Office of the Commissioner of Lobbying of Canada

Commissariat au lobbying du Canada

Administering the *Lobbying Act*

Observations and Recommendations
Based on the Experience of the Last Five Years

Report presented by the Commissioner of Lobbying
to the Standing Committee on Access to Information, Privacy and Ethics

Updated December 13, 2011

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Foreword

The attached paper, "Administering the *Lobbying Act* – Observations and Recommendations Based on the Experience of the Last Five Years," was prepared for presentation to the House of Commons Standing Committee on Access to Information, Privacy and Ethics to assist with its legislative review. It summarizes the experience of the last five years in administering the legislation and offers nine recommendations for improving or maintaining the existing lobbyist registration regime. The document, originally presented to Committee on March 23, 2011, contains up-to-date statistics and an additional section providing information about three administrative monetary penalty schemes (Appendix A).

Message from the Commissioner of Lobbying

As the Commissioner of Lobbying, it is my responsibility to administer the *Lobbying Act* (the Act) and the *Lobbyists' Code of Conduct* (the Code). The Act and the Code are intended to ensure that federal lobbying activities are transparent and that lobbyists conduct themselves with the highest ethical standards. I am guided by the principles stated in the preamble of the Act in fulfilling my mandate.

- Free and open access to government is an important matter of public interest.
- Lobbying public office holders is a legitimate activity.
- It is desirable that public office holders and the general public be able to know who is engaged in lobbying activities.
- The system for the registration of paid lobbyists should not impede free and open access to government.

The House of Commons Standing Committee on Access to Information, Privacy and Ethics has been tasked with reviewing the *Lobbying Act*. In support of the legislative review process, I am pleased to share this paper, which provides an overview of my experience, and that of my predecessor, the Registrar of Lobbyists, in administering the lobbying legislation, the related Regulations and the *Lobbyists' Code of Conduct* since 2005. In addition, I am providing my recommendations for improvements to the Act for consideration in the legislative review, regarding clarifying aspects of the registration, inclusion and disclosure procedures, and penalties for breaches of the Act.

The first *Lobbyists Registration Act*, which came into force in 1989, represented a step forward in ensuring transparency of lobbying activities conducted at the federal level. This legislation focused primarily on the registration of lobbyists by introducing basic disclosure requirements. Subsequent versions of the legislation changed the focus from simple registration to more elaborate regulation of lobbyists. Over time, the lobbying legislative framework has been strengthened considerably, through the development of a *Lobbyists' Code of Conduct,* the creation of an independent Commissioner of Lobbying with greater powers to investigate, a broadening of the range of information that must be disclosed about lobbying activities, and penalties for breaches of the Act and the Code.

A new sub-category of public office holders, referred to as 'designated public office holders' was created as part of the last series of legislative amendments, and lobbyists must report certain communications they have with them every month. Publicizing communications with designated public office holders, who are senior decision makers at the federal level, further enhances the transparency of lobbying activities. The five-year prohibition on lobbying applied to designated public office holders also ensures that former high-level decision makers do not use advantages gained (including contacts made) during their time as elected or appointed officials for personal gain as paid lobbyists.

In my view, many aspects of the Act are working well and as originally intended by Parliamentarians. More than 5,000 lobbyists are currently registered to lobby federal public office holders and, every month, hundreds of communications with designated public office holders are disclosed by lobbyists. Not surprisingly, this number has increased significantly since Members of the House of Commons and Senators were designated by way of regulation in September 2010. Information relating to these communications is available publicly and consulted regularly by the public, the media and public office holders.

I believe that the vast majority of lobbyists want to be in compliance with not only the letter, but also with the spirit, of the Act. In that regard, it is encouraging to note that a growing number of lobbyists are coming forward to voluntarily disclose potential breaches of the Act.

However, it is becoming increasingly clear to me that amendments are required to address shortcomings in some key aspects of the Act. For instance, the Act prescribes significant penalties in the form of fines and jail terms for offences, yet no charges have ever been laid. My experience in that respect points toward the need for a complementary or alternative penalty model, which would offer penalty options somewhere between my practice of employing a system of education, correction and monitoring for less serious transgressions and the more severe, time-consuming, and costly Reports to Parliament and referrals to a peace officer that are provided for by the Act.

This paper summarizes the experience of the last five years in administering the federal lobbying legislation – the *Lobbying Act*, since 2008, and the *Lobbyists Registration Act*, before 2008. The document is organized around the three main components of my mandate: the Registry of Lobbyists, Education and Outreach activities, and Reviews and Investigations. Each section concludes with a brief assessment of how the legislation is working, highlighting some of the lessons that have been learned and providing recommendations for changes that I respectfully submit to Parliamentarians to consider in their review of the *Lobbying Act*.

Karen E. Shepherd
Commissioner of Lobbying

Summary of Recommendations

The following are the nine recommendations listed in the document.

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*.

Overview of Legislative Amendments

The 2005 amendments

In June 2005, an amended *Lobbyists Registration Act* came into force. These amendments both strengthened and simplified the disclosure requirements for lobbyists. Most importantly, the definition of lobbying was clarified in three ways:

- First, the scope of activities for which registration was required was broadened by removing the expression 'in an attempt to influence' from the Act. This meant that all communications on subject-matters prescribed in the legislation were now considered lobbying;
- Second, the amendments specified that simple inquiries or requests for information were not considered lobbying;
- Third, the amendments removed the exemption from the requirement to register when a communication is initiated by a public office holder.

The disclosure requirements for lobbyists were also amended in several ways. A new renewal cycle was introduced, and all categories of lobbyists were now required to update or renew their registration every six months. Disclosure requirements for corporate lobbyists and lobbyists employed by non-profit organizations were aligned so that the most senior officer of either the corporation or the non-profit organization was now responsible for filing the registration and listing employees who engaged in lobbying activities. More detailed information was also required in the registrations. Former public office holders engaged in lobbying were also required to provide information on previous positions held in the federal government.

In terms of enforcement, the amended legislation now required the Registrar to notify a peace officer having jurisdiction to investigate the alleged offence if he had reasonable grounds to believe that a breach of the Act had occurred.

The 2008 amendments

In July 2008, the *Lobbying Act* came into force, replacing the *Lobbyists Registration Act* and bringing significant changes to the federal lobbyists' registration regime.

The position of Commissioner of Lobbying was created as an independent Agent of Parliament. Under the Act, the nomination of the Commissioner requires consultation with the leader of every recognized party in the Senate and the House of Commons and approval of the appointment by resolution of the Senate and the House of Commons. Upon appointment, the Commissioner of Lobbying holds office during good behaviour for a term of seven years and is eligible for further terms, each not to exceed seven years. The Commissioner may be removed for cause by the Governor in Council at any time on address of the Senate and House of Commons. The Commissioner reports directly to Parliament through the Speakers of both Houses.

The *Lobbying Act* provides the Commissioner with a formal mandate for education and outreach and expanded investigatory powers, including the capacity to investigate breaches of the Act.

The Act also created a sub-category of public office holders, to be known as 'designated' public office holders (DPOHs) and lobbyists were now required to disclose certain oral and arranged communications with DPOHs on a monthly basis. Under the Act, former DPOHs also became subject to a five-year prohibition on lobbying.

Other key changes that were introduced in 2008 include:

- An increase in monetary penalties and potential jail terms for breaches of the Act and the ability to prohibit those convicted of an offence under the *Lobbying Act* from lobbying for up to two years;
- A ban on contingency fees; and
- An extension of the limitation period from two to ten years on the ability to pursue allegations of breaches of the *Lobbying Act*.

The Registry of Lobbyists

The Registry of Lobbyists is the primary tool to increase the transparency of federal lobbying activities.

Section 9 of the *Lobbying Act* provides the Commissioner of Lobbying with the mandate to establish and maintain a Registry of Lobbyists. The Act sets out the disclosure requirements for lobbyists, while the *Lobbyists Registration Regulations* prescribe the form and manner in which lobbyists must register their activities when they intend to communicate with federal public office holders on certain subjects. The Registry is a web-based database that is publicly accessible 24 hours a day, seven days a week.

The Registry contains detailed information about lobbyists and their activities, including:

- Who is paid to lobby for which firms, corporations, organizations or associations;
- Which Government of Canada departments or agencies are being contacted; and
- What the lobbying activities are about, including a general description of the subject-matter, and details such as the names and descriptions of the specific legislative proposals, bills, regulations, policies, programs of interest and grants, contributions or contracts sought.

Lobbyists must also provide information regarding:

- Any formerly held federal public offices; and
- Certain oral and arranged communications with designated public office holders.

The information submitted in the registration is certified for accuracy by lobbyists and is validated for completeness by the staff in the Office of the Commissioner of Lobbying (the Office), before it is posted in the Registry of Lobbyists. There is no registration fee for lobbyists and the public can search the Registry free of charge.

There are currently more than 5,000 individuals listed as active lobbyists in the Registry of Lobbyists. The table below contains the number of registered lobbyists by type over the last few years.

