists’ Code of Conduct is established by the Commissioner. While it is published in the *Canada Gazette*, the Code is not a statutory instrument. Nevertheless, it sets standards of conduct that all lobbyists—both consultants and in-house lobbyists named in returns—must meet in their dealings with federal public office holders.

There are no fines or penal sanctions in the Code, but there still can be consequences. The Commissioner has the power to investigate alleged breaches of the Code and, having done so, will submit a report to the Registrar General of Canada who will then table it before both Houses of Parliament. The Commissioner has the discretion to include in the report “details of any payment received, disbursement made or expense incurred” by anyone who is required to file a return or who is required to be named in a corporation or organization’s return. Anyone who is to be found in breach of the Code will be given a reasonable opportunity to present their views to the Commissioner.

The Commissioner is generally bound to keep what he or she learns confidential. However, the Commissioner can alert police if, in the course of an investigation, he or she comes to believe on reasonable grounds that a person has committed an offence under federal or provincial law.

### **What is the possible impact of the amendments?**

The broad filing and registration requirements mean that professional lobbyists, professional firms, business corporations and other organizations should be more careful than ever to include lobbying activity record-keeping as an action item when dealing with the federal government knowing that DPOHs will also be keeping detailed records of their communications with lobbyists.

There will be some degree of uncertainty during the period that these new provisions are implemented. Stikeman Elliott would be pleased to assist you in determining whether or not you or your company must file. We will also provide any updates on developments as they become available.

For further information, please contact your Stikeman Elliott representative or Gregory Kane q.c. of our Ottawa office ([gkane@stikeman.com](mailto:gkane@stikeman.com)).

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