A. INTRODUCTION

The Province of Alberta will shortly become the eighth jurisdiction in Canada to pass a lobbyist registration law, and the seventh jurisdiction to enforce one. Meanwhile, significant changes to the federal lobbying statute, passed by Parliament almost one year ago, are anticipated to come into force within the next few months. These developments provide an opportunity for in-house lawyers to evaluate how well their own organizations are meeting their obligations under Canadian lobbying laws and to identify any risks of non-compliance.

1. Lobbying? Who Says We Lobby?

Some assume, wrongly, that only professional lobbyists are affected by Canadian lobbying laws. In fact, federal and provincial lobbying laws cover everyone who is paid and communicates with a public official about a government decision. The laws apply both to employees who communicate with government officials and to any remunerated non-employees (e.g., directors, partners, and external service providers such as lawyers and accountants) who communicate on behalf of a corporation or organization. All these must register or be registered.

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1. Alberta, Legislative Assembly, 3\textsuperscript{rd} Session, 26\textsuperscript{th} Legislature, Bill 1, \textit{Lobbyists Act}. First reading, March 7, 2007. Second reading, March 22, 2007. Report (including proposed amendments) adopted by Standing Committee on Government Services, November 2, 2007. At the time of writing (November 4), the bill had not yet been reported back from committee. It is quite possible that by the time of my speech (November 23), the amended bill will have received third reading and perhaps Royal Assent.

2. Lobbying laws have also been passed and are enforced at the federal level and in British Columbia, Newfoundland and Labrador, Nova Scotia, Ontario and Quebec. The eighth jurisdiction — the only one to pass a lobbying law but then fail to bring the law into effect or to enforce it — is the City of Toronto. The troubled history of Toronto's lobbying law is discussed in section A.4. Because the Toronto law is in limbo, it is not included in this paper's general analyses; in other words, references to “all” jurisdictions or “all” lobbying laws do not include Toronto and its Lobbying By-law.


4. Non-employees are always personally responsible for registration. In the case of employees, some statutes require individual registration and others make registration a responsibility of the chief executive officer or senior employee of the corporation or organization.
The Canadian statutes that govern lobbying tend to define it fairly consistently: Lobbying is communication with a government official about a government decision, or in an attempt to influence a government decision.

The types of decisions to which this definition apply include legislation, regulation, policies and programs. In most places, decisions to privatise state assets are also covered.

At the same time, the definition of lobbying excludes traditional legal advocacy. For example, the federal Act does not consider to be lobbying “any oral or written communication made to a public office holder by an individual on behalf of any person or organization with respect to the enforcement, interpretation or application of any Act of Parliament or regulation by that public office holder with respect to that person or organization.” In brief, advocating for rights under the law, or arguing the interpretation or application of existing law, is not lobbying. Trying to change the law is lobbying.

As a result of changes to the federal legislation that took effect in June 2005, the law applies to all communication with a public office holder about a government decision. The communication need not be intended to influence government action; any contact merely “in respect of” a decision would be covered. On the other hand, all provincial definitions of “lobby,” save one, only include communication with a public office holder that is made in an attempt to influence a specified type of government decision. The exception is Quebec, where lobbying consists of communication “in an attempt to influence or that may reasonably be considered by the initiator of the communication as capable of influencing” a government decision.

Many people underestimate the scope of communication covered by lobbying registration laws. The federal and provincial statutes apply to many more activities than those traditionally considered lobbying. Even casual conversations in the hallway or at a social event are potentially subject to being reported. Phone calls, e-mails and other forms of communication are covered. What matters is there be a communication about a government decision, not the location, means and context of the communication.

Under federal law, even if the conversation is initiated by a federal government official, the legislation may still apply. Thus, it is no excuse to explain that an MP or civil servant started the dialogue.

While lobbyist registration laws vary among jurisdictions, each imposes the same basic requirement. A person who is paid to communicate with a public office holder about a government decision (such as drafting or amending a statute, regulation, policy, or program) must file a report with the registrar of lobbyists. While making representations to courts and tribunals is generally exempt from the legislation, public policy advocacy — that is, on behalf of an employer or client, urging government to adopt a particular decision or course of action — is most definitely subject to the statutory reporting requirement.

