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The Federal Lobbying System: *The* Lobbying Act *and the* Lobbyists' Code of Conduct

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Nancy Holmes
Dara Lithwick

Legal and Legislative Affairs Division
Parliamentary Information and Research Service

The Federal Lobbying System: *The* Lobbying Act *and the* Lobbyists' Code of Conduct

(Background Paper)

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THE FEDERAL LOBBYING SYSTEM: THE *LOBBYING ACT* AND THE *LOBBYISTS' CODE OF CONDUCT*

1 INTRODUCTION

The term "lobbying" refers generally to any effort to communicate with legislators or other public officials against or in favour of a specific cause.

Lobbying at the federal level was first governed by the *Lobbyists Registration Act*. It came into force in 1989 and established a registration system intended to foster the public's right to know and to be informed regarding who was trying to influence government policy in Canada. In 2008, following substantive amendments brought about by the *Federal Accountability Act* in 2006, the Act was renamed the *Lobbying Act* because the Act now seeks to regulate the activities of lobbyists rather than simply monitor them by means of a registration system. Currently, more than 5,000 lobbyists are registered to lobby federal public offices. In March 2011, prior to dissolution of the 40th Parliament, the House of Commons Standing Committee on Access to Information, Privacy and Ethics began the five-year mandated review of the *Lobbying Act*.

As well, the *Lobbyists' Code of Conduct*, which came into force in March 1997, sets out ethical standards for lobbyists to follow in order to maintain public confidence in the "integrity, objectivity and impartiality of government decision-making."[1] As such, it complements the disclosure and registration requirements of the *Lobbying Act*. Lobbyists are required to comply with the Code.

This paper provides a review of the legislative history of the *Lobbying Act*[2] and outlines how the Act and the *Lobbyists' Code of Conduct* operate in practice.[3] It also considers the issues raised thus far in the course of the Act's 2011 statutory review.

2 LEGISLATIVE HISTORY

2.1 THE *LOBBYISTS REGISTRATION ACT*

On 30 September 1989, following extensive consultations and considerable debate, the *Lobbyists Registration Act* came into force in Canada.[4] The legislation sought to make transparent the activities of lobbyists without impeding access to government. The Act was a response to the public perception at the time that individuals seeking to influence the government through political or personal contacts were abusing the system. Indeed, between 1965 and 1985, over 20 private members' bills were introduced in the House of Commons on the subject of lobbyist regulation in response to political scandals or public outcry.[5]

It was believed that the enactment of the *Lobbyists Registration Act* would lead to a reliable and accurate source of information on the activities of lobbyists, which would dispel much of the mystery surrounding lobbying and thus remove the atmosphere of conjecture and innuendo that can accompany such activities. The Act required paid

lobbyists to register and disclose certain information through a public registry.[6] Under the Act, the Registrar of Lobbyists was responsible for administering the information disclosure provisions of the Act and maintaining the public registry. The Act did not attempt to regulate lobbyists or the manner in which lobbying was conducted.

The *Lobbyists Registration Act* evolved significantly over time,[7] in large part because of statutory review provisions in the legislation that required periodic parliamentary reviews of its provisions and operation.[8] The last full review was conducted in 2001 by the House of Commons Standing Committee on Industry, Science and Technology. In its report, *Transparency in the Information Age: The "Lobbyists Registration Act" in the 21st Century*, the committee made several recommendations aimed at improving the operation of the Act.[9]

Bill C-15, An Act to amend the Lobbyists Registration Act, responded to some of the major recommendations of the Industry Committee's report. This bill, which received Royal Assent on 11 June 2003, specifically sought to improve investigation and enforcement of the Act, simplify and harmonize the registration requirements for lobbyists, and clarify and improve the language of the Act. For example, Bill C-15 clarified the definition of lobbying in three ways:

- It broadened the scope of activities for which registration was required by removing the expression 'in an attempt to influence' from the Act. This change meant that all communications on matters prescribed in the legislation were now considered lobbying.
- It specified that simple inquiries or requests for information were not considered lobbying.
- It removed the exemption from the requirement for a lobbyist to register when a communication was initiated by a public office holder.[10]

Although Bill C-15 received Royal Assent on 11 June 2003, it did not come into force until 20 June 2005, along with *Regulations Amending the Lobbyists Registration Regulations*. The delay was necessary in order to update the *Lobbyists Registration Regulations* as well as the electronic filing system for online registrations.

