

QUEEN
KE
4559
.C32
1998/99
c.2

IC

LOBBYISTS' CODE OF CONDUCT

ANNUAL REPORT

for the year ended March 31, 1999

Queen
KE
4559
.C32
1998/99
c.2

Industry Canada
Library - Queen

AUG - 9 1999

Industrie Canada
Bibliothèque - Queen

LOBBYISTS' CODE OF CONDUCT

ANNUAL REPORT

For the year ended March 31, 1999

Office of the Ethics Counsellor

This publication is also available electronically on the World Wide Web at the following address:

<http://strategis.ic.gc.ca/lobbyist>

For additional copies of this publication, please contact:

Office of the Ethics Counsellor
Industry Canada
22nd floor
66 Slater Street
Ottawa ON K1A 0C9

Tel.: (613) 995-0721
Fax: (613) 995-7308

© Her Majesty the Queen in Right of Canada (Industry Canada) 1999
Cat. No. RG77-1/1-1999
ISBN 0-662-64298-8
52744B



20% recycled material



Office of the
Ethics Counsellor

22nd Floor
66 Slater Street
Ottawa, Ontario
K1A 0C9

Telephone: (613) 995-0721
Fax: (613) 995-7308
Site: <http://strategis.ic.gc.ca/ethics>

Bureau du
conseiller en éthique

22e étage
66, rue Slater
Ottawa (Ontario)
K1A 0C9

Téléphone: (613) 995-0721
Télécopieur: (613) 995-7308
Site: <http://strategis.ic.gc.ca/éthique>

June 30, 1999

The Honourable John Manley, P.C., M.P.
Registrar General of Canada
House of Commons
Confederation Building
Ottawa ON K1A 0A6

Dear Sir:

I have the honour to present to you the fourth Annual Report on the *Lobbyists' Code of Conduct* for transmission to Parliament and in accordance with section 10.6 of the *Lobbyists Registration Act*. The Act requires the Ethics Counsellor to table a report on the exercise of the powers, duties and functions related to the *Lobbyists' Code of Conduct*. The report covers the fiscal year ending March 31, 1999.

Yours sincerely,

Howard R. Wilson
Ethics Counsellor



CONTENTS

INTRODUCTION	1
BACKGROUND	1
PURPOSE AND DESCRIPTION OF THE <i>LOBBYISTS' CODE OF CONDUCT</i>	1
COMPLIANCE	2
ADVISORY ROLE OF THE OFFICE	2
ANNEX: GUIDELINES FOR CHINESE WALLS	7

INTRODUCTION

This is the fourth Annual Report on the exercise of the powers, duties and functions conferred on the Ethics Counsellor under the *Lobbyists Registration Act* for the *Lobbyists' Code of Conduct*. This report covers the period from April 1, 1998 to March 31, 1999.

BACKGROUND

In July of 1995, the *Lobbyists Registration Act* was significantly amended to promote public trust in the integrity of government decision making. The amendments greatly increased the information that all paid lobbyists must disclose, and provided stronger measures for compliance and enforcement. Furthermore, the amended Act directed the Ethics Counsellor to develop a code of conduct for lobbyists in consultation with interested parties. There were extensive consultations, not only on the structure and content of the code, but also on the first and subsequent drafts. The code was then referred to the House of Commons Standing Committee on Procedure and House Affairs and subsequently published in the *Canada Gazette* on February 8, 1997. The *Lobbyists' Code of Conduct* entered into force on March 1, 1997.

PURPOSE AND DESCRIPTION OF THE *LOBBYISTS' CODE OF CONDUCT*

The purpose of the *Lobbyists' Code of Conduct* (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.

The Code establishes standards of conduct for all lobbyists communicating with federal public office holders and forms a counterpart to the obligations that federal officials must honour in their codes of conduct when they interact with the public and with lobbyists.

Like most professional codes, the *Lobbyists' Code of Conduct* begins with a preamble that states its purpose and places it in a broader context. Next comes a body of overriding principles that set out, in positive terms, the goals and objectives to be attained without establishing precise standards. They are intended as general guidance. The principles of integrity and honesty, openness and professionalism thus represent goals that should be pursued.

