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REGISTRATION OF LOBBYISTS

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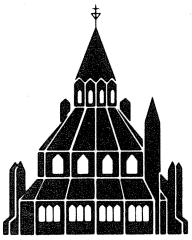

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THE REGISTRATION OF LOBBYISTS

ISSUE DEFINITION

On September 9, 1986 Prime Minister Mulroney announced that one of his initiatives in the field of public sector ethics would be the development and implementation of a scheme of registration for paid lobbyists. It may be asked why Parliament and Parliamentarians should be concerned with the imposition of a system of regulation or registration upon the lobbying industry. What ills will this cure? The main objective seems to be to provide some measure of accountability and some assurance to the public that government decisions are made on the merits of individual cases. Public disclosure of the activities of lobbyists should in some way respond to the public concern that certain paid lobbyists might receive preferential treatment.

The problems that confront a legislator when attempting to deal with this subject have to do mainly with finding appropriate definitions of "lobbying" and "lobbyist". The issue that must then be confronted is the amount of public disclosure which should be required to accomplish the principal objectives of registration. The problems which must be addressed can be set out in the form of six questions.

1. Who should be required to register?

2. What types of activities should trigger the registration process?

3. How should the scheme be administered?

4. How much of the information received from the lobbyist should be made public?

5. Will a registration scheme conflict with the Charter of Rights and Freedoms?

6. Should there be sanctions for non-compliance?

BACKGROUND AND ANALYSIS

A. Current Legislative Situation

There is no legislation at either the federal or provincial level which deals with lobbying in Canada. Lobbying has been present in this country since before Confederation, however, and is now looked upon as a necessary and useful part of the legislative process. Some legislation does, however, touch obliquely on the subject; for example, sections of the Criminal Code which protect against serious abuses and wherein those who offer advantages to elected or other officials and those whose accept them can be charged with criminal offences and are liable to be punished. As well, the Standing Orders of the House of Commons, Beauchesne's Parliamentary Rules and Forms, and The Senate and House of Commons Act all contain relevant instructions to federal Members of Parliament dealing with such matters as:

(a) the disentitlement to vote upon any question in which a member has a pecuniary interest;
(b) the prohibition of bribery;
(c) the preservation of the independence of Parliament through the setting of rules of eligibility for Members of Parliament.

The Standing Orders of the House of Commons also deal with Parliamentary Agents who are promoters of private bills.

B. Lobbying in Canada

While little is empirically known of the extent of lobbying in Canada, more is known about the general fashion in which it is carried out. It is often assumed that much of the American experience with lobbying can be applied to the analysis of the situation in Canada. There are similarities, to be sure, in the tactics employed by interest groups

in both countries. However, the parliamentary nature of Canadian government dictates that genuine decision-making power is found in the executive part of government - the cabinet and the bureaucracy. In the United States, legislators in and out of committee exert powers and have authority which is not granted to a parliamentary backbencher, except in exceptional circumstances. Further, there is less party discipline in Congress - it is not unusual for a particular Senator or Representative to take exception to the party line on a variety of issues. Congressmen and Congressional committees lack the direct departmental support and sustenance which the Cabinet receives in Canada; hence they are very receptive to the resources and information provided by well-organized lobbies.

Modern government in Canada concentrates most power in the bureaucracy and in ministers of the Crown. Parliament is not, in most circumstances, the primary focus for interest group activity. In a study conducted by Robert Presthus into the lobbying efforts of groups in Canada and the United States the lobbyists were asked who in the government structure they most consistently approached as their primary target. The responses were as follows:

	(Percentage of groups using location as primary targets for lobbying)	
Location	U.S. Groups	Canadian Groups
Bureaucracy	21%	40%
Legislators	41	10
Legislative Committees	19	7
Cabinet	4	19
Executive Assistants	3	5
Judiciary	3	3
Others	9	6

These figures reveal the marked dominance of cabinet and bureaucracy as targets for lobbying in Canada, in comparison with the United States. In that country, interest groups are over three times more likely to target legislators and their committees.

It has been said that there are three phases in the legislative process in Canada. In the first, "pre-Parliamentary" phase, a policy initiative is taken, either within the bureaucracy, or in response to outside events. Its feasibility is studied, and its implications are tested and evaluated. Then a briefing book is prepared for consideration by the Cabinet. There then follows the "Parliamentary phase", where the matter is debated in Cabinet committee and, if it is accepted, drafting instructions are issued. The draft bill is then reviewed and approved by the Cabinet and then committed to what has been called the "ceremonial" process - first and second reading in Parliament, consideration in Committee, and then third reading and approval by the other chamber of Parliament. The third and final phase is the "post-Parliamentary" phase, when the legislation is enforced, regulations and administrative guidelines promulgated, and whatever discretion reposed in officials in the legislation is exercised.