Bill C-15 also added section 14.1 to the Act, which specified that a parliamentary review of the provisions and operation of the Act must be undertaken every five years (previous versions of the Act had not required regular periodic reviews). The first review was due to begin in 2010. Following a letter sent by the chair of the House of Commons Standing Committee on Access to Information, Privacy and Ethics to the Leader of the Government in the House of Commons, on 15 December 2010, the House of Commons unanimously adopted a motion to designate the committee to undertake the parliamentary review of the Act in the House of Commons.

2.2 THE *LOBBYING ACT*

As noted earlier, in December 2006, the *Federal Accountability Act* made substantive amendments to the *Lobbyists Registration Act*, including renaming the law the *Lobbying Act*.[11]

The amendments were, in part, designed to implement the recommendations of Justice John Gomery in his 1 February 2006 report of the Commission of Inquiry into the Sponsorship Program and Advertising Activities,[12] a commission into concerns raised in the 2003 report of the auditor general of Canada.[13] In its February 2006 report, the Gomery Commission recommended that the Registrar of Lobbyists should report directly to Parliament on matters concerning the application and enforcement of the *Lobbyists Registration Act*, and the Office of the Registrar of Lobbyists should be provided with sufficient resources to enable it to publicize and enforce the requirements of the Act, including investigation and prosecution of violations of the Act by its own personnel. The Gomery Commission also recommended that the limitation period for investigation and prosecution should be increased from two years to five from the time the registrar becomes aware of an infringement.

Some noteworthy changes brought about by the enactment of the *Lobbying Act* on 2 July 2008 included:

- the replacement of the position of Registrar of Lobbyists with that of Commissioner of Lobbying, an independent Agent of Parliament with expanded investigative powers and an education mandate;
- the identification of a new category of public office holder within the federal government, called Designated Public Office Holder (DPOH), a key decision maker in government;
- the imposition of a five-year, post-employment prohibition on a DPOH becoming a lobbyist once that individual has left office;
- new filing requirements for lobbyists and an obligation, when requested by the Commissioner of Lobbying, for DPOHs or former DPOHs to confirm information that is provided by lobbyists about communications with DPOHs;
- a ban on making or receiving any payment or other benefit that is contingent on the outcome of any consultant lobbyist's activity;[14] and
- extension from 2 to 10 years of the period during which possible infractions or violations under the *Lobbying Act* and the *Lobbyists' Code of Conduct* may be investigated and prosecution may be initiated.

3 THE PRESENT SYSTEM

3.1 THE *LOBBYING ACT*

3.1.1 ADMINISTRATION OF THE ACT: THE COMMISSIONER OF LOBBYING

The *Lobbying Act* replaced the position of Registrar of Lobbyists with that of Commissioner of Lobbying, an independent officer of Parliament responsible for promoting an understanding of, acceptance of and compliance with the Act. The commissioner's mandate includes education, particularly with respect to lobbyists, their clients and public office holders, and some enforcement through limited measures (see section 3.1.5 of this paper, "Offence Provisions and Sanctions"). The Act also provides the commissioner with broad investigatory powers in relation to both the legislation and the *Lobbyists' Code of Conduct*.[15] All investigations are to be conducted in private, and the commissioner must report to Parliament on his or her findings and conclusions after the completion of an investigation. The commissioner is also required to table an annual report before Parliament on the administration of the Act. In addition, a special report may be prepared on any matter of importance that falls within the commissioner's mandate.

Despite enhanced investigatory powers, the commissioner, like the former Registrar of Lobbying, does not have the authority to impose administrative or monetary penalties as alternatives to criminal charges under the Act.[16] The commissioner must cease an investigation and advise the appropriate authorities where he or she has reasonable grounds to believe that a person has committed an offence under this Act or any other Act of Parliament or of a provincial legislature.

3.1.2 LOBBYING IN THE CONTEXT OF THE ACT

3.1.2.1 LOBBYING

The *Lobbying Act*'s preamble provides that free and open access to government is an important matter of public interest, that lobbying public office holders is a legitimate activity, that it is desirable that public office holders and the public be able to know who is engaged in lobbying activities, and that a system for the registration of paid lobbyists should not impede free and open access to government.

The *Lobbying Act* defines activities that, when carried out for compensation, are considered to be lobbying. These activities are detailed in the *Lobbying Act*. Generally speaking, they include communicating with public office holders about changing federal laws, regulations, policies or programs, obtaining a financial benefit such as a grant or contribution, and, in certain cases, obtaining a government contract. As well, in the case of consultant lobbyists (individuals who lobby on behalf of clients), arranging a meeting between a public office holder and another person qualifies as lobbying.[17]

3.1.2.2 Public Office Holders and Designated Public Office Holders

Public office holders, as defined under the Act, are virtually all persons occupying an elected or appointed position in the federal government, including members of the House of Commons and the Senate and their staff.[18] The *Lobbying Act* also contains the definition "designated public office holder." The term refers to key decision makers within government and includes ministers of the Crown, their exempt staff, senior public servants (e.g., deputy or assistant deputy ministers) and other positions designated by regulation (e.g., certain senior members of the Canadian Forces). The Act also treats as a DPOH any member of a prime minister's transition team. DPOHs are subject to post-employment limitations on lobbying, and lobbyists have particular disclosure requirements when meeting with DPOHs.