Table 1
Number of Individuals Listed as Active Lobbyists, by Type of Lobbyists
2006-2011 (as of March 31 of each year)

Type of Lobbyists	2006	2007	2008	2009	2010	2011
Consultant	732	860	867	873	753	814
In-House (Organizations)	2,306	2,539	2,439	2,936	2,725	2,507
In-House (Corporations)	1,809	1,882	1,754	1,817	1,791	1,808
Total	**4,847**	**5,281**	**5,060**	**5,626**	**5,269**	**5,129**

Broadening the scope of the legislation

In 2005, a key amendment to the *Lobbyists Registration Act* was the removal of the words 'in an attempt to influence' from the definition of registrable communications. This change was intended to simplify the definition of lobbying by focusing more directly on 'communications' between lobbyists and federal public office holders regarding specific subject-matters prescribed by the legislation. It broadened the definition of lobbying and resulted in more activities being captured by the legislation, and therefore increased the range of 'registrable' communications. It also had an impact on the number of organizations and corporations having to register. With the removal of the concept of 'influence', organizations and corporations that 'communicated' with federal public office holders on registrable topics and met the threshold for registration (i.e. the lobbying activities of all employees added up to the equivalent of a significant part of one person's duties) were now required to submit a registration, whether they were 'attempting to influence' someone or not.

The scope of the legislation, in terms of who was required to register, remained unchanged with the coming into force of the *Lobbying Act* in 2008.

Making registration requirements more consistent

Prior to 2005, there were two types of in-house lobbyists (corporations and organizations) with differing registration requirements. The 2005 amendments to the legislation resulted in changes to registration requirements that provided consistency between the two types of in-house lobbyists. Prior to the amendments, in-house lobbyists (corporations) were required to file their own individual registration once they individually reached the threshold set out in the Act with respect to the 'significant part of the duties' test. In contrast, the most senior officer of a non-profit organization was responsible for filing a registration on behalf of the organization, when cumulative lobbying activities conducted

by his or her employees represented a 'significant part' of the equivalent of one person's duties.

The amendments aligned the registration requirements of in-house lobbyists (corporations) with those of in-house lobbyists (organizations), removing the requirement for in-house lobbyists (corporations) to file individual registrations. As was the case for organizations, the most senior officer in a corporation was now responsible for filing the registration on behalf of the corporation, and was required to list employees engaged in lobbying activities. This provided for a more consistent treatment of all types of lobbyists, and was intended to ensure that the accountability for the actions of lobbyists rested with the highest-level corporate representative.

The 2008 amendments to the legislation did not modify these provisions.

Table 1 above indicates that, since 2006, the number of lobbyists has remained relatively stable in each of the categories.

Increasing the disclosure requirements

Legislative amendments in both 2005 and 2008 introduced additional reporting requirements for lobbyists.

Beginning in 2005, lobbyists were required to disclose previously-held federal public offices.

In 2008, the *Lobbying Act* introduced the requirement for lobbyists to report certain communications with 'designated' public office holders (DPOHs), a newly created sub-category of public office holders. The Act defines DPOHs as senior federal government decision-makers, including ministers, their staff, deputy ministers and assistant deputy ministers. The Act also gave the Governor in Council the authority to further designate positions as DPOH by way of regulation. In July 2008, eleven positions were so designated, including seven senior positions in the Canadian Armed Forces, two classes of positions in the Privy Council Office, and the Comptroller General of Canada. In September 2010, the Regulations were amended to expand the DPOH sub-category to include Members of the House of Commons and Senators.

Under the *Lobbying Act*, registered lobbyists are required to report, on a monthly basis, certain communications with DPOHs, including the following information:

- The name of the consultant lobbyist, or most senior officer in the corporation or organization;
- The name of the DPOH who was the object of the communication;
- The subject-matter of the communication; and
- The date of the communication.

A communication with a DPOH must be disclosed by a lobbyist in a monthly communication report if it is both 'oral' and 'arranged', about a registrable activity, and requested by the lobbyist. When a communication is initiated by a DPOH, it must only be disclosed by the lobbyist if it concerns the awarding of a grant, contribution or other financial benefit, or the awarding of a contract. It should be noted that an initial registration is required for all registrable communications regardless of who initiates it.

The introduction of monthly communication reports has made available a wealth of new information regarding actual communications between lobbyists and senior federal government decision-makers. Monthly communication reports provide timely information on who is lobbying which high-level public office holder, and on what subject-matter. These reports increase transparency in that they provide a more complete picture of lobbying activities actually conducted at the federal level.

The provisions that prescribe what information is to be disclosed in monthly communication reports may however be worth reviewing. Currently, monthly communication reports for in-house lobbyists do not indicate who was actually at the meeting. Only the Senior Officer responsible for filing the initial registration is listed in a monthly communication report, rather than the lobbyists who were actually present at the meeting.

Under the *Lobbying Act*, the most senior officers for organizations and corporations are responsible for filing monthly communication reports on behalf of their corporation or organization. However, it may be argued that greater transparency would result from disclosing the names of those actually engaged in lobbying activities and meeting with designated public office holders, in addition to the name of the Senior Officer. The Senior Officer should remain responsible, however, for filing the monthly communication reports.

It is also a challenge to determine when a communication is an oral and 'arranged' communication. The experience of administering this provision has shown that the concept of 'arranged in advance' creates significant confusion among both lobbyists and designated public office holders in terms of determining which communications should be disclosed publicly on a monthly basis. The inclusion of all 'oral' communications, whether or not they are 'arranged' in advance, would also positively impact on transparency since so-called 'chance' meetings or other communications about registrable subject-matters between lobbyists and DPOHs would now have to be reported.

Since July 2008, more than 22,000 monthly communication reports have been filed by lobbyists. Lobbyists submitted an average of approximately 625 reports per month from July 2008 to September 2010. When the category of DPOH was expanded in September 2010 to include parliamentarians, the average number of monthly communication reports increased to more than 1,100.

All registrations are validated for completeness by the Office of the Commissioner of Lobbying before being posted on the Registry. Monthly communication reports are

published directly in the Registry when certified by the registrants. However, a sample of communication reports is verified every month to monitor accuracy.

Prior to 2008, registrants were required to update their registrations every six months. Since 2008, registrants have been required to update their registrations each month if any information must be corrected, if additional information needs to be added (i.e., a new department is being lobbied), or if the undertaking has been terminated. If five months have elapsed since a change was last made to the initial registration and no monthly communication report was filed, registrants must re-submit their registration to re-certify the information it contains.

A new trend is also emerging with respect to the disclosure of information about clients in registrations. Some consultant lobbyists are being 'sub-contracted' by lobbying firms to undertake lobbying activities and represent a specific client. Currently, the Act does not clearly indicate that lobbyists should disclose the actual interest they represent. Rather, it asks them to disclose the 'client' which could be interpreted as the consulting firm which has, in fact, hired the lobbyist. The Office has adopted the practice of requiring lobbyists, when listing a consulting firm as the client, to also indicate the actual client whose interests they are ultimately representing.

Individuals and activities covered by the *Lobbying Act*

Another issue creating some challenges with respect to registration (and enforcement) is that compliance with the Act does not necessarily require registration. The two most obvious examples of this are corporations and organizations that do not meet the 'significant part of duties' test set in the Act, and those who are not paid since the Act only applies to lobbying activities undertaken 'for payment'.

The concept of 'significant part of duties' is present in the *Lobbying Act*, and the lobbying legislation of many jurisdictions in Canada. The concept is intended to provide a threshold below which registration of lobbying activities by for-profit corporations or not-for-profit organizations is not required under the Act. However, the concept tends to be interpreted differently depending on the jurisdiction. In all cases, the concept was introduced to ensure that organizations and corporations that are lobbying 'significantly' are captured by the legislation, while not imposing too onerous a registration requirement on those that only 'occasionally' undertake lobbying activities.

At the federal level, the 'significant part of duties' provisions has long been interpreted as 20 percent of one person's duties. With the coming into force of the *Lobbying Act*, the provisions have been interpreted to mean 20 percent of one person's duties over a one-month period. This means that organizations and corporations must register when combined lobbying activities conducted by all employees reach the equivalent of 20 percent of one employee's duties over a one-month period.

The Commissioner is of the view that there are challenges in enforcing the 'significant part of duties' provisions of the *Lobbying Act*. This is all the more problematic given that the concept is applied in a number of areas.

The most obvious is that the provisions affect the 'coverage' of the legislation. Does the legislation capture the individuals it was intended to regulate? Currently, the Act does not require the registration of corporations and organizations whose employees do not spend, collectively, 'a significant part of their duties' on lobbying federal public office holders. Many organizations and corporations who lobby federal public office holders are therefore not required to file a registration to be in compliance with the *Lobbying Act*. An unknown number of lobbying activities are therefore not disclosed publicly. Transparency is further reduced given that corporations or organizations that do not have to file an initial registration, are also not required to file a monthly communication report when their employees meet with designated public office holders (DPOHs).

Removing the 'significant part of duties' provisions from the Act would clearly broaden the scope of the legislation and facilitate the enforcement of the remaining registration requirements, since all organizations and corporations would potentially be required to register their lobbying activities. Removing the threshold to register could, however, create a cost to accessing government that some corporations or organizations might find onerous.