Registration of in-house lobbyists (employees) is subject to a volume threshold, discussed in section B.2.2, at page 14.
2. **Four Reasons Why Compliance Matters**

The heading above this section should not be misunderstood. Compliance with the law is *always* important. Ensuring that the company or organization meets its legal obligations is foremost among the responsibilities of corporate counsel. The heading is not meant to suggest that the imperative of complying with the law needs any further justification.

That said, there are at least four reasons why compliance with these particular laws — Canadian lobbying laws, that is — will be of great interest to others within the corporation or organization served by in-house counsel. These reasons are as follows:

2.1 **CEO Liability**

In four jurisdictions — federal, Newfoundland and Labrador, Quebec and Alberta (proposed) — when employees of a business corporation engage in lobbying, they are not individually responsible for registering and reporting on their activities. Instead, the statutory reporting obligation falls on the employee who holds the most senior office in the organization and is compensated for the performance of his or her duties. Typically that officer is styled the president, chief executive officer or executive director.

In the case of non-profit corporations and organizations, *all* jurisdictions place the statutory reporting obligation on the CEO or other senior officer.

If a report is not filed, or is filed late, incorrectly or incompletely, then the CEO or senior officer is subject to potential prosecution. In fact, the second lobbying law conviction in Canada was of a CEO.\(^6\)

2.2 **Strict Liability**

Most offences under Canadian lobbying laws — e.g., failure to file, failure to include required information in a return — are strict liability offences. On the other hand, knowingly making a false or misleading statement is typically a *mens rea* offence.

Under changes contained in the *Federal Accountability Act*, the strict liability offence of failure to file will become subject to the same penalties as the *mens rea* offence of knowingly making a false or misleading statement:\(^7\)

- \$ 50,000 fine or six months’ imprisonment or both (summary conviction)
- \$200,000 fine or two years imprisonment or both (indictment)

The offence is failing “to file a return as required under subsection 5(1) or (3) or 7(1) or (4),” which would also include filing inaccurately or filing incompletely. As noted, this is an offence

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\(^6\) See section A.2.3, page 4.

\(^7\) *Lobbying Act*, subss. 10.4(7),(8), enacted by *Fed.A.A.*, note 3, s. 77.
4. even if the inaccurate or incomplete filing does not occur knowingly, yet the penalties will be the same as for the \textit{mens rea} offence of knowingly making a false or misleading statement.

In theory, the CEO charged with a strict liability offence can argue that he or she took all “reasonable care” or exercised “due diligence” to ensure legal compliance. The exercise of reasonable care must, however, be specific to the applicable lobbyist registration statute. (Telling subordinates to adhere to laws, generally, does not constitute reasonable care to comply with a particular Act.) Leaving it to others to determine how to comply with the Act is not reasonable care. A CEO may be justified in placing reasonable reliance on reports from informed subordinates, but only if the CEO’s prior instructions to them and his identified expectations are clear. The onus lies on the defendant to prove due diligence or reasonable care.

2.3 \textit{Increased Enforcement}

Canadian regulators, led by the Lobbying Commissioner in the Province of Quebec, have stepped up their enforcement activities.

Significantly, the second conviction under a Canadian lobbying statute was of a CEO (the head of the Quebec association of consulting engineers) who failed to report on in-house lobbying.\textsuperscript{8} Johanne Desrochers pleaded guilty in September 2006 to unregistered lobbying of Hydro Québec and of the provincial transportation ministry and was ordered to pay $1260 in fines and costs.

The first and third Canadian convictions, also in Quebec, were of a lawyer and a property developer respectively. In March 2006, Montreal immigration lawyer Jean-François Harvey pleaded guilty to five separate violations of the \textit{Lobbying Transparency and Ethics Act}, and was ordered to pay fines and costs totalling $3105.\textsuperscript{9} In July 2007, Jacques Roberge became the first Canadian convicted of unregistered lobbying of a municipal government; he had failed to register and report on communication with officials of Quebec City on behalf of developer Les Investissements René St-Pierre Ltée. He was fined $1500 and ordered to pay an additional $390 in costs.\textsuperscript{10}

In February 2007, the federal Registrar of Lobbyists issued four separate reports of investigations into the activities of an Oakville-based consultant Neelam J. Makhija on behalf of four corporations based in British Columbia. Each corporation was named in the title and in the body of the relevant report and in the resulting media coverage. The reports were tabled in Parliament.