On 20 September 2010, new regulations entered into force amending the *Designated Public Office Holder Regulations*.[19] The amendments added members of Parliament, senators and certain staff of the Office of the Leader of the Opposition to the list of "designated public office holders."

3.1.2.3 Types of Lobbyists

The *Lobbying Act* applies to paid lobbyists who communicate with federal public office holders on behalf of a third party. Three types of lobbyists are identified by the Act:

- *Consultant lobbyists*. Individuals who lobby on behalf of clients must register as consultant lobbyists.
- *In-house lobbyists (corporate)*. Senior officers of corporations that carry on commercial activities for financial gain must register as in-house lobbyists (corporate) when one or more employees lobby and where the total lobbying duties of all employees would constitute a significant part of the duties of one employee (20% or more).
- *In-house lobbyists (organizations)*. Senior officers of organizations that pursue non-profit objectives must register as in-house lobbyists (organizations) when one or more employees lobby and where the total lobbying duties of all employees would constitute a significant part of the duties of one employee (20% or more).

3.1.3 Five-Year Post-Employment Ban for Designated Public Office Holders

DPOHs, among them members of Parliament and senators, are prohibited by law from lobbying for five years after leaving office.[20] The five-year lobbying ban also applies to persons identified by the prime minister as having provided support and advice to him or her during the transition period from election to swearing-in as prime minister. The five-year period starts from the time the member ceases to carry out his or her functions with the team. Anyone who contravenes this provision commits an offence and is liable on summary conviction to a fine not exceeding $50,000. The commissioner also has the power to make public any offence committed under this

section as well as the name of the offender. The prohibition does not apply to individuals who were DPOHs through employment exchange programs.

A former DPOH may apply to the commissioner for an exemption from the five-year post-employment ban. In determining whether to grant an exemption, the commissioner considers whether doing so would be in keeping with the purpose of the Act and the criteria set out in the Act (i.e., if the applicant was a DPOH for only a short time, or was employed on an acting or administrative basis only, or was employed as a student). The commissioner is required to make public every exemption granted, along with his or her reasons for doing so. Since the provisions of the *Lobbying Act* came into force in 2008, the commissioner has granted four individuals exemptions on the five-year prohibition on lobbying.[21]

The exemption criteria for members of a prime minister's transition team differ from the exemption criteria for other DPOHs. For example, the following factors can be considered for transition team members: the circumstances under which the member left the team, the authority and influence the member possessed while on the team and the degree to which the member's new employer might gain unfair commercial advantage upon hiring the member. Indeed, transition team members are very closely involved in senior government offices – often in the staffing of high-level positions – and they could thus potentially exercise considerable influence over these offices if they were permitted to lobby them within five years of leaving the team.

3.1.4 Disclosure Requirements and the Registry of Lobbyists

3.1.4.1 Initial Return

The *Lobbying Act*, as with the *Lobbyists Registration Act* before it, requires lobbyists to register, in an initial return, all types of communication with public office holders. Information is submitted in the form and manner prescribed by regulation (the *Lobbyists Registration Regulations*); the forms and regulations function as an integral part of the implementation of the *Lobbying Act*. The regulations also set out certain additional information to be disclosed in returns beyond the information set out in the Act. The information includes, but is not limited to, the name of the client or employer, the subject lobbied, the federal institution being lobbied, the lobbying methods used, whether the lobbyist was formerly a public office holder, the public office(s) held, as well as confirmation on whether the lobbyist was a DPOH, and the last date on which they held that position.

3.1.4.2 Monthly Returns

In addition to the initial registration requirement, the *Lobbying Act* contains provisions that require lobbyists to file monthly returns if they carry out oral and arranged communications with DPOHs. Oral and arranged communications include telephone calls, meetings and any other communications that are arranged in advance.

The return must disclose, for each communication that took place in a given month, the date of the communication with a DPOH, the name and title of all DPOHs who were the object of the communication, and the subject of the communication. The

return must be submitted to the Commissioner of Lobbying no later than the 15th day after the end of the month covered by the report.[22]

3.1.4.3 Registry of Lobbyists

Section 9 of the *Lobbying Act* provides the Commissioner of Lobbying with the mandate to establish and maintain a Registry of Lobbyists. The Registry of Lobbyists is considered by the Commissioner of Lobbying to be the primary tool to increase transparency of federal lobbying activities.[23] The registry is a free, publicly accessible web-based database.