It is argued that in only the first and third phases of this process do lobbyists have significant chance of influencing government behaviour - that is to say in the very early stages of policy development, and with respect to the discretionary and administrative elements of enforcement. Once a matter enters the second, or Parliamentary, phase policy decisions have been made which often will be altered in only superficial ways. This accounts for the fact that lobbying in Canada is more directed to the Cabinet and the bureaucracy than to legislators. It is even argued that, at least with respect to policy formulation, the primacy of the Cabinet is largely theoretical, and that most new policy proposals are initiated by, and take shape within, the bureaucracy.

Those arguments, however, were raised prior to the adoption by the House of Commons of the most recent reforms, designed to strengthen the position of the private member. Stronger, more independent committees functioning with their own staff and budgets, should raise the profile of the private member to the point where he or she becomes increasingly the object of lobbying activity. Any system adopted to deal with lobbying will have to take this increased influence of the private member into account.

C. Regulation of Lobbying in Other Jurisdictions

It is useful to look at the experience of other jurisdictions when considering what possible action could be taken in Canada with regard to the registration of lobbyists. For this purpose the experience in the United States is most helpful. At the present time, lobbying is governed by the 40-year-old Federal Regulation of Lobbying Act which was enacted as part of the Legislative Reorganization Act of 1946. Lobbyists as defined under the Act, are required to register with the Clerk of the House of Representatives or the Secretary of the Senate before they begin their lobbying activity. They must report under oath, quarterly, all the money received and spent in pursuit of lobbying and are required to reveal to whom they gave money, the purpose, and the legislation they opposed or supported. They are to list certain contributions and expenditures. Indirect or "grassroots" lobbying is not caught by this statute, however, and neither are contacts with the executive branch.

Since the passage of this Act, court decisions have restricted its application. In the case of United States v. Harris, decided in 1954 by the Supreme Court, it was ruled that the law applied only to groups and individuals receiving money for the main purpose of influencing legislation through "direct contact" with Members of Congress. In addition to this, large loopholes have been found in the parts of the statute which require financial disclosure. There have been repeated attempts to amend this statute to broaden its effect and application but to date none has been successful.

While most States have laws which to a certain degree affect lobbying, it is generally accepted that California has the strictest disclosure laws. Lobbyists, lobbying firms and lobbyist employers are all obliged to file certifications, registrations and reports with the office of the Secretary of State. Information must be provided regarding the person on whose behalf the lobbying is being done and the amounts received and contributions spent in furtherance of the lobbying activity. One criticism of the California legislation is that it is so demanding and

requires such detail that it is relatively ineffective because the information provided is too voluminous to be properly analyzed.

Recently, Australia adopted a system which involves the keeping of two registers dealing with lobbyists. These are confidential for the use of Ministers and public officials. There is a Special Register for lobbyists whose clients are foreign governments or their agencies, and a General Register for other lobbyists and their clients. Lobbyists who do not register are denied access to government Ministers and officials.

The Federal Republic of Germany has a register of lobbyists, but it applies only to those who approach the members of the lower house. This public list is kept by the Speaker and information from it is published annually in the official federal gazette. Disclosure of the lobbyist's name and interests are required, but not the disclosure of financial information.

The experience in these jurisdictions is instructive as it illustrates some of the problems that will have to be dealt with in the design of a registration scheme for those who lobby the Canadian federal government. The federal United States lobbying law is too limited in its application both because it does not apply to those who lobby the bureaucracy or congressional staff, and because it has no enforcement provisions. The California system is too comprehensive. Too much detail is required and therefore analysis of the filings is difficult. The Australian system, while it is appealing in its simplicity, is not for public use. It does little to alleviate the public fear that government decisions are influenced by those who have favoured access to the decision-makers.