The 'significant part of duties' provision is also perceived by some as a way for individuals to circumvent the intentions of Parliament. For instance, the provisions are applied to the registration requirements for in-house lobbyists employed by corporations. Under the *Lobbying Act,* former DPOHs are prohibited from lobbying for a period of five years after they leave office. However, in effect, this strict prohibition only applies to those who work as consultant lobbyists or as in-house lobbyists employed by organizations. The Act prescribes that a former DPOH can work as a lobbyist for a corporation, as long as his or her lobbying activities do not constitute a 'significant part of their duties'.

With respect to unpaid, volunteer lobbyists, it is difficult to justify their inclusion among those who must register because it might limit Canadians' access to government decision-makers. In a free and democratic society, it is imperative that citizens be able to access their government and its representatives. The Commissioner believes, therefore, that any amendments to the Act should not require volunteer or unpaid lobbyists to register.

In making the decision whether to remove the 'significant part of duties' provisions, Parliament should consider the principle of the *Lobbying Act* that states that "free and open access to government is an important matter of public interest." The question should be about determining who Parliament wishes to capture with the legislation and, therefore, whether certain exemptions might be warranted (e.g., certain types of charitable organizations). The Commissioner would be pleased to further explore this issue with Parliament.

Impact of changes on the Registry of Lobbyists

The 2005 amendments led to the establishment of an entirely new Registry of Lobbyists because of the extensive changes to registration requirements. The changes introduced by the *Lobbying Act* in 2008 also called for a significant overhaul of the Registry of

Lobbyists to accommodate the further expansion of reporting requirements and the higher number of transactions caused by the monthly reporting cycle. In addition, the system needed to be upgraded to capture the monthly disclosure of certain oral and arranged communications between lobbyists and DPOHs.

There is increasing demand to offer the information available in the Registry in alternative formats, in accordance with the current trend towards open government. This past fiscal year, the Office has responded to nine separate requests from media and academics for large-scale pulls of Registry data. This suggests that the database is contributing to increased transparency of lobbying activities.

Planning and development work for the 2005 and 2008 amendments to the federal lobbying legislation began approximately two years before the coming into force of the amended provisions. System upgrades to accommodate the requirements of the *Lobbying Act* totalled approximately $2 million. An annual budget of $1.1 million is spent on the administration of the Registry, including salaries for the equivalent of six full-time employees dedicated primarily to providing registration assistance for lobbyists. The budget covers between $400,000 to $500,000 invested annually in technical work to maintain and upgrade the system.

Recommendations

Experience in administering the federal Registry of Lobbyists over the last five years has highlighted areas of the Act requiring improvements.

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.

- The introduction of the requirement for lobbyists to report certain monthly communications with designated public office holders, served to enhance the transparency of lobbying activities. However, the *Lobbying Act* only requires corporations and organizations to be registered once the threshold set by the significant amount of duties test is met. If they determine that they do not meet the test, they do not have to register, in which case the Registry will not contain any information about the lobbying activities conducted by these lobbyists. As well, their oral and arranged communications with DPOHs are not required to be disclosed in monthly communication reports.

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.

- Monthly communication reports currently list the name of the DPOH and the name of the senior officer of a corporation or organization who is responsible for filing the registration. The names of the in-house lobbyists who actually participated in the oral and arranged communication with the DPOH are not listed in the monthly communication report.

Recommendation 3: The prescribed form of communications for the purposes of monthly communication reports should be changed from 'oral and arranged' to simply 'oral'.

- The lack of a clear definition of what constitutes an oral and 'arranged' communication, for the purpose of disclosure in monthly communication reports, is creating confusion on the part of both lobbyists and DPOHs as to which communications must be reported. The inclusion of all 'oral' communications, whether or not they are 'arranged' in advance, would also positively impact on transparency since so-called 'chance' meetings or other communications on prescribed subject-matters between lobbyists and DPOHs would now have to be reported.

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.

- The Act currently requires lobbyists to file a monthly communication report only when the oral and arranged communication is initiated by the lobbyist, except when the subject matter relates to the awarding of grants, contributions or other financial benefits or the awarding of a contract, in which case the communication must be reported regardless of who initiated it.

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.

- A new trend is emerging with respect to the disclosure of information about clients in registrations. Some consultant lobbyists are being 'sub-contracted' by lobbying firms to undertake lobbying activities and represent a specific client.

Currently, the Act does not clearly indicate that lobbyists should disclose the actual interest they ultimately represent. Rather, it asks them to disclose the 'client' which could be interpreted as the consulting firm which has, in fact, hired the lobbyist. The Office has adopted the practice of requiring lobbyists, when listing a consulting firm as the client, to also indicate the actual client whose interests they are ultimately representing.

Education and Outreach

Informing lobbyists, public office holders and the public about the *Lobbying Act* leads to greater compliance.

Under the *Lobbyists Registration Act*, the Registrar of Lobbyists did not have an explicit mandate to undertake an education and outreach program in order to raise awareness about the rationale and requirements of the legislation. The Registrar recognized, however, that raising awareness amongst lobbyists and public office holders generally led to greater compliance with the requirements of the Act.

In 2008, the amendments to the legislation formally incorporated a mandate for the Commissioner to develop and implement an education and awareness program. The *Lobbying Act* sets out that the Commissioner's "functions and duties […] include developing and implementing educational programs to foster public awareness of the requirements of this Act, particularly on the part of lobbyists, their clients, and public office holders."[1]

In both 2005 and 2008, a significant amount of effort was devoted to ensure that the changes to the lobbying legislation were well understood by both lobbyists and public office holders. In advance of amendments coming into force, information kits outlining the new registration requirements were forwarded to every lobbyist listed in the Registry, as well as to all heads of federal departments and agencies, to ensure that they understood the upcoming legislative changes.

Prior to the coming into force of the *Lobbying Act* in 2008, the Registrar issued a series of nine implementation notices that were sent to all registrants, and posted on the Office's website.

These documents described in detail the various amendments to the legislation and covered the following topics of interest to both lobbyists and public office holders:

- Coming-into-Force of the *Lobbying Act*
- Designated Public Office Holders
- The Five-Year Prohibition on Lobbying
- Monthly Returns
- Communication with a Designated Public Office Holder
- Members of Boards of Directors and Members of Organizations
- Contingency Fees

[1] *Lobbying Act*, subsection 4.2(2)

- The Lobbyists Registration System
- Miscellaneous Changes to Lobbyists Registration Requirements.

In 2008, multimedia tutorials were made accessible through the Office's website to help registrants understand the registration process and the specific requirements of the Act. These tutorials continue to provide assistance and are regularly updated to reflect changes to the Registry.

The section below highlights the outreach activities that have been undertaken over the last few years to raise awareness among key stakeholders.

Sharing information with lobbyists

The Office of the Commissioner of Lobbying devotes significant efforts and resources to communicating and sharing information about the requirements of the *Lobbying Act* with lobbyists. For instance, the Office:

- Responds to inquiries from registered or potential lobbyists about the registration requirements under the legislation and provides technical assistance to facilitate their interaction with the web-based Lobbyists Registration System;
- Delivers training and information sessions to individuals and groups about the key features of the Act;
- Meets regularly with associations representing lobbyists, including the Government Relations Institute of Canada, the Canadian Public Relations Society, the Public Affairs Association of Canada, the Canadian Chamber of Commerce, and the Canadian Society of Association Executives, to inform participants and share views on the legislation;
- Contacts registered lobbyists directly to provide information on specific changes to registration requirements, with a view to raising awareness and further improving compliance – communications are primarily done via email.
- Sends advisory letters to individuals who may be engaging in lobbying activities but may be unaware of the registration requirements under the *Lobbying Act*, to encourage them to visit the Office's website so they may determine whether they should be registered as lobbyists.

Educating public office holders

The Commissioner of Lobbying believes that federal public office holders, whether they are elected officials or public servants, have a key role to play in ensuring a better understanding of the *Lobbying Act* and its requirements. When public office holders understand what the *Lobbying Act* is intended to accomplish, they can contribute to greater transparency by inquiring if the lobbyists they meet are aware of the Act and are in compliance with it.

The Commissioner and other representatives of the Office regularly meet with management teams and other groups of officials in departments and agencies across the federal public service. These sessions provide an effective forum for sharing information and views on issues relating to lobbying activities and the requirements of the Act.

Of particular interest, in 2009-2010, the Commissioner met with the senior officials of the 20 most-lobbied federal government institutions. The objectives of these meetings were to outline the requirements of the *Lobbying Act*, share views on its implementation and determine future outreach and information needs.

In 2010-2011, the Commissioner met with representatives of several Regional Federal Councils in the context of their regularly scheduled meetings. Regional Federal Councils are intended to provide regional federal officials with a forum to share views and concerns on issues that are common to the federal departments and agencies located in each region of the country. This series of meetings helped ensure that federal public office holders located outside of the National Capital Region were aware of the requirements of the *Lobbying Act*.

Assisting Parliamentarians

The Commissioner of Lobbying is an independent Agent of Parliament and, as such, reports to both Houses of Parliament. The Commissioner primarily appears at the Standing Committee on Access to Information, Privacy and Ethics to report on her activities. In so doing, she endeavours to provide all necessary information to help Parliamentarians better understand the mandate she receives from the *Lobbying Act* and appropriately perform their oversight function.