Lobbyists must certify the accuracy of information in their returns. These returns are then validated for completeness by the staff in the Office of the Commissioner of Lobbying before being posted in the registry. There is no registration fee for lobbyists.

3.1.5 Offence Provisions and Sanctions

The *Lobbyists Registration Act* contained penalties for non-compliance with the legislation (e.g., failure to register) and for submitting false or misleading information. The *Lobbying Act* added offence provisions for failure to file a requisite return or for a DPOH to make a false or misleading statement in response to a request for information from the commissioner. Anyone convicted of these offences by way of summary conviction is liable to a maximum fine of $50,000 (up from $25,000 under the *Lobbyists Registration Act*) or imprisonment for up to six months, or both. Where proceedings are by way of indictment, the maximum fine is $200,000 (up from $100,000) or imprisonment for up to two years, or both. The Act also provides that anyone convicted of contravening any other provision of the Act, except in relation to the *Lobbyists' Code of Conduct*, will be liable to a maximum fine of $50,000 (up from $25,000). The limitation period for instituting proceedings by way of summary conviction under the Act is not later than 5 years after the commissioner became aware of the facts and not later than 10 years after the offence was committed.[24]

The commissioner may prohibit anyone who has been convicted of an offence under the Act from lobbying for up to two years. The commissioner must be satisfied that the prohibition is necessary in the public interest, and he or she must also take into consideration the gravity of the offence and the existence of any previous convictions. In addition, the commissioner has the power to make publicly available any information related to a person convicted of an offence under the Act, including the person's name, the nature of the offence, the punishment imposed and any lobbying prohibition the commissioner may have imposed.

3.2 The *Lobbyists' Code of Conduct*

In 1995, the *Lobbyists Registration Act* was amended, and at that time, provision was made for a mandatory code of conduct for lobbyists and the submission of an annual report to Parliament on this code. After extensive consultations with all registered lobbyists and with parliamentarians, journalists and academics, review by the House of Commons Standing Committee on Procedure and House Affairs, and publication

in the *Canada Gazette*, the *Lobbyists' Code of Conduct* came into effect on 1 March 1997.[25]

The Code establishes standards of conduct for all lobbyists who communicate with federal public office holders and forms a counterpart to the obligations that federal officials are required to observe in their interactions with the public and with lobbyists. The Code begins with a preamble setting out its purpose and context. This is followed by a series of principles that, in turn, are followed by specific rules. The principles establish the operational parameters of the Code and set the framework through which the Code's goals and objectives are to be attained, but they do not establish precise standards. The rules provide detailed requirements for behaviour in certain situations. The specific obligations or requirements under the Code can be broken down into three categories: transparency, confidentiality and conflict of interest.

The Commissioner of Lobbying is responsible for investigating possible breaches of the Code and, as noted earlier, such investigations must be conducted in private. In February 2007, the introductory message to the Code was amended to provide that an investigation may be triggered by the breach of a principle or a rule of the Code. Previously, the Ethics Counsellor held that only the breach of a rule could trigger an investigation.[26] Where a formal investigation has been conducted, the commissioner shall table a report to Parliament citing the investigation's findings, conclusions and reasons for those conclusions. The *Lobbying Act* does not prescribe penalties for breaches of the Code (nor did the *Lobbyists Registration Act* before it); neither does the *Lobbying Act* specify how Parliament is to respond to a reported breach of the Code. There is also no limitation period for pursuing breaches of the Code.

3.2.1 RULE 8 OF THE CODE: IMPROPER INFLUENCE

Rule 8 of the Code specifies that "[l]obbyists 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."

In 2002, the then-Ethics Counsellor was asked to examine the application of the *Lobbyists' Code of Conduct* (in particular Rule 8) to a situation where registered lobbyists planned to lobby a federal department while involved in assisting the minister of that department on a possible bid for the leadership of a federal party. As a result of this situation, the Ethics Counsellor issued guidelines establishing a high threshold for "improper influence." Entitled *Rule 8 – Improper Influence – Lobbyists and Leadership Campaigns*, these guidelines took the position that only the inappropriate use of the lobbyists' authority or trust of the public office holder was considered an improper influence. A lobbyist would be considered to have exerted "improper influence" when interfering with a public office holder in making a decision or judgment, or taking an action, such that the public office holder would effectively be deprived of his or her free will.[27]