The principles are then followed by rules that set out specific obligations or requirements. The rules are in three categories: transparency, confidentiality and conflict of interest. Under the rule of transparency, lobbyists have an obligation to provide accurate information to public office holders and to disclose the identity of the person or organization on whose behalf the representation is made and the purpose of the representation. They must also disclose to their client, employer or organization, their obligations under the *Lobbyists Registration Act* and the Code itself. Under the rule of confidentiality, lobbyists cannot divulge confidential information nor use insider information to the disadvantage of their client, employer or organization. And finally, under the rule of conflict of interest, lobbyists are not to use improper influence nor represent conflicting or competing interests without the consent of their clients.

The Code is available via *Strategis*, Industry Canada's Web site at <http://strategis.ic.gc.ca/lobbyist>

The *Lobbyists' Code of Conduct* is also an integral part of the registration kit distributed to all lobbyists and printed copies can be obtained from the Office of the Ethics Counsellor.

COMPLIANCE

Lobbyists have a legal obligation to comply with the Code. Where, on reasonable grounds, the Ethics Counsellor believes that a rule has been breached, the Act provides that the Ethics Counsellor shall investigate and the results of that investigation must be tabled in Parliament. During the year under review, no complaint under the *Lobbyists' Code of Conduct* was received by the Office of the Ethics Counsellor.

ADVISORY ROLE OF THE OFFICE

Since a major objective of the Code is to promote public trust in the integrity of government decision making, the Office places a high priority on providing guidance and clarification on the Code to lobbyists and their clients and, more generally, the public.

One issue that has occasionally arisen involves firms that are involved in two lines of business: first, lobbying on behalf of private sector clients and, second, providing advisory services to government departments. The question is whether there is any way a firm can avoid conflict and satisfactorily provide advice to a government department while at the same time representing a company with interests in the activities of that same department.

The Office of the Ethics Counsellor has advised that the only satisfactory way this can be handled is by putting in place "Chinese Walls" to ensure that information confidential to each of the two clients (one private, the other public) is not inadvertently used to the advantage or disadvantage of the other.

The issue of Chinese Walls first arose in the Supreme Court of Canada, *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, now commonly known as *Martin v. Gray*, in a case involving the transfer of a lawyer from one firm to another. The lawyer joined a law firm that was acting against one of her former clients, about whom she possessed confidential information. The claim was made that her new law firm should be disqualified because the former client's confidential information could be used to his disadvantage. The court unanimously agreed. The majority, in a judgment written by Sopinka J., however, held:

The second question is whether the confidential information will be misused. A lawyer who has relevant confidential information cannot act against his client or former client. In such a case the disqualification is automatic. No assurances or undertakings not to use the information will avail

The answer is less clear with respect to the partners or associates in the firm. Some courts have applied the concept of imputed knowledge. This assumes that the knowledge of one member of the firm is the knowledge of all. If one lawyer cannot act, no member of the firm can act. This is a rule that has been applied by some law firms as their particular brand of ethics. While this is commendable and is to be encouraged, it is, in my opinion, an assumption which is unrealistic in the era of the mega-firm

There is, however, a strong inference that lawyers who work together share confidences. In answering this question, the court should therefore draw the inference, unless satisfied on the basis of clear and convincing evidence, that all reasonable measures have been taken to ensure that no disclosure will occur by the "tainted" lawyer to the member or members of the firm who are engaged against the former client. Such reasonable measures would include institutional mechanisms such as Chinese Walls and cones of silence. These concepts are not familiar to Canadian courts and indeed do not seem to have been adopted by the governing bodies of the legal profession. It can be expected that the Canadian Bar Association, which took the lead in adopting a Code of Professional Conduct in 1974, will again take the lead to determine whether institutional devices are effective

and develop standards for the use of institutional devices which will be uniform throughout Canada. Although I am not prepared to say that a court should never accept these devices as sufficient evidence of effective screening until the governing bodies have approved of them and adopted rules with respect to their operation, I would not foresee a court doing so except in exceptional circumstances. Thus, in the vast majority of cases, the courts are unlikely to accept the effectiveness of these devices until the profession, through its governing body, has studied the matter and determined whether there are institutional guarantees that will satisfy the need to maintain confidence in the integrity of the profession.