and made public.\textsuperscript{11}

The reports concluded that in each instance Makhija had breached the federal \textit{Lobbyists Registration Act} and federal \textit{Lobbyists’ Code of Conduct}. There was no possibility of prosecution for breach of the Act, because the two-year limitation period had already expired. (An amendment passed by Parliament but not yet in force will increase the limitation period for summary prosecutions under the Act to five years after the Commissioner became aware of the subject-matter of the proceedings, but no later than ten years after the subject matter of the proceedings arose.\textsuperscript{12}) There was never a prospect of prosecution for breach of the \textit{Lobbyists’ Code of Conduct}, because it is not an offence to contravene the Code; however, the Registrar’s investigation report (including findings, conclusions and reasons) must be tabled before the House of Commons and Senate and there is no limitation period for investigations into alleged breaches of the Code.

As of April 1, 2007, another six investigations into potential contraventions of the federal Code were still in progress.\textsuperscript{13}

While the federal Registrar conducts investigations into alleged breaches of the Code, investigations into possible breaches of the Act are the responsibility of the police. As the result of an external complaint or request, or of its own monitoring, the Office of the Registrar may commence what it calls an \textit{administrative review}. The administrative review is not an investigation; its purpose is to determine whether an investigation is required. If the administrative review gives rise to a reasonable belief that the Act has been breached, then the matter is referred to the RCMP.\textsuperscript{14}

Between April 1, 2006, and March 31, 2007, the Office of the Registrar launched 24 administrative reviews. Of these reviews:\textsuperscript{15}

- Three involved potential breaches of the Act and the files were closed.
- One involved a potential breach of the Act and was referred to the RCMP, which subsequently “informed the [Office] that taken in their entirety, the facts in this case did not lend themselves to a successful prosecution. The file is still open.”
- Five involved potential breaches of the Act and the administrative reviews were ongoing as of April 1.


\textsuperscript{12} \textit{Lobbying Act}, subs. 14(3), enacted by \textit{Fed.A.A.}, note 3, s. 80.

\textsuperscript{13} Canada, Office of the Registrar of Lobbyists, \textit{Annual Reports 2006-2007}, at 27.

\textsuperscript{14} \textit{Ibid.}, at 15.

\textsuperscript{15} \textit{Ibid.}, at 17-18, 26.
Seven reviews related to possible breaches of the Code, based on allegations of improper lobbying by individuals seeking financial benefits from a special operating agency of the federal government.

Two reviews related to possible breaches of the Code by registered lobbyists alleged to be providing advice and professional services to federal public office holders at the same time as being registered to lobby the government.

Six reviews related to matters decided by the former Ethics Counsellor, whose decisions were then challenged in Federal Court by Democracy Watch (Four of the Ethics Counsellor’s decisions were quashed and two were upheld.) The Office of the Registrar, with the agreement of Democracy Watch, commenced administrative reviews of all six matters, based on potential violations of the Code. One of the six reviews has, in fact, led to a formal investigation into a possible violation of the Code.

In addition to investigations into breaches of the Code and administrative reviews that may lead to matters being referred to the police, the federal Registrar has established another process to promote compliance. It involves the issuance of advisory letters, reminding of the statutory obligation to register and report, to individuals whom the Office has reason to believe are engaged in unregistered lobbying.16

Meanwhile, in British Columbia, the Registrar of Lobbyists (who is also the provincial Information and Privacy Commissioner) issued a May 28, 2007, report which found that a former Deputy Minister to the Premier and Cabinet Secretary had failed to register as a consultant lobbyist in a timely fashion. Ken Dobell had communicated with provincial government officials on behalf of the City of Vancouver, but argued that his activities were not subject to the Lobbyists Registration Act (British Columbia). He said that he was a “content consultant” not a lobbyist, and that his communication with provincial officials consisted of “public policy discussions or debate” not lobbying. The Registrar rejected those arguments and found that Dobell had not, as required by law, registered within ten days of commencing his lobbying undertaking.17

2.4 Increased Scrutiny

In addition to enforcement by lobbyist registrars, lobbying commissioners and the police, unregistered lobbying, and allegations of unregistered lobbying, continue to attract considerable attention in the news media, in Parliament and in provincial legislatures.