When the Regulations were amended in September 2010 to expand the definition of designated public office holder (DPOH) and include Members of Parliament and Senators, the Commissioner wrote to these new DPOHs. She provided them with information on their responsibilities under the *Lobbying Act*. She also reached out to all registered lobbyists and reminded them of key aspects of the disclosure requirements for lobbyists, particularly as these related to communications with the newly designated public office holders. The Commissioner also gave presentations to some party caucuses in both the House of Commons and the Senate.

Connecting with counterparts

The community that works to ensure that lobbying is conducted in an ethical and transparent manner is relatively small. It is critical to establish and maintain a network to connect federal, provincial and international counterparts in order to share experiences and best practices, and discuss ways to address existing and emerging challenges in various jurisdictions.

The Commissioner of Lobbying plays an active role in this regard. In Canada, the provinces of Alberta, British Columbia, Newfoundland and Labrador, Nova Scotia, Ontario, Quebec and Manitoba, and the City of Toronto have lobbying legislation. A

network of officials responsible for the administration of lobbying legislation in these jurisdictions was established. Since 2007, the Lobbyists Registrars and Commissioners of Canada have met annually to compare experiences, discuss emerging issues and learn from each other.

The Commissioner of Lobbying has been active on the international front. Specifically, she is a member of the Council on Governmental Ethics Laws (COGEL) and regularly participates in conferences and other fora to present the Canadian perspective on lobbying legislation to foreign representatives.

Interpretation bulletins and advisory opinions

Under subsection 10(1) of the *Lobbying Act*, the Commissioner has the authority to issue advisory opinions and interpretation bulletins with respect to the enforcement, interpretation and application of the Act. These are non-statutory instruments that are intended to clarify certain aspects of the Act. Interpretation bulletins are issued in relation to sections of the Act that are not easily interpreted as written. They are broad in their interpretation and not specific to any particular group or individual. Advisory opinions are more specific, offering guidance to a particular group or set of individuals on how the Act may or may not apply to them.

Seven interpretation bulletins and six advisory opinions are currently posted on the Office's website, addressing the following topics:

- Interpretation Bulletins:
    - Acting Appointments in Designated Public Office Holder Positions
    - Interpretation of 'Comparable Rank' for Designated Public Offices
    - A Significant Part of Duties ('The 20 percent Rule')
    - Communicating with Federal Public Office Holders
    - Communicating with Designated Public Office Holders
    - Disclosure of Previous Public Offices
    - Disclosure Requirements Related to Advisory and Stakeholder Consultations

- Advisory Opinions:
    - Boards of Directors: Application of the Act to Outside Chairpersons and Members
    - Crown Corporations and Registrable Activities under the *Lobbying Act*
    - Departmental Corporations and Registrable Activities under the *Lobbying Act*
    - Registration Requirements Related to the Academic Sector
    - Registration Requirements Related to Tax Credits
    - Shared Governance Organizations and Registrable Activities under the *Lobbying Act*.

Commissioner's guidance

The *Lobbyists' Code of Conduct* was introduced in 1997. The Code contains three principles and eight rules intended to ensure that lobbyists conduct their activities ethically and according to the highest standards.

Following a Federal Court of Appeal decision issued in March 2009[2], the Commissioner of Lobbying issued guidance to lobbyists on Rule 8 (Improper Influence) of the Code, which deals with Conflict of Interest. This guidance included a set of documents that explains conflict of interest and provides advice to lobbyists on how to avoid the creation of a real or apparent conflict of interest. Following the release of the guidance, lobbyists expressed a need to better understand how the Commissioner would assess the issue of political activities as it relates to Rule 8. In response, the Commissioner issued clarification about political activities in the context of Rule 8.

Website

The Office's website is a powerful and effective tool for disseminating information to lobbyists, public office holders and the general public as evidenced by the high volume of visits every year. The Office uses electronic and web-based approaches as a cost-effective way to reach a broad range of audiences. The educational material prepared by the Office is made available on its website and updated regularly. It includes:

- PowerPoint presentations to highlight the key features of the *Lobbying Act;*
- Interpretation bulletins and advisory opinions explaining important requirements of the Act; and,
- Guidance material on the application of the rules under the *Lobbyists' Code of Conduct.*

Work has begun to revitalize the Office's website with an emphasis on facilitating navigation on the site. As well, efforts are made to update the website frequently and ensure the information it contains is both relevant and accurate.

Resources

For fiscal year 2010-2011, the financial and human resources allocated to fulfil this portion of the Commissioner's mandate included a budget of approximately $900,000, including the salaries for the equivalent of seven full-time employees.

Recommendation

Reaching out and providing information to lobbyists, their clients and public office holders is an important aspect of the responsibilities of the Commissioner of Lobbying

[2] *Democracy Watch* v. *Barry Campbell and the Attorney General of Canada (Office of the Registrar of Lobbyists),* 2009 FCA 79.

set out in the *Lobbying Act*. Education and Outreach activities remain an integral aspect of the Office's compliance strategy.

Outreach activities undertaken by this Office can be divided into two main types: implementation activities and ongoing activities. Parliament should consider that any changes to the legislative framework will require implementation outreach activities, in order to ensure that lobbyists, their clients, and public office holders are aware of changes to the requirements in the Act.

Lobbyists have increasingly been coming forward to voluntarily disclose that they were late in registering. It is encouraging to note that lobbyists are aware of the Act, and are disclosing potential breaches voluntarily. In fiscal year 2010-2011, ten administrative reviews initiated by the Office were the result of voluntary disclosures.

A more in-depth understanding of the requirements of the Act is demonstrated by a decrease in the number of technical questions addressed to the Office. Moving beyond basic questions, lobbyists and public office holders are formulating complex queries that highlight an improved understanding of the Act, and a need for ongoing outreach.

The need for ongoing outreach and education activities is frequently demonstrated by lobbyists and public office holders who raise similar issues and concerns on a recurring basis. For instance, the Commissioner is often asked to explain concepts such as the 'significant part of duties' provisions for organizations and corporations, or to clarify the interpretation of oral and 'arranged' communication for the purpose of disclosure in monthly communication reports. Another frequent question relates to the difference between the requirement to file an initial registration, on the one hand, and the need to report a monthly communication with a DPOH, on the other. These are three complex aspects of the current legislation.

The Commissioner's outreach activities determine where knowledge gaps exist among stakeholder groups, and where education efforts should be refined and focused. This has resulted in more targeted outreach products and activities, and has greatly contributed to the Office's policy discussions. As an example, a document entitled "Ten Things You Should Know about Lobbying" has been prepared and distributed to help Parliamentarians understand the *Lobbying Act*.

A survey is currently in development and will be administered to stakeholders with a view to helping target outreach efforts where they are most needed in the future.

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.

Reviews and Investigations

The only enforcement measures provided by the *Lobbying Act* are referrals to the police and Reports to Parliament.

Key amendments to enforcement provisions

Prior to 2005, the legislation provided the Registrar of Lobbyists with the authority only to investigate alleged breaches of the *Lobbyists' Code of Conduct*, but gave him no authority to investigate alleged breaches of the *Lobbyists Registration Act*. The 2005 amendments to the *Lobbyists Registration Act* introduced the requirement for the Registrar to notify a peace officer if he had reasonable grounds to believe that an offence had been committed under the Act.

The 2008 amendments to the legislation created the position of Commissioner of Lobbying and provided for greater investigatory powers. Under the *Lobbying Act*, the Commissioner now has the authority to investigate alleged breaches of the Act, as well as of the Code. However, the Commissioner must still notify a peace officer if she has reasonable grounds to believe that an offence has been committed under the Act. The Act also prescribes that the Commissioner may also refuse to conduct, or decide to cease, an investigation if she determines that pursuing the matter would serve no useful purpose because of, among other things, the amount of time that has elapsed since the matter arose.

Prior to 2008, the legislation prescribed a two-year limitation period for initiating an investigation and for pursuing matters, after which no charges could be laid. In 2008, the limitation period was increased to ten years from the day on which the alleged offence took place.

The 2008 amendments also doubled the maximum fines prescribed in the legislation for breaches of the Act, from $100,000 to $200,000. Under the *Lobbying Act*, the Commissioner also has the authority to prohibit a lobbyist who was convicted of an offence under the Act from engaging in lobbying activities for a period of up to two years.

Experience enforcing the lobbying legislation

Following the coming into force of the amended *Lobbyists Registration Act* in 2005, an Investigations Directorate was established within the Office of the Registrar of Lobbyists. Over time, the Investigations Directorate has increased in size in order to manage a growing caseload and the introduction of additional responsibilities related to the verification of monthly communication reports and reviews of exemption requests. It now has a budget of $1.1 million, including the salaries for the equivalent of nine full-time employees.

Administrative Reviews

Any individual can bring allegations of suspected breaches of the *Lobbying Act* or the *Lobbyists' Code of Conduct* to the attention of the Commissioner of Lobbying. The Commissioner can also look into potential breaches from her own observations, based on information published in the media and other publicly available information. In the recent past, a new trend has begun to emerge whereby lobbyists are voluntarily disclosing that they have failed to comply with requirements in the Act, such as timeliness of registration or the reporting of monthly communication reports.