In 2009, the Federal Court of Appeal held that an interpretation of Rule 8 based on the 2002 guidelines was unreasonable.[28] The Court explained that Rule 8 is principally a rule that prohibits lobbyists from placing public office holders in a conflict

of interest. As a result, the words "improper influence" must be understood as an elaboration of, and not a limitation on, the notion of "conflict of interest." The Court's interpretation broadened the scope of circumstances in which Rule 8 may apply.[29] The Federal Court of Appeal summarized the concept of improper influence in paragraph 52 of the decision:

> Improper influence has to be assessed in the context of conflict of interest, where the issue is divided loyalties. Since a public office holder has, by definition, a public duty, one can only place a public office holder in a conflict of interest by creating a competing private interest. That private interest, which claims or could claim the public office holder's loyalty, is the improper influence to which the Rule refers.

Following the Federal Court of Appeal's decision, Commissioner of Lobbying Karen Shepherd issued a general guidance (a guideline) for lobbyists on the application of Rule 8 of the *Lobbyists' Code of Conduct*, replacing the 2002 guidelines. According to the November 2009 guidance,[30] a lobbyist may be in breach of Rule 8 if the lobbyist's actions "create a real conflict of interest for a public office holder, or the appearance of a conflict of interest for a public office holder." The Commissioner of Lobbying has interpreted a real or apparent conflict of interest as follows: "A conflict of interest can be created by the presence of a tension between the public officer holder's duty to serve the public interest and his or her private interest or obligation created or facilitated by the lobbyist." Determinations must be made on a case by case basis. According to the 2009 guidance, a competing obligation or private interest could arise from factors such as:

- the provision of a gift, an amount of money, a service or property without an obligation to repay;
- the use of property or money that is provided without charge or at less than its commercial value; and
- political activities.

In June 2010, the National Constitutional and Human Rights Law Section of the Canadian Bar Association (CBA) called the 2009 guidance, in particular the reference to political activities, an unconstitutional violation of freedom of expression as guaranteed in the *Canadian Charter of Rights and Freedoms*.[31] According to then-CBA president Kevin Carroll, the guidance was "tantamount to a complete ban on political activity." He further stated that "(n)o one should have to choose between being able to do their job and engaging in legal political activities that strengthen Canada's democracy."[32]

Following requests from lobbyists for additional clarification about political activities as a result of the 2009 guidance, the Commissioner released a document in August 2010 clarifying what types of political activities could put a lobbyist in violation of Rule 8 of the *Lobbyists' Code of Conduct*.[33]

In the 2010 document, the Commissioner outlined the sorts of political activities in which a lobbyist would not be in breach of Rule 8, would potentially be in breach of Rule 8, and would likely be in breach of Rule 8.

Examples in which there would be no breach include instances where the lobbyist has very little or no interaction with a public office holder or, in cases with a high level of interaction, where the political activity is limited to tasks such as "voting in an election, placing a sign on a lawn, purchasing a ticket to a fundraising event such as a barbeque or golf tournament, or donating money to an election campaign within the limits established in the *Canada Elections Act*." Activities in which there is a higher risk of being in breach of Rule 8 include those where there is close interaction with the public office holder, such as "being a member of a public office holder's constituency association or limited participation in a campaign for the election of the public office holder." Finally, situations in which there would be a likely violation of Rule 8 include "being a member of the board of directors of a public office holder's constituency association, or organizing a fundraising activity for the benefit of the public office holder or their constituency association, or chairing a campaign for the election of the public office holder."

During the campaign for the election of the 41st Parliament, a number of lobbyists expressed frustration with how the 2009 guidance and subsequent clarifications issued in August 2010 continued to be vague and prevented them from participating in the electoral process to the extent to which they desired, in possible violation of their Charter rights.[34]

4 STATUTORY REVIEW OF THE *LOBBYING ACT*

As discussed earlier, Bill C-15 added section 14.1 to the Act, which mandates that a parliamentary review of the Act must be undertaken every five years:

> 14.1 (1) A comprehensive review of the provisions and operation of this Act must be undertaken, every five years after this section comes into force, by the committee of the Senate, of the House of Commons, or of both Houses of Parliament, that may be designated or established for that purpose.
>
> (2) The committee referred to in subsection (1) must, within a year after the review is undertaken or within any further period that the Senate, the House of Commons, or both Houses of Parliament, as the case may be, may authorize, submit a report on the review to Parliament that includes a statement of any changes to this Act or its operation that the committee recommends.