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16 Ibid., at 16.
For example, the British Columbia Registrar launched his review of Ken Dobell’s lobbying after the matter was raised in the Legislative Assembly.\textsuperscript{18,19}

In February 2007, the national news media gave widespread coverage to allegations that celebrity Don Cherry and senior officials of CV Technologies, Inc., the maker of COLD-fx, had lobbied federal officials without being registered.\textsuperscript{20} Following an administrative review by his Office, the federal Registrar told the company that registration of in-house lobbying was not required because the cumulative amount of lobbying did not exceed the 20-per-cent threshold.\textsuperscript{21}

3. The Case for Lobbying Laws

The premise of Canadian lobbying law is that lobbying of government officials is a proper activity, provided that it is conducted in an open and ethical manner. As the preamble to the federal \textit{Lobbyists Registration Act}\textsuperscript{22} recognises, “lobbying public office holders is a legitimate activity.”

Indeed, to say that making representations to government is “legitimate” is an understatement. Access to government is a fundamental democratic right. Its roots reach back to \textit{Magna Carta}, which confirmed the right of barons to petition the King for the redress of transgressions,\textsuperscript{23} and the \textit{Bill of Rights, 1689}, which declared “That it is the right of the subjects to petition the king, and all commitments and prosecutions for such petitioning are illegal.”\textsuperscript{24}

Government is larger and more complex than it was during the 13\textsuperscript{th}-century reign of King John. It is therefore little wonder that when dealing with government some individual and corporate citizens choose to seek the assistance of specialists. The freedom to rely on such expert support, advice and representation is a necessary corollary to the right to communicate with government. After all, to force citizens to go unrepresented in all their dealings with government would render nugatory their right of access to government.

While access to government is a fundamental right, recent, high-profile abuses — at all levels of government, federal, provincial and municipal — have shaken Canadians’ faith in the

\textsuperscript{18} British Columbia, Legislative Assembly, 3\textsuperscript{rd} Session, 38\textsuperscript{th} Parliament, \textit{Official Report of Debates of the Legislative Assembly}, Vol. 18, No. 3 (April 18, 2007, afternoon sitting), at 6842.

\textsuperscript{19} “Report on Registration of Ken Dobell Under the Lobbyists Registration Act,” note 17, at 1.

\textsuperscript{20} Carly Weeks, \textit{National Post}, “COLD-fx lobbied against rules/NDP: Alleges Cherry assisted” (February 20, 2007), online: http://www.canada.com/nationalpost/story.html?id=8dc77d40-06a7-4dd6-940b-00bac9fa905a&k=50768.

\textsuperscript{21} Carly Weeks, \textit{Edmonton Journal}, “Federal lobbying penalty waved off for Cherry, Shan: Visit to Parliament Hill to promote COLD-fX was too brief to draw a whistle, watchdog says” (August 31, 2007), online:


\textsuperscript{23} \textit{Magna Carta} (1215), cap. 61. Clause 61 was subsequently renounced by John I and omitted from all subsequent reissues of \textit{Magna Carta}.

\textsuperscript{24} \textit{An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown}, 1 Will. & Mar. sess. 2, c. 2. William and Mary of Orange had to accept the statute and its affirmation of rights before being offered the Throne.
accountability of our democratic institutions and raised questions about the influences on government decision-making. High-profile abuses of access and influence in other countries indicate that the problem is not unique to Canada.

Legislation that strengthens lobbyist registration and introduces lobbyist regulation is necessary to respond to these problems and to restore Canadians’ confidence in the public policy process. Lobbyist registration is based on the principle that, while access to government is a democratic right, nobody has the right of anonymous, secretive access to government. On the contrary, access must be open and transparent, because Canadians have a right to know all the factors and influences that affect government decision-making. Lobbyist regulation is a necessary complement to lobbyist registration; it ensures that access is not misused and that those who attempt to affect public policy do so with integrity.

4. **The Sorry Tale of Toronto’s Lobbying By-law**

The City of Toronto enacted a by-law requiring the registration of lobbyists in February 2007, but the new law, Chapter 140 (Lobbying) of the *Toronto Municipal Code*, is not yet in force and it is unclear when it will take effect. Despite a 33-9 margin of support for the By-law, City Council subsequently set the Lobbyist Registrar’s budget so low that it is doubtful the Registrar will be able to implement and enforce the By-law. The City Manager, in consultation with the Lobbyist Registrar, has been authorized to determine when the By-law comes into force, but it is now uncertain whether this will ever occur.