After becoming aware of an alleged breach of either the Act or the Code, the Commissioner may initiate an administrative review. However, the *Lobbying Act* requires that she must suspend looking into the matter if she discovers that the matter is already the subject of another investigation or that a charge has been laid. The investigation may not continue until the other agency has disposed of the matter.

The administrative review process was developed and established in 2005. It is worth noting that an administrative review is not a formal investigation, as prescribed by the Act. The objective of an administrative review is to research the facts of the allegations and provide the Commissioner with a summary of the allegation, background information, and an analysis of the alleged contravention to allow her to determine a suitable means of ensuring compliance with the Act, including initiating an investigation.

Just like investigations, administrative reviews focus on fact-finding, and involve background research, in-depth interviews, and searches of the Registry and other publicly available information. For the purpose of conducting investigations, however, the *Lobbying Act* gives the Commissioner the authority to summon and enforce the attendance of persons, compel persons to produce documents and administer oaths, "in the same manner and to the same extent as a superior court of record".

Administrative reviews tend to be extensive because they may eventually lead to investigations. In addition, decisions of the Commissioner are subject to application for judicial review in Federal Court. Administrative reviews, just like investigations, must therefore be conducted thoroughly in order for the Commissioner's decisions to be fair, complete and defensible in a court of law.

At the conclusion of an administrative review, the Commissioner is provided with a comprehensive report outlining the facts of the case and recommendations to assist her in determining the appropriate course of action to ensure compliance with the Act. There are four possible outcomes.

1. The review is closed because the allegation was not well-founded. Reasons why allegations are not well-founded include: it did not involve a registrable activity; the activity was not undertaken for payment; or, the 'significant part of duties' threshold for registration was not met by the corporation or organization employing the individual. In such cases, the Commissioner will advise the person and the complainant of her decision by letter.

2. The review is closed even though the allegation is well-founded. In cases where the Commissioner considers the offence not to be serious enough to be referred to the RCMP, she may choose to employ alternative compliance measures that she considers better suited to ensure compliance with the Act. These measures would include, for instance, educating the person on the requirements of the Act or requesting that a correction be made to the Registry of Lobbyists. These cases are always subject to further monitoring.

3. A formal investigation is initiated when the Commissioner determines the allegation of the breach is serious and appears to be well-founded. The *Lobbying Act* prescribes that she shall initiate an investigation if she has 'reason to believe' that an investigation is necessary to ensure compliance with the Act and the Code.

4. The matter is referred to a peace officer if the Commissioner 'believes on reasonable grounds' that an offence has been committed under the *Lobbying Act*, or any other Act of Parliament or of the legislature of a province.

It should be noted that the length of time required to complete an administrative review will vary in each case, depending on the complexity of the file, the availability of witnesses or evidence, and other factors. In addition, when a file is referred to the RCMP, the Commissioner is no longer in control of it.

Investigations

Under the *Lobbyists Registration Act*, the Registrar could open an investigation if he had 'reasonable grounds to believe that a breach of the Code had occurred'. Under the *Lobbying Act* (the Act), the Commissioner can initiate an investigation if she has 'reason to believe an investigation is necessary to ensure compliance with either the Act or the Code.' The Commissioner, like the Registrar before her, has the authority to summon attendance and to compel information during an investigation. Generally, the Commissioner's experience is that witnesses are willing to cooperate and respond to inquiries for information and evidence without her having to exercise these powers.

The Act requires that, before finding someone in breach of the Code, the person under investigation is provided with an opportunity to present his or her views. The Commissioner's practice is to forward a copy of the report she receives from the Office's Investigations Directorate to the person, who is given 30 days to comment. Extensions have been granted upon request.

The *Lobbying Act* requires, as did the *Lobbyists Registration Act*, that the Commissioner must then prepare a Report of Investigation presenting her findings and conclusions, and reasons for these conclusions. In preparing the report, she will take into account both the report from the Investigations Directorate and the views of the person in formulating her conclusions. The Report on Investigation is then tabled before both Houses of Parliament. Since 2005, twelve Reports on Investigation have been tabled in both Houses of Parliament.

During an investigation, the *Lobbying Act* prescribes that if the Commissioner has reasonable grounds to believe that an offence has been committed under the Act or any other act of Parliament, the matter must be referred to a peace officer. The Commissioner is required to suspend looking into the matter pending the outcome of any police investigation. In addition, the Commissioner must suspend her investigation if she discovers that the subject matter is already under investigation by a peace officer. The requirement to suspend investigations and refer matters to the police, or to suspend looking into a matter if the Commissioner becomes aware that it is being looked at by another body, affects the Commissioner's ability to table timely Reports to Parliament on her investigations.

Compliance measures

The *Lobbying Act* sets the penalties, including fines and jail terms, for breaches of the Act. If, during an investigation, the Commissioner 'believes on reasonable grounds' that a person has committed an offence under the Act, she must advise a peace officer and immediately suspend her investigation. This is the only enforcement option available to the Commissioner. The peace officer having jurisdiction to investigate the matter, generally the Royal Canadian Mounted Police (RCMP) in the case of the *Lobbying Act*, will consider the case in consultation with legal counsel at the Department of Justice and federal prosecutors at the Department of Public Prosecutions. Together, they will determine whether or not to lay charges.

Since 2005, only two of the cases that were referred to the RCMP, involving a single individual, resulted in a sanction. In this case, a consultant lobbyist failed to register his lobbying activities under the *Lobbyists Registration Act*. The Attorney General elected to address the violation by means of an alternative dispute resolution. This case ended with a requirement for the individual to write an essay outlining his experience and describing the lessons to be learned by former government employees whose subsequent activities required registration under the Act.

Since July 2008, the RCMP has taken an average of eight months to review files that have been forwarded by the Commissioner. This period of time adds to the overall length of time of Investigations and affects the Commissioner's ability to provide Parliamentarians with timely Reports on Investigation. As the *Lobbying Act* requires that the Commissioner must conduct Investigations in private, she also cannot discuss publicly the status of these files while they are ongoing.

The Commissioner exercises discretion when determining compliance measures for less serious transgressions, such as late filings of a monthly communication report. She is of the opinion that the public interest would not be well served if she were to refer every case to the RCMP. In her view, such offences do not warrant a criminal investigation.

Under the *Lobbying Act,* there are no fines or jail terms for breaches of the *Lobbyists' Code of Conduct*. The Commissioner has the authority to determine if an individual has breached the Code and must table the results of an Investigation before both Houses of

Parliament. The Registrar of Lobbyists tabled four such Reports on Investigation to Parliament, in 2007. The Commissioner has tabled eight Reports.

Exemptions from the five-year prohibition on lobbying for former DPOHs

In 2008, the *Lobbying Act* introduced a five-year prohibition on lobbying for former designated public office holders (DPOHs). This five-year prohibition on lobbying the federal government after leaving office is intended to prevent former senior-level public office holders from using advantages and personal connections derived from their government positions for lobbying purposes. However, the Act provides the Commissioner with the authority to exempt individuals from the application of the prohibition, if she is of the opinion that such an exemption would not be contrary to the purposes of the Act. Of all jurisdictions in Canada, this is the longest post-employment prohibition on lobbying applied to former public office holders. Quebec, with the next longest post-employment restriction, prohibits certain former public office holders from lobbying for a period of two years.

A process to review application for exemption was developed and implemented to ensure that the Commissioner is provided with sufficient information regarding whether to grant an exemption or not. Although it is not prescribed by the Act, the Commissioner has determined that it was in the interest of natural justice to provide the applicant with an opportunity to present his or her views on the Commissioner's intent to grant or not an exemption before she renders her final decision.

The Commissioner has taken a strict approach in terms of granting exemptions, choosing to use the exemption authority only in the most exceptional of circumstances. Since 2008, the Commissioner has received nineteen applications for exemption and four exemptions have been granted. The names of those who were granted an exemption and the reasons for granting them are available on the Office's website. The Commissioner's decisions regarding exemptions have yet to be challenged in court.

Significant part of duties

The *Lobbying Act* requires that corporations and organizations must register if lobbying "constitutes a significant part of the duties of one employee or would constitute a significant part of the duties of one employee if they were performed by only one employee."

In order to facilitate compliance (and enforcement), it is preferable to have a clear demarcation of what activities are covered by legislation. The use of the concept of 'significant part of duties' makes it difficult to quantify the level at which the Act applies. As previously mentioned, the concept has long been interpreted as 20 percent of duties (i.e., the 20 percent rule) at the federal level, which is essentially a measurement of the proportion of time worked. This requires an extensive examination to properly measure the amount of work that has been performed and to verify that this work is related to

activities requiring registration. Furthermore, one must ascertain the total amount of work being performed.

The 20 percent rule therefore requires the measurement of two activities – registrable activities and total work activities – both of which are difficult to quantify reliably and with accuracy. In spite of the longstanding interpretation, it is possible that the courts might take a different view of what constitutes a 'significant part of duties', as this interpretation has not been tested in the courts.