The issue of protecting confidential information has recently been considered in the United Kingdom in cases involving forensic accountants. In effect, the courts in the U.K. have applied the same standards for the protection of confidential information to forensic accountants as they do to lawyers. Lord Millett, in *Prince Jefri Bolkiah v. KPMG* [1999] 2 WLR 215, issued on December 18, 1998, stated, "There is no rule of law that Chinese Walls or other arrangements of a similar kind are insufficient to eliminate the risk. But the starting point must be that, unless special measures are taken, information moves within a firm." He further added, "In my opinion an effective Chinese Wall needs to be an established part of the organisational structure of the firm, not created *ad hoc* and dependent on the acceptance of evidence sworn for the purpose by members of staff engaged on the relevant work."

But what are effective Chinese Walls? A task force created by the Canadian Bar Association took up the Supreme Court's challenge to answer this question and, in 1993, produced a report entitled *Conflict of Interest Disqualification: Martin vs Gray and Screening Methods*, which provides guidelines for setting up Chinese Walls (see Annex). These guidelines have now been adapted and incorporated into the *Rules of Professional Conduct* of the Law Society of Upper Canada.

The Office of the Ethics Counsellor has concluded that if Chinese Walls are now acceptable for the legal profession, they should be acceptable for wider application.

Although lobbying activities may not be viewed by the courts with the same stringency that they would apply to lawyers and forensic accountants, it nonetheless remains that clients, irrespectively, will expect that the firms they hire would indeed apply the same standards as are required of lawyers to ensure that their confidential information is not used to their disadvantage.

It was with this expectation in mind that the *Lobbyists' Code of Conduct* includes the following rule:

4. Confidential information

Lobbyists shall not divulge confidential information unless they have obtained the informed consent of their client, employer or organization, or disclosure is required by law.

Returning to the question of whether a firm can provide advisory services to a government department while at the same time representing a private sector client with interests in that same department, the Office believes that it can, but only if Chinese Walls are put in place that follow the guidelines set out by the Canadian Bar Association. These guidelines provide a fair and objective basis upon which to assess the adequacy of the measures taken by a lobbying firm in such a situation. This would mean, however, that the organizational structure of the firm would need to provide for different people, separate files and internal undertakings to ensure that everyone within the firm agrees and complies. The firm would also need the informed consent of both clients.

ANNEX: GUIDELINES FOR CHINESE WALLS

Conflict of Interest Disqualification: Martin vs Gray and Screening Methods

The Canadian Bar Association Task Force Report

February 1993

GUIDELINES

- Guideline 1. The screened lawyer should not participate in the current representation.
- Guideline 2. The screened lawyer should not disclose confidential information relating to the prior representation.
- Guideline 3. No member of the new firm should disclose confidential information relating to the current matter or the prior representation with the screened lawyer.
- Guideline 4. The current client matter should be discussed only within the limited group who are working on the matter.
- Guideline 5. The files of the current client, including computer files, should be physically segregated from the regular filing system, specifically identified, and accessible only to those lawyers and support personnel in the firm who are working on the matter (or require access for other specifically identified and approved reasons).
- Guideline 6. No member of the new firm should show the screened lawyer any documents relating to the current client matter.
- Guideline 7. The measures taken by the firm to screen the lawyer should be stated in a written policy explained to all lawyers and support personnel within the firm, supported by an admonition that violation of the policy will result in sanctions, up to and including dismissal.
- Guideline 8. Affidavits or undertakings, whichever is appropriate to the circumstances, should be provided by the relevant firm members, setting out that they have adhered to and/or that they will continue to adhere to all elements of the screen.
- Guideline 9. The current and former clients should be informed that the screened lawyer is now with the firm representing the current client.

- Guideline 10. The current and former clients should be informed of the measures adopted by the firm to ensure that there will be no misuse of the confidential information.
- Guideline 11. The screened lawyer's office should be located away from the offices of those working on the current client matter.
- Guideline 12. The screened lawyer should work with associates and support personnel different from those working on the current client matter.
- Guideline 13. Every effort should be made to obtain the former client's informed consent to the new firm's representation.