D. Suggestions for a Canadian Solution

The Discussion Paper entitled Lobbying and the Registration of Paid Lobbyists, prepared by the Department of Consumer and Corporate Affairs during 1985, suggests various ways for dealing with the lobbying industry. One is by allowing self-regulation by lobbyists as is done in Great Britain. This would have to be accompanied by guidelines which would

instruct public office holders to deal only with accredited members of the lobbying association. Alternatively, a code of conduct could be developed which would have to be adhered to by both public officials and lobbyists. The implementation of either of these measures would not be onerous, especially for the lobbying industry. At the other extreme, perhaps legislation could be enacted which would regulate the actions of both public officials and lobbyists. As the paper suggests, "Legislation could regulate their behaviour and dictate the parmameters of how, when, where, and on behalf of whom approaches to the government could be made."

The Discussion Paper describes a possible system for registration which contains a rather broad description of registerable lobbying activity. It would include almost all approaches to government at all levels except for communication with public office holders about the normal administrative machinery of government, appearances before quasi-judicial bodies and unpaid lobbying activity.

All those who are paid to lobby would be required to register and there should also be a register of foreign agents. Those who register should be required to disclose the name and business address of the paid lobbyist, the subject matter of the activity and the names of clients. The question of the disclosure of financial information should be resolved by balancing the public's right to know and the privacy of legitimate business concerns. The information disclosed could be published in the Canada Gazette and updated on a regular basis.

The solution proposed in the Discussion Paper raises a number of problems which will have to be solved if we are to move toward a system of registration of lobbyists. Those designing such a system will have to be careful that it in no way inhibits a constituent from approaching his or her Member of Parliament or a government official on a matter of personal concern. Also Section 2 of the Charter of Rights and Freedoms which guarantees "freedom of thought, belief, opinion and expression" must not be encroached upon by a system of registration. As with all new initiatives, it is vitally important that those charged with the task of designing the registration system not lose sight of the original objectives in this area.

E. The Report of the Standing Committee on Elections, Privileges and Procedure

The Report of the Standing Committee on Elections, Privileges and Procedure tabled in the House of Commons on 27 January 1987 concluded that registration is the best solution to the problem of providing a method of disclosure of the activities of lobbyists.

The Committee did not want to fall into the trap which seems to be prevalent in the United States, whereby systems of registration have been established which are largely ineffective or simply ignored by lobbyists. In Washington, lobbying activity requires registration only when senators and members of the House of Representatives are lobbied directly. Nor are there efficient mechanisms in place in the federal act to force registration by lobbyists. In California, the amount of information required to be disclosed in the filings by lobbyists is so great that it is virtually impossible to determine who is lobbying whom, the subject matter, and the amount of money involved in the lobbying activity. Therefore, the Committee determined that the definition of lobbying activities which should be subject to registration should be as inclusive as possible.

Lobbying is defined as all attempts to influence directly or indirectly any government activity. All efforts and approaches to influence the executive, Members of Parliament, including both members of the House of Commons and the Senate and their staff and the bureaucracy would be considered as falling within this definition of lobbying. Specifically the act of lobbying government would be defined as to include:

(a) attempting to influence the making or amending of legislation and regulations;

(b) attempting to influence the making or changing of federal policies or programs;

(c) attempting to influence federal decisions on the awarding of grants, contracts, contributions or any similar benefits;

(d) attempting to influence federal appointments to boards, commissions and any other public office.

1. Definition of Lobbyist

The Committee decided that not all those who attempt to influence government activity should be defined as lobbyists who have to register. The definition was restricted to "paid lobbyists". This would include those who lobby on behalf of clients, those who work for companies, non-profit or volunteer organizations and who are paid and whose job is to lobby government. These would be required to register, as would their company or organization. It was also determined that those who are paid to organize mass mailings or advertising campaigns to disseminate material designed to influence government through public opinion should be required to register. Also non-profit organizations, volunteer groups and single interest groups should be required to register when they retain a paid lobbyist to represent their views to government.

Lawyers, accountants and other professionals when they represent clients in attempts to change or influence government policy should also be required to register as lobbyists.

The Committee decided that, for the present, volunteer associations, single-interest groups and non-profit associations would not generally be required to register. This decision eliminates a large portion of the lobbying population from the requirement of registration. It was felt, however, that requiring these groups to register might have a chilling or detrimental effect on their ability to organize and communicate effectively with government.

2. Degree of Disclosure Required

The Committee reached a consensus that it would not create an excessive burden on lobbyists to disclose their names, or name of their firm if applicable; names of clients and their place of business; and the issue or matter upon which the lobbying activity is to take place.