Investigations in private

The *Lobbying Act* states that investigations must be conducted in private. This provision has been in place since the former *Lobbyists Registration Act* was amended to provide for the establishment of a *Lobbyists' Code of Conduct* in the 1990s. It was added to ensure that investigations regarding the conduct of lobbyists would be carried out in a manner that is not public. This provision has often been criticized, with opponents arguing that the Commissioner is not delivering on her mandate as she should, since she cannot disclose the status of individual files. The Commissioner takes the view that it would be contrary to the Act to even disclose whether a particular file has been referred to the RCMP for investigation. The experience over the last five years suggests that conducting investigative work in private has significant benefits.

First, it protects the integrity of the Commissioner's investigation. Evidence must be gathered with fidelity, assessed in confidence, and a case built that meets generally accepted rules of evidence. To ensure fairness, it is important that an independent arbiter, such as the Commissioner of Lobbying, be allowed to conduct investigations in a manner that is independent of public opinion or pressure from interest groups. By using this specific legislative framework, some certainty is also provided that every case is examined in the same way, with the same rigour.

Second, conducting investigations in private provides some assurance that any subsequent police investigation of the alleged offences is not compromised. If the particulars of a case were to be discussed openly and publicly, it could be argued that evidence and elements of proof might be destroyed or compromised, interpretation or bias errors might occur when argued from individual perspectives, and the individuals accused might perceive they were being unfairly treated. Taken together, these factors add up to a high risk that the investigation would be compromised if made public prematurely.

Finally, conducting investigations in private ensures that the rules of fairness and natural justice are followed. Under our legal system, individuals are presumed to be innocent until proven guilty. Conducting investigations in private helps protect the reputations of those who may be wrongly accused of improper lobbying activities.

The Commissioner has recently commenced confirming to Parliamentary Committees when administrative reviews and investigations are underway, when the individual's name is in the public domain. As a complement to the Commissioner's authority to

conduct investigations, legislative provisions similar to those that have been added to the *Auditor General Act* regarding immunities should be added to the *Lobbying Act*. Sections 18.1 and 18.2 of the *Auditor General Act* provide an excellent example. Similar provisions exist in the *Conflict of Interest Act* and various provincial lobbying legislations (see Annex A).

Recommendations

In conclusion, many aspects of the *Lobbying Act* are working well from an enforcement perspective. However, based on the experience of the last five years, the administration of the Act could benefit from amendments in certain key areas of the legislation.

One of the central questions that emerges from the experience of the last five years is whether the available compliance or enforcement measures under the *Lobbying Act* are appropriate to the various types of infractions.

In 2008, penalties for breaches of the lobbying legislation were increased significantly to a maximum of $200,000 or imprisonment for a term not exceeding two years, or both. If a person is convicted of an offence under the *Lobbying Act*, the Commissioner may also prohibit the person from lobbying for a period of up to two years.

Despite the available penalties, no one has ever been charged or convicted of an offence under the *Lobbying Act*. The Office forwards comprehensive, well-documented case files to the RCMP. Yet, prosecutions have not been commenced in ten of the eleven cases referred to the RCMP since 2005.

The Commissioner employs alternative measures when dealing with minor transgressions. These measures currently focus on educating the individual. These persons are also subject to close monitoring to ensure compliance in the future. One example of such a minor offence is the late filing of registrations.

However, it is clear that even minor transgressions, such as habitual late filing, may negatively affect the transparency of lobbying activities. In order to deal with such transgressions, the *Lobbying Act* offers no enforcement alternatives. Certain transgressions may warrant sanctions or penalties that would fall somewhere between the two extremes currently being utilized: the system of education, correction and monitoring employed by the Commissioner, at one end, and a Report to Parliament and/or criminal proceedings with resulting fines, jail terms and possible prohibition, at the other.

The establishment of an administrative monetary penalty system (AMP), would potentially address the lack of flexibility in terms of enforcement options currently provided for in the Act. Not all transgressions have the same gravity. An AMP system would provide an effective bridge between the two extremes currently employed by the Commissioner. An AMP system would introduce a continuum of progressively more severe sanctions more appropriate to the existing range of possible breaches. Publicizing administrative monetary penalties applied would also serve as general deterrent to all

lobbyists. Such schemes exist in several other jurisdictions in Canada as well as in other federal legislation.

Further analysis is required to determine with accuracy the financial and human resources requirements associated, depending on the specific model. The introduction of an administrative appeal system would also require the development of some form of appeal mechanism or process.

In terms of breaches of the *Lobbyists' Code of Conduct,* the only enforcement option available is to disclose publicly the name of the person in breach by tabling a Report on Investigation in both Houses of Parliament. Although this is believed to provide specific deterrence to the individual in question and general deterrence to all lobbyists, the corrective impact is generally perceived as being limited. For this reason, the possibility of introducing administrative penalties for breaches of the Code should also be considered.

Finally, in addition to administrative monetary penalties for breaches of the Act and the Code, the ability for the Commissioner to prohibit individuals from lobbying public office holders for a period of time might provide another useful measure to ensure compliance with the Act and the Code.

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.

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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*.

The *Lobbyists' Code of Conduct*

The purpose of the Code is to assure the Canadian public that lobbying is done ethically and with the highest standards.

The *Lobbyists' Code of Conduct* (the Code) is the result of extensive consultations with a large number of people and organizations interested in promoting public trust in the integrity of government decision-making. The Code came into effect on March 1, 1997.

The purpose of the Code is to assure the Canadian public that lobbying is done ethically and with the highest standards, with a view to conserving and enhancing public confidence and trust in the integrity, objectivity and impartiality of government decision-making. Whereas the Act sets out the mandate and authorities of the Commissioner, the disclosure requirements for registrants, and the consequences of non-compliance, the Code establishes mandatory standards of conduct for individuals who engage in activity deemed registrable under the Act. It does so by expressing three overriding principles (Integrity and Honesty; Openness; and Professionalism); and eight Rules that place specific obligations and requirements on lobbyists. The Rules are organized into three categories: Transparency; Confidentiality; and, Conflict of Interest.

Although lobbyists have a legal obligation under the *Lobbying Act* to comply with the Code, breaches of the Code are not deemed to be offences under the Act. Subsection 14(2) of the Act, a clause which sets out the punishment for summary conviction offences, specifically excludes breaches of the Code from the list of contraventions.

Conversely, any contravention of the Act places lobbyists in breach of the Code. The Principle of Professionalism requires that lobbyists "conform fully with not only the letter but the spirit of the *Lobbyists' Code of Conduct* as well as all relevant laws, including the *Lobbying Act* and its regulations." Prior to February 2007, the Registrar of Lobbyists only investigated breaches of the Rules of the Code. This changed when he published a notice on the Office's website advising lobbyists that his powers of Investigation would be triggered where there was an alleged breach of either a Principle or a Rule of the Code. The Commissioner of Lobbying also investigates breaches both of the Principles and the Rules of the Code.

A finding by the Commissioner of Lobbying that a lobbyist is in breach of the Code does not carry fines or jail terms. Instead, the Commissioner is required to publish her findings and conclusions, and the reasons for her conclusions, in a report tabled in both Houses of Parliament. Reports to Parliament are a key compliance tool, because they offer both specific deterrence to the individual in question and general deterrence to all lobbyists. Additionally, the publication of a report may be damaging to the reputation of a lobbyist, and could negatively impact their ability to attract or retain clients or employers.

Unlike the ten-year limitation on the laying of charges for offences contained in the *Lobbying Act* for breaches of the Act, there is no time limitation placed on the Commissioner's ability to report on a breach of the Code.

In the past five years, twelve Reports to Parliament have been published. Ten of the Reports contained findings that individuals were in breach of the Code as a consequence of their failure to register as lobbyists. A failure to register is seen as a breach of the Principle of Professionalism, and may constitute a breach of Rules 2 and 3 of the Code, which require that lobbyists provide accurate information; avoid misleading anyone; and disclose to clients and employers their obligations under the Act and Code.

The other two Reports tabled relate to breaches of Rule 8. One of three rules concerning Conflict of Interest, Rule 8 (Improper Influence) prohibits lobbyists from placing 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." Approximately ten percent of the Administrative Review files opened in the past five years, and 15 percent of the Investigations initiated, contain an allegation that a lobbyist was in breach of Rule 8.

To date there has not been a finding that a lobbyist has breached any of the other Principles or Rules set out in the Code.

The Commissioner intends to review the Code once the Act has passed through legislative review and new amendments, if any, have been implemented.

Direction from the Courts regarding the *Lobbyists' Code of Conduct*

There have been three cases argued before and decided by the Federal Court and the Federal Court of Appeal. Each of those cases has had an important impact upon the interpretation of the *Lobbyists' Code of Conduct* and the approach of the Commissioner of Lobbying, and before her, the Registrar of Lobbyists, to the application of the Code regarding the actions of lobbyists.

A 2004 decision of the Federal Court in *Democracy Watch v. Attorney General of Canada (Office of the Ethics Counsellor)*[3] concerned four applications for judicial review by the public interest group Democracy Watch. The Court decided all four applications on the issue of bias, concluding that grounds existed to provide a reasonable apprehension of bias, on the part of the Ethics Counsellor (the predecessor of the Registrar of Lobbyists) and his office, against Democracy Watch.