Section 14.1 came into force on 20 June 2005.[35]

On 15 December 2010, during the 3rd Session of the 40th Parliament, the House of Commons unanimously adopted a motion to designate the Standing Committee on Access to Information, Privacy and Ethics as the committee charged with conducting the parliamentary review of the *Lobbying Act* in the House of Commons.[36]

Prior to dissolution of the 40th Parliament, the committee had the opportunity to hear testimony from the Commissioner of Lobbying on two occasions: on 14 December 2010, in anticipation of the statutory review; and on 23 March 2011, the formal beginning of the review, when the Commissioner made several recommendations to amend the Act in order to improve its functioning.

During her appearance before the committee on 14 December 2010, lobbying commissioner Karen Shepherd shared her views on the issues that the committee might wish to consider in the context of the legislative review. She noted several areas of the Act that could be further explored; namely, the enforcement mechanisms in the Act, the scope of application of the Act, and the disclosure requirements under the Act.

- **Enforcement:** "The only enforcement option at my disposal for a breach of the act is a referral to the Royal Canadian Mounted Police. Penalties were increased when the *Lobbying Act* came into force, but so far no one has been charged. It appears that both the RCMP and the federal prosecutor have a high threshold for initiating a prosecution. As a result, prosecutions have not been commenced in 10 of the 11 cases referred to the RCMP since 2005." [37] She then added, "For less serious transgressions, such as late filing of monthly communication reports, I do not believe the public interest would be well served if I were to refer such a file to the RCMP. In my view, such an offence does not warrant a criminal investigation. However, late filings do negatively impact transparency, and habitual late filings may warrant a type of sanction, such as an administrative monetary penalty, which is not currently available under the *Lobbying Act* but exists in some provincial lobbying legislation and in other federal legislation." [38]
- **Scope of application:** "Another consideration is whether the legislation is capturing the individuals it was intended to regulate. Currently the act does not require the registration of organizations or corporations whose employees do not collectively spend a significant part of their duties on lobbying federal public office holders or who are not paid to do so. In considering these issues, I would put in a word of caution about the potential burden changing these provisions may represent for some. In that respect, it is important to keep in mind the principles on which the act is founded, in particular that free and open access to government is an important matter of public interest." [39]
- **Disclosure requirements:** "The information being disclosed in monthly communication reports may also be worth reviewing. Currently, monthly communication reports do not always indicate who is actually at the meeting. In the case of in-house registrations, for instance, only the senior reporting officer is listed in a monthly report, rather than the lobbyists who are present at the meeting. While there is an argument for requiring that senior decision-makers in corporations and organizations must be accountable for filing monthly communication reports on behalf of their firms, I believe it would be more transparent to also include the names of those actually engaging in lobbying activities and meeting with DPOHs." She added that "I would also like to submit that the determination of what is oral and arranged communication is not always as straightforward as one would think, and deserves some attention." [40]

Later, during her opening remarks to the committee on 23 March 2011, the Commissioner noted that while the federal lobbying system is working rather well, amendments could nonetheless improve its functioning: "Let me begin by saying that in my view several aspects of the *Lobbying Act* are working to increase transparency. More than 5,000 lobbyists are registered to lobby federal public office holders, and every month hundreds of communications with DPOHs are disclosed by lobbyists. However, based on my experience, key amendments to the act would capture a greater share of lobbying activities and enable me to enforce it more decisively." [41]

In a companion document titled *Administering the* Lobbying Act*: Observations and Recommendations Based on the Experience of the Last Five Years*,[42] the Commissioner summarized her nine recommendations for reform of the Act as thus:

- **Recommendation 1:** The provisions regarding the "significant part of duties" should be removed from the *Lobbying Act* and consideration should be given to allowing limited exemptions.
- **Recommendation 2:** The Act should be amended to require that every in-house lobbyist who actually participated in the communication be listed in monthly communication reports, in addition to the name of the most senior officer.
- **Recommendation 3:** The prescribed form of communications for the purposes of monthly communication reports should be changed from "oral and arranged" to simply "oral."
- **Recommendation 4:** The Act should be amended to require lobbyists to disclose all oral communications about prescribed subject-matters with DPOHs, regardless of who initiates them.
- **Recommendation 5:** The Act should be amended to make explicit the requirement for consultant lobbyists to disclose the ultimate client of the undertaking, as opposed to the firm that is hiring them.
- **Recommendation 6:** The provision of an explicit outreach and education mandate should be maintained in the *Lobbying Act* to support the Commissioner's efforts to raise awareness of the legislation's rationale and requirements.
- **Recommendation 7:** The Act should be amended to provide for the establishment of a system of administrative monetary penalties for breaches of the Act and the Code, to be administered by the Commissioner of Lobbying.
- **Recommendation 8:** The requirement for the Commissioner to conduct investigations in private should remain in the *Lobbying Act*.
- **Recommendation 9:** An immunity provision, similar to that found in sections 18.1 and 18.2 of the *Auditor General Act*, should be added to the *Lobbying Act*.