3. Administration and Sanctions

These recommendations were designed to circumvent the problems encountered in the United States where Washington has no means of forcing registration or indeed checking on the validity and veracity of the

information filed. In Canada, this will be done by the office of the Assistant Deputy Registrar General. The registration of the particular lobbying activity would take place within ten days of its commencement and the Assistant Deputy Registrar General would be empowered to check the filings for deficiencies. If any deficiencies or irregularities are demonstrated he should have the power to enforce compliance with the requirements of the register. This would include the power to carry out investigations and refer the matter to the police or appropriate authorities for action.

4. Implementation

The Committee recommended that the bill implementing its recommendations should be referred to it for scrutiny. Also the whole matter of the registration of lobbyists should be reviewed in two years by the Committee.

5. Bill C-82

On June 30, 1987, Bill C-82, An Act respecting the registration of lobbyists was given first reading in the House of Commons. The bill, unlike the Report of the Standing Committee on Elections, Privileges, and Procedure, proposed a two-tiered approach to the registration of lobbyists. Lobbyists in both tiers would have to register, but they would be treated differently with respect to disclosure. In the first tier would be professional lobbyists who, under contract to third parties, make approaches to public office holders, even for the purpose of arranging meetings with clients. In the second tier would be people who lobby federal officials as part of their duties on behalf of their employer. This would include a broad range of employees of trade associations, labour federations, professional associations, chambers of commerce and like organizations.

While the first group would have to disclose who their employer was, the name and address of the client, and the proposed subject matter of meetings or communications, the second group would have to disclose only their names and the name of the organization by whom they were employed.

The Register of lobbyists would be kept by the Registrar General of Canada and would be open to public inspection. The Registrar would also be obliged to report annually to Parliament on the administration of the Act.

The bill contained a clause whereby the Act would be subject to review by a committee of either the House of Commons or the Senate (or in fact a joint committee if such were deemed necessary), three years after it came into force.

During the Legislative Committee stage of this bill, certain substantive amendments were introduced and these amendments found their way into the final version of the bill.

Section 4 of the bill, which deals with those exempted from its operation, was expanded to include the staff of members of municipal councils as well as the employees of municipalities. Also exempted were members of the council of an Indian band and its staff and employees, as well as diplomatic representatives of foreign governments and officers of the United Nations or other international organizations.

Section 5 of the bill, which contains a list of included activities of lobbyists, was also amended. It is now clear that attempts to influence the making or amending of any regulation within the meaning of the Statutory Instruments Act and influencing the awarding of any monetary grant or financial benefit by the government are lobbying activities.

Bill C-82 received Royal Assent on 13 September 1988, after third reading in the Senate on 8 September 1988.

PARLIAMENTARY ACTION/CHRONOLOGY

28 June 1985 - The Honourable James McGrath introduced private member's Bill C-248, An Act to Register Lobbyists.

5 December 1985 - Mr. John Rodriguez tabled Bill C-256, An Act to Register Lobbyists.

14 February 1986 - The Department of Consumer and Corporate Affairs discussion paper Lobbying and the Registration of Paid Lobbyists was tabled in the House of Commons.

14 April 1986 - The Standing Committee of the House of Commons on Elections, Privileges, and Procedure commenced public hearings on the subject of lobbying.

27 January 1987 - The Standing Committee on Elections, Privileges and Procedure tabled its report on the Registration of Paid Lobbyists.

12 February 1987 - Motion of Mr. Rodriguez, M.P., seconded by Mr. Riis, M.P. that the First Report of the Standing Committee on Elections, Privileges and Procedure, presented to the House on Tuesday, 27 January 1987, be concurred with.

30 June 1987 - The Honourable Harvie Andre introduced for first reading Bill C-82, An Act respecting the registration of lobbyists.

14 March 1988 - Bill C-82 received approval on second reading.

22 March 1988 - Legislative Committee on Bill C-82 was organized and began public hearings on 12 April 1988.

27 April 1988 - Legislative Committee on Bill C-82 approved the bill as amended and reported back to the House of Commons where it received third reading on 25 July 1988.

13 September 1988 - Bill C-82 received Royal Assent, having passed third reading stage in the Senate on 8 September 1988.

SELECTED REFERENCES

Department of Consumer and Corporate Affairs. Lobbying and the Registration of Paid Lobbyists, A Discussion Paper. 1985.

Duchesne, Pierre and Russell Ducasse. "Must Lobbying be Regulated". Canadian Parliamentary Review, Winter 1984-85, p. 2.

Gillies, James and Jean Pigott. "Participation in the Legislative Process". Canadian Public Administration, 1982, Vol. 25, Summer, p. 254.