This conclusion was based upon a finding that there was a lack of independence of the Ethics Counsellor, as the Ethics Counsellor was appointed to his position by the Prime Minister and held office at the pleasure of the Prime Minister, with the result that his tenure as Ethics Counsellor was not secure. The Court also drew inferences of bias from the fact that the Ethics Counsellor had rejected every petition by Democracy Watch that

[3] *Democracy Watch v. Attorney General of Canada (Office of the Ethics Counsellor),* 2004 FC 969.

he had responded to and found that there had been a pattern of delayed responses to Democracy Watch. As a result, the Court ruled in favour of Democracy Watch and concluded that there was a reasonable apprehension of bias against Democracy Watch by the Ethics Counsellor.

The findings of the Federal Court in this decision were superseded in 2004, prior to the decision, by the abolition of the position of Ethics Counsellor, effective May 17, 2004. The Ethics Commissioner replaced the Ethics Counsellor for purposes of administering the rules for conflict of interest, while the authority of the Ethics Counsellor to administer the *Lobbyists Registration Act* and the *Lobbyists' Code of Conduct* became the responsibility of the Registrar of Lobbyists. In the decision, the Court determined that the Ethics Counsellor's approach to the interpretation of Rule 8 of the Code met the standard of reasonableness. That approach to the interpretation of Rule 8 was used by the Registrar of Lobbyists upon his assumption of responsibilities in 2004.

The second case concerning Rule 8 of the Code was the Federal Court of Appeal decision in *Democracy Watch v. Barry Campbell and the Attorney General of Canada*[4]*,* decided in March 2009.

In that case, the Registrar of Lobbyists was asked to examine an allegation by Democracy Watch that a registered lobbyist had breached Rule 8 of the Code when he hosted a fundraising dinner on behalf of a Member of Parliament who was running for re-election. At the time, the Member of Parliament was Secretary of State (International Financial Institutions), a cabinet member with responsibilities in relation to the Department of Finance, and the lobbyist had registered as a lobbyist in relation to a number of undertakings, one of which involved the Department of Finance.

The Registrar concluded that there had not been a violation of Rule 8 and he did not open an Investigation. His decision took into account the advice that had been provided to lobbyists by the former Ethics Counsellor, which suggested that improper influence would require putting a public office holder in an actual, rather than an apparent, conflict of interest. The Registrar noted in his decision that it would be unfair to retroactively apply a new approach to enforcement of the *Lobbyists' Code of Conduct*.

Democracy Watch sought judicial review of the Registrar's decision in the Federal Court. While the Federal Court dismissed the application, the decision was appealed and, in March 2009, the Federal Court of Appeal allowed the appeal and set aside the decision of the Federal Court. The Federal Court of Appeal concluded that the interpretation of conflict of interest used by the Registrar, which was based upon the advice that had been provided to lobbyists by the former Ethics Counsellor, was too narrow. The decision outlined a number of principles to be applied in determining a conflict of interest and instructed the Registrar to develop a new approach to the interpretation and application of Rule 8 that would reflect the Court's decision. The Commissioner of Lobbying has done that, providing guidance to lobbyists regarding the application of Rule 8 of the *Lobbyists'*

[4] Supra, footnote 2.

Code of Conduct in November 2009 and further *Clarifications about political activities* in August 2010.

The Guidance may be summarized as follows:

- 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 lobbyist's actions create the appearance of a conflict of interest for a public office holder.

In addition to the Commissioner's guidance, some lobbyists have asked for advance rulings regarding the allowable political activities of lobbyists. The Commissioner's decision not to provide advance rulings is based on the fact that her responsibilities under the *Lobbying Act* and in relation to enforcing the *Lobbyists' Code of Conduct* lie in the regulation of lobbying activities, not political activities. Under the Act, decisions of the Commissioner are judicially reviewable. It is therefore imperative that all her decisions be fair and based on all relevant facts. She must be prudent in relation to advising lobbyists regarding potential situations, based on information that could easily change after the advice was given. It would not only put at risk the person she would provide this ruling to, but it would also put at risk her ability to look into the matter in the future should there be allegations against this person. Her neutrality and her ability to be fair would be compromised.

The third case involving the *Lobbyists' Code of Conduct* was the December 2010 Federal Court of Appeal decision in *Makhija v. Attorney General of Canada*[5].

In March 2007, the Registrar of Lobbyists completed four Investigation Reports concerning allegations of unregistered lobbying by Mr. Neelam Makhija. The reports, which were tabled in the Senate and the House of Commons, concluded that Mr. Makhija contravened the former *Lobbyists Registration Act* when he failed to register his activities on behalf of four corporations, and that his activities were in breach of the *Lobbyists' Code of Conduct*.

Mr. Makhija sought judicial review of the Registrar's decisions, as set out in the four reports, claiming that he was not a lobbyist and that the Registrar had made a legal error. He asked that the decisions be overturned and that the reports be withdrawn from Parliament. In March 2008, the Federal Court overturned the Registrar's decisions and ordered that the four Investigation Reports that were tabled in Parliament be withdrawn. This decision placed into question the Registrar's ability to table findings regarding apparent breaches of the Act and to initiate an Investigation under the *Lobbyists' Code of Conduct* of persons failing to register as lobbyists.

That decision was appealed by the Attorney General and the Federal Court of Appeal quashed the decision of the Federal Court, concluding that the Registrar was entitled to

[5] *Neelam Makhija v. Attorney General of Canada,* 2010 FCA 342.

conduct an Investigation once he had reasonable grounds to believe that a breach of the Code had occurred, even if the person under Investigation had not registered as a lobbyist. That decision resolved the question of the Registrar's jurisdiction raised by the Federal Court. Leave to appeal the decision to the Supreme Court of Canada was sought, but that application was denied.

As a result, the application for judicial review was sent back to the Federal Court to make a decision based on the merits of Mr. Makhija's application for judicial review. The Federal Court declared in February 2010 that the Registrar's conclusions regarding the breaches of the *Lobbyists' Code of Conduct* were reasonable and thus valid and legal in the circumstances. With respect to the Registrar's conclusion that Mr. Makhija had breached the *Lobbyists Registration Act*, the Court declared that the Registrar was not entitled to reach that conclusion under the Act and quashed that portion of each of the four Investigation Reports by the Registrar. This decision was appealed to the Federal Court of Appeal and finally decided in December 2010 when the Federal Court of Appeal affirmed the Federal Court's decision.

The question of the Commissioner's ability to investigate an apparent breach of the Act or the Code had been clarified in July 2008, when amendments to the legislation contained in the *Lobbying Act* set out the authority of the Commissioner to launch an Investigation when the Commissioner considers it necessary to ensure compliance with the Act or the Code.

Annex A – Overview of Administrative Monetary Penalty Systems

The *Lobbying Act* (the Act) currently provides for considerable penalties for breaches to its provisions which include maximum fines of up to $200,000 and imprisonment terms of up to two years. Despite the availability of these penalties, to date no charges have been laid nor has an individual been convicted of an offence. Currently, the Act does not offer any alternative enforcement measures for less serious transgressions. The Commissioner can refer a case of a breach of the Act to the RCMP, or report a breach of the Code to Parliament. In some instances, alternative compliance measures have been applied by the Commissioner such as educating the registrant and monitoring their registration for continued compliance. This recognizes that not all transgressions are created equal.

The Commissioner has recommended the establishment of an administrative monetary penalty (AMP) system, to provide a bridge between the two extremes currently available to her. The Commissioner is of the view that an AMP system would introduce a more appropriate continuum that is reflective of the range of transgressions.

There are three models which are worthy of consideration, one at the federal level and two at the provincial level, as these regulate a similar subject-matter as that regulated by the OCL: the federal *Conflict of Interest Act*, the Alberta *Lobbyists Act*, and the British Columbia *Lobbyists Registration Act*.

Federal *Conflict of Interest Act*

Authority
The Conflict of Interest and Ethics Commissioner has the authority to impose a monetary penalty not exceeding $500 for breaches of the provisions of the Act pertaining to failures to meet certain reporting deadlines or file required documents within specified timeframes.

Procedural Fairness/Appeals
The Act provides the alleged violator with an opportunity to make representations which the Ethics Commissioner will take into consideration along with criteria set out in the legislation. The Ethics Commissioner's decisions are final and are only subject to judicial review on limited grounds in the Federal Court.

Decision mechanism and public notification
After taking into consideration the representations made, the Ethics Commissioner will then render a decision which may include the imposition of a monetary penalty. Where an administrative monetary penalty is imposed, the Act requires the nature of the violation, the name of the violator and the amount of the penalty be made public.

Collection of unpaid fines
A monetary penalty is considered to be a debt owed to the Crown and is recoverable in the Federal Court or any court of competent jurisdiction.

Criminal prosecution provision
The AMPs only apply to breaches of those provisions relating to the filing of documents or the reporting of certain information within specified timeframes. The Act does not include criminal penalties. Other breaches of the Act are not subject to AMPs.