5 CONCLUSION

In its 2001 report on the *Lobbyists Registration Act*, the House of Commons Standing Committee on Industry, Science and Technology concluded its study by describing the lobbyists registration system as a "work in progress." The committee noted that, just as our thinking must continue to evolve on the subjects of transparency and access to government, so too must our legislative framework remain flexible and responsive to change. This observation rings true some 10 years later. Further, the parliamentary reviews of the *Lobbying Act*, now mandated to take place every five years, should help the Act to stay modern as our parliamentary democracy continues to evolve.

NOTES

1. Office of the Commissioner of Lobbying of Canada, "Introductory Message," *The Lobbyists' Code of Conduct*.
2. *Lobbying Act*, R.S.C., 1985, c. 44 (4th Supp.), as amended.
3. Office of the Commissioner of Lobbying of Canada, "Lobbyists' Code of Conduct," *Lobbyists' Code of Conduct*.
4. Essentially, two principal viewpoints on how to regulate the lobbying industry in Canada emerged from a series of hearings on the subject held by the House of Commons Standing Committee on Elections, Privileges and Procedure in 1986–1987. Some argued against a registration system for lobbyists, asserting that it would involve too much paperwork and high administrative costs, and would interfere with client confidentiality. They suggested that a system of self-regulation by the lobbying industry would be a more cost-effective and less objectionable means of achieving ethical standards of behaviour. Others, however, contended that a registration system would endow lobbying with a sense of legitimacy. It would ensure the public's right to know and be informed regarding who is trying to influence government policy, thereby ensuring the health of Canadian democracy. The standing committee sided with the proponents of a registration system and, six months after the report had been tabled, the government introduced Bill C-82, The Lobbyists Registration Act.
5. House of Commons, Standing Committee on Access to Information, Privacy and Ethics, *Evidence*, 1st Session, 38th Parliament, 14 June 2005, 0905 (Karen Shepherd, Director, Lobbyists Registration Branch, Industry Canada).
6. Only persons who are paid to communicate with federal public office holders are subject to the Act (see section 3.1.2 of this paper, "Lobbying in the Context of the Act"). Volunteers, for example, are not required to register pursuant to the legislation.
7. Initially, the reporting requirements for registered lobbyists were so few that many people argued that the *Lobbyists Registration Act* was simply a "business card" law. The Act was subsequently amended in 1995, 1996, 2003, 2004 and 2006.
8. For more on what took place during these parliamentary reviews, see Paul Pross, *The* Lobbyists Registration Act*: Its Application and Effectiveness*, Research paper prepared for the Commission of Inquiry into the Sponsorship Program and Advertising Activities, Phase 2 report, *Restoring Accountability: Recommendations*, Public Works and Government Services Canada, Ottawa, 1 February 2006.
9. House of Commons, Standing Committee on Industry, Science and Technology, *Transparency in the Information Age: The Lobbyists Registration Act in the 21st Century*, Ottawa, June 2001.
10. Office of the Commissioner of Lobbying of Canada, *Administering the* Lobbying Act*: Observations and Recommendations Based on the Experience of the Last Five Years*, Ottawa, 23 March 2011.
11. *Federal Accountability Act*, S.C. 2006, c. 9.
12. Commission of Inquiry into the Sponsorship Program and Advertising Activities, "Advertising, Sponsorship Initiatives and Lobbying," Chapter 9, in *Restoring Accountability: Recommendations* (2006), pp. 171–174.

13. Commissioner Gomery was given a two-part mandate with power issued under the *Inquiries Act*. The first part of the mandate was to investigate and report on questions and concerns addressed in the *2003 Report of the Auditor General of Canada* relating to the sponsorship program and advertising activities of the Government of Canada. The second part of the mandate was for Commissioner Gomery to make any recommendations that he considered advisable, based on his findings – particularly with regards to accountability, governance, compliance and enforcement.

14. A consultant lobbyist is an individual (for example, a lawyer, accountant, public relations specialist or other professional) who is paid to lobby on behalf of a client.

15. The former Registrar of Lobbyists had no investigatory powers under the *Lobbyists Registration Act*, although he could conduct investigations into possible breaches of the *Lobbyists' Code of Conduct*.

16. Under the *Lobbyists Registration Act*, when staff from the Office of the Registrar of Lobbyists received a request or complaint from the general public, media, a member of Parliament or an organization, or when officials of the branch believed there was a possible contravention of the Act or Code, the branch would assemble and review factual evidence to determine whether a formal investigation was warranted. Where there was an indication of a possible contravention of the Act, the matter was turned over to the RCMP. As well, the Registrar of Lobbyists was required to notify police forces where there were reasonable grounds to believe that a criminal offence had been committed under the Act. No charges were ever laid for contraventions of the *Lobbyists Registration Act*, leading some observers to conclude that the legislation could not be adequately enforced.