Alberta *Lobbyists Act*

Authority
The Alberta *Lobbyists Act* provides the Registrar with the authority to impose an administrative monetary penalty not exceeding $25,000 for breaches of its provisions. As well, taking into consideration the gravity of the offence and the number of previous convictions or administrative monetary penalties imposed the Ethics Commissioner may prohibit the person from lobbying and from filing a registration for a period of up to two years.

Procedural Fairness/Appeals
Where the Registrar conducts an investigation he is required to provide an opportunity to present views prior to making any adverse findings. Where the Registrar issues a notice of administrative penalty the person has the option of either paying the penalty or appealing the Registrar's decision to the Alberta Court of Queen's Bench.

Decision mechanism and public notification
The Registrar is required to conduct an investigation where he has reason to believe that it is necessary to ensure compliance with the Act and must provide an opportunity to present views. The Registrar must prepare a report of his findings and where he has found the person to be in contravention of the legislation he may, after taking into consideration various factors outlined in the regulations, impose an administrative monetary penalty. There are no specific provisions in the Act requiring the Registrar to make public the imposition of an administrative penalty; however, all reports are posted on the registry website.

Collection of unpaid fines
Subject to the right of appeal, where the person fails to pay the penalty, it may be recovered by filing a certified copy of the notice of administrative penalty with the Clerk of the Court of Queen's Bench and the notice has the same force and effect as if it were a judgment of that Court.

Criminal prosecution provision
The Act does provide for criminal prosecution, however the Act specifies that a person who pays an administrative penalty in relation to a contravention cannot be charged under the Act with an offence for that same contravention.

British Columbia's *Lobbyists Registration Act*

Authority
The Registrar may impose an administrative monetary penalty not exceeding $25,000 if the Registrar determines that a person has contravened a provision of the legislation. As well, the Registrar may prohibit an individual who has been convicted of an offense from lobbying and from registering for a period of two years.

Procedural Fairness/Appeals
After conducting an investigation, where the Registrar believes the person has not complied with a provision of the legislation, she must give the person a reasonable opportunity to be heard. The Act also provides for a possibility for the person to request a reconsideration of the Registrar's decision which may result in the decision being rescinded or confirmed, and the amount of the penalty being varied or confirmed. The reconsidered decision is subject to judicial review.

Decision mechanism and public notification
After considering the person's representations, the Registrar is required to give the person a notice of the determination and, where the Registrar chooses to impose an administrative penalty, the amount of the penalty being imposed. Although the Act does not provide for any factors to be considered in assessing the amount of the penalty to be imposed, the Office of the Registrar of Lobbyists has adopted *Policies and Procedures* which list factors to be considered. The Registrar must prepare a report of findings, reasons and conclusions and the amount of administrative penalty imposed which is submitted to the Speaker of the Legislative Assembly. The Act provides the Registrar with the authority to make reports publicly available.

Collection of unpaid fines
The penalty is considered a debt due to the government and may be recovered by filing a certified copy of the notice in the Supreme Court or Provincial Court giving it full force and effect of a judgement of that Court.

Criminal prosecution provision
The Act provides for criminal prosecution however, the Act specifies that a person who is subject to an administrative monetary penalty cannot be prosecuted for an offence for the same incident.

Annex B – Examples of Immunity Provisions

Immunity Provisions under Federal Legislation

AUDITOR GENERAL ACT

Immunity as witness

18.1 The Auditor General, or any person acting on behalf or under the direction of the Auditor General, is not a competent or compellable witness — in respect of any matter coming to the knowledge of the Auditor General or that person as a result of performing audit powers, duties or functions under this or any other Act of Parliament during an examination or inquiry — in any proceedings other than a prosecution for an offence under section 131 of the *Criminal Code* (perjury) in respect of a statement made under this Act.

Protection from prosecution

18.2 (1) No criminal or civil proceedings lie against the Auditor General, or against any person acting on behalf or under the direction of the Auditor General, for anything done, reported or said in good faith in the course of the performance or purported performance of audit powers, duties or functions under this or any other Act of Parliament.

Defamation

(2) For the purposes of any law relating to defamation,

(*a*) anything said, any information supplied or any document or thing produced in good faith by or on behalf of the Auditor General, in the course of the performance or purported performance of audit powers, duties or functions under this or any other Act of Parliament, is privileged; and

(*b*) any report made in good faith by the Auditor General in the course of the performance or purported performance of audit powers, duties or functions under this or any other Act of Parliament, and any fair and accurate account of the report made in good faith in a newspaper or any other periodical publication or in a broadcast, is privileged.

CONFLICT OF INTEREST ACT

The federal ***Conflict of Interest Act*** does provide the Commissioner and the staff with immunity against liability. This is in addition to the protection afforded by subsection 86 (2) of the *Parliament of Canada Act* which stipulates that the Commissioner enjoys the

privileges and immunities of the House of Commons and its members when carrying out the duties and functions of the mandate.

Subsection 50(2) states:

> No criminal or civil proceedings lie against the Commissioner, or any person acting on behalf or under the direction of the Commissioner, for anything done, reported or said in good faith in the exercise or purported exercise of any power, or the performance or purported performance of any duty or function, of the Commissioner under this Act.

PUBLIC SERVANTS DISCLOSURE PROTECTION ACT

Protection

45. No criminal or civil proceedings lie against the Commissioner, or against any person acting on behalf of or under the direction of the Commissioner, for anything done or omitted to be done, or reported or said, in good faith in the course of the exercise or performance, or purported exercise or performance, of any power or duty of the Commissioner under this Act.

PRIVACY ACT

Protection of Privacy Commissioner

67. (1) No criminal or civil proceedings lie against the Privacy Commissioner, or against any person acting on behalf or under the direction of the Commissioner, for anything done, reported or said in good faith in the course of the exercise or performance or purported exercise or performance of any power, duty or function of the Commissioner under this Act.

Libel or slander

(2) For the purposes of any law relating to libel or slander,

(*a*) anything said, any information supplied or any document or thing produced in good faith in the course of an investigation carried out by or on behalf of the Privacy Commissioner under this Act is privileged; and

(*b*) any report made in good faith by the Privacy Commissioner under this Act and any fair and accurate account of the report made in good faith in a newspaper or any other periodical publication or in a broadcast is privileged.

ACCESS TO INFORMATION ACT

Protection of Information Commissioner

66. (1) No criminal or civil proceedings lie against the Information Commissioner, or against any person acting on behalf or under the direction of the Commissioner, for anything done, reported or said in good faith in the course of the exercise or performance or purported exercise or performance of any power, duty or function of the Commissioner under this Act.

Libel or slander

(2) For the purposes of any law relating to libel or slander,

(*a*) anything said, any information supplied or any document or thing produced in good faith in the course of an investigation by or on behalf of the Information Commissioner under this Act is privileged; and

(*b*) any report made in good faith by the Information Commissioner under this Act and any fair and accurate account of the report made in good faith in a newspaper or any other periodical publication or in a broadcast is privileged.

OFFICIAL LANGUAGES ACT

Protection of Commissioner

75. (1) No criminal or civil proceedings lie against the Commissioner, or against any person acting on behalf or under the direction of the Commissioner, for anything done, reported or said in good faith in the course of the exercise or performance or purported exercise or performance of any power, duty or function of the Commissioner under this Act.

Libel or slander

(2) For the purposes of any law relating to libel or slander,

(*a*) anything said, any information supplied or any document or thing produced in good faith in the course of an investigation by or on behalf of the Commissioner under this Act is privileged; and

(*b*) any report made in good faith by the Commissioner under this Act and any fair and accurate account of the report made in good faith in a newspaper or any other periodical publication or in a broadcast is privileged.

Immunity Provisions under Provincial Lobbying Legislation

The **Newfoundland-and-Labrador** *Lobbyist Registration Act* provides at section 32 as follows:

> A person is not liable for anything done or omitted to be done in good faith in the exercise or performance or intended exercise or performance of a power, duty or function conferred under this Act.

The province of **Quebec**'s *Lobbying Transparency and Ethics Act* at section 46 states:

> No civil action may be instituted by reason of the publication of a report of the Commissioner or the publication in good faith of an extract from or a summary of such a report.

The **Alberta** *Lobbyists Act* at section 16 provides for a limit on liability:

> (1) No action lies against the Registrar or any former Registrar or any other individual who is or was employed or engaged by the Registrar for anything done in good faith under this Act.
>
> (2) No action lies against an individual who in good faith provides information or gives evidence in an investigation under this Act or to an individual employed or engaged by the Registrar.

The **British Columbia** *Lobbyists Registration Act* at subsection 9.2(1) states:

> […] no legal proceeding for damages lies or may be commenced or maintained against the registrar or persons acting on behalf of the registrar because of anything done or omitted
>
> (a) in the exercise or intended exercise of any power under this act, or
> (b) in the performance or intended performance of any duty under this Act.

The **City of Toronto** provides for similar protection under section 391 of the *City of Toronto Act*:

> No proceeding for damages or otherwise shall be commenced against a member of city council, an officer, employee or agent of the City or a person acting under the instructions of the officer, employee or agent for any act done in good faith in the performance of a duty or authority under this Act or a by-law passed under it or for any alleged neglect or default in the performance in good faith of the duty or authority.