17. Office of the Commissioner of Lobbying of Canada, *The Lobbying Act – A Summary of New Requirements*, Ottawa, June 2008.

18. The Act defines "public office holder" as any officer or employee of the federal government, including members of the Senate or House of Commons and members of their staff, Governor in Council appointees, ministers, officers, directors or employees of any federal board, commission or tribunal, members of the Canadian Armed Forces and members of the Royal Canadian Mounted Police.

19. *Designated Public Office Holder Regulations*, SOR/2008-117, as amended by SOR/2010-192, s. 1.

20. Prior to the *Federal Accountability Act*, the *Conflict of Interest and Post-employment Code for Public Office Holders* provided that former ministers, senior public servants and designated ministerial staff could not act as consultant lobbyists or accept employment as in-house lobbyists for a period of five years after leaving office. Although public office holders were bound by this obligation under the Code, the Code did not have the force of law.

21. Office of the Commissioner of Lobbying of Canada, *Exemptions granted under the Lobbying Act*.

22. Office of the Commissioner of Lobbying of Canada (2008).

23. Office of the Commissioner of Lobbying of Canada (2011), pp. 11–19.

24. Under the *Lobbyists Registration Act*, proceedings by way of summary conviction could not be instituted later than two years after the time when the subject matter of the proceedings arose.

25. Office of the Commissioner of Lobbying of Canada, "Introductory Message," *Lobbyists' Code of Conduct*.

26. In 1994, the Office of the Ethics Counsellor was established within Industry Canada. The Ethics Counsellor was a Governor in Council appointee who was required to provide the minister of Industry with an annual report on the exercise of his or her powers, duties and functions in relation to the *Lobbyists' Code of Conduct*. The report to the minister was then transmitted to Parliament. The Ethics Counsellor's mandate at that time also included the administration of the *Conflict of Interest and Post-Employment Code for Public Office Holders*.

27. Office of the Commissioner of Lobbying of Canada, *Questions and Answers for the Commissioner's Guidance on Conflict of Interest – Rule 8 (Lobbyists' Code of Conduct)*, November 2009.

28. *Democracy Watch* v. *Campbell and Attorney General of Canada (Registrar of Lobbyists)*, 2009 FCA 79.

29. Office of the Commissioner of Lobbying of Canada (2009).

30. Office of the Commissioner of Lobbying of Canada, *Commissioner's Guidance on Conflict of Interest – Rule 8 (Lobbyists' Code of Conduct)*.

31. Canadian Bar Association, National Constitutional and Human Rights Law Section, *Opinion Respecting the Constitutionality of Rule 8 of the* Lobbyists' Code of Conduct, Ottawa, June 2010.

32. Canadian Bar Association, "CBA says Commissioner's Guidance on Rule 8 of the *Lobbyists' Code of Conduct* is unconstitutional," News release, 15 July 2010.

33. Office of the Commissioner of Lobbying of Canada, "Clarifications about political activities in the context of Rule 8," *Code of Conduct*, August 2010.

34. Bea Vongdouangchanh, "Lobbyists 'pissed' they can't work on election campaign, say it's against their Charter rights," *The Hill Times* [Ottawa], 4 April 2011; CBC News, "Lobbyists seek clarity on election campaigning," 5 April 2011.

35. Privy Council Office, PC Number: 2005-0919 (SI/2005-0049), 17 May 2005.

36. House of Commons, *Journals*, 3rd Session, 40th Parliament, No. 118, 15 December 2010: "By unanimous consent, it was ordered, – That the Standing Committee on Access to Information, Privacy and Ethics be the committee designated for the purposes of section 14.1 of the *Lobbying Act*."

37. House of Commons, Standing Committee on Access to Information, Privacy and Ethics, *Evidence*, 3rd Session, 40th Parliament, 14 December 2010, 1535 (Karen Shepherd, Commissioner of Lobbying, Office of the Commissioner of Lobbying of Canada).

38. Ibid., 1540.

39. Ibid.

40. Ibid.

41. House of Commons, Standing Committee on Access to Information, Privacy and Ethics, *Evidence*, 3rd Session, 40th Parliament, 23 March 2011, 1530 (Karen Shepherd, Commissioner of Lobbying, Office of the Commissioner of Lobbying of Canada).

42. Office of the Commissioner of Lobbying of Canada (2011), p. 7.