4.1 **The Bellamy Inquiry**

The impetus for the creation of a binding lobbyist registry in Toronto was the release by Justice Denise Bellamy of the report of her inquiry into a major city procurement controversy. After listening to 156 witnesses over 214 hearing days and reviewing more than 124,000 pages of evidence, the judge issued 32 recommendations related to the practice of lobbying, including the creation of a binding lobbyist registry.

Justice Bellamy explained the need for a lobbyist registry as follows:

116. The City should establish and maintain a lobbyist registry. A lobbyist is in business to try to exert influence. That is not necessarily against the public interest. What is against the public interest is when lobbying occurs in secret.

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25 City Of Toronto, By-law No. 150-2007, To adopt a new City of Toronto Municipal Code Chapter 140, Lobbying, (“Toronto By-law”). Chapter 140 is not yet in force.
26 City of Toronto, City Council, Minutes, Meeting No. 2 (February 5, 6, 7 and 8, 2007), at 14, vote on Item 2.9, as amended.
27 City of Toronto, Toronto City Council Decision Document, Meeting No. 2 (February 5, 6, 7 and 8, 2007), at 3.
a. Purpose

The fundamental purpose of requiring lobbyists to register is to achieve greater transparency in government decision making and dispel the perception that influence is being brought to bear by private interests unknown to the public — in a “back-room deal.” The public has a right to know how decisions are being made and what attempts are being made to influence government decision-makers. When people are being paid to influence political decisions, it should be disclosed, in the same way that campaign spending is disclosed. Many lobbyists are not opposed to lobbyist registries, recognizing that increasing their exposure improves their profile and dispels mistrust of lobbying activities.

b. Limits

A lobbyist registry cannot stop lobbyists, if they are so inclined, from engaging in corrupt or unethical practices. Nor can it stop elected officials or staff, if they are so inclined, from engaging in corrupt or unethical practices in their dealings with lobbyists. Mandatory firearms licensing does not put an end to all gun crimes.

A registry is an achievable transparency measure, albeit an imperfect one. But it is better to do the achievable than to do nothing. A lobbyist registry benefits the public by accounting for all ethical lobbying. Beyond increasing transparency, a registry will serve to highlight the ethical transgressions of those who are caught lobbying inappropriately—for example, lobbying on behalf of two different clients on the same transaction.

Another purpose of a registry is to change the interaction between lobbyists and public servants by requiring both parties to think about the consequences of their conduct. But it is more likely that a lobbyist registry will affect ethical behaviour if it is part of a larger program of ethics policy. The goal is to change behaviour, and, as discussed in Chapter II, achieving such change requires a multipronged approach and ongoing attention.

c. Weaknesses of Existing Registries

Most current lobbyist registries are not sufficiently user-friendly. They are difficult to navigate unless users already know exactly what they are looking for. In general, they are designed for people who are involved in the process, using language unclear to outsiders, including members of the public. As a result, those who should be referring to registries, such as citizens’ groups and interested individuals, do not use them as often as they should, and a valuable opportunity to reassure the public is wasted. If a registry is not easy to decipher, the benefit of transparency is lost. To be effective, therefore, a lobbyist registry should be not only available to the public but also easy to understand.

d. Opposition

Some lobbyists contend that a lobbyist registry would decrease lobbying. In fact, the opposite has happened in jurisdictions where a registry is in place. The registry seems to bring lobbying out of the shadows. The number of registrants in federal and provincial lobbyist registries has increased every year. At the same time, various registration statutes have sought to demystify the subject. It has become part of the political landscape, and companies and organizations no longer feel awkward about hiring a lobbyist.

Another concern raised by lobbyists is that their competitors will use the registry to keep track of them and poach their clients, or to learn who their contacts are in government. These may be legitimate concerns for those in the business of lobbying, but where the public interest is concerned, transparency in decision making is paramount.

Lobbyists who are against a registry often invoke their right to privacy when it comes to disclosure. However, nobody has a right to earn a livelihood in a way that undermines the public interest. The public has a right well-heeled clients. Some members of the public think lobbyists sell access to
government officials. This is seen as giving those with funds an unfair advantage over those who cannot afford a lobbyist. There is also the perception that money talks, and those with the deepest pockets might get the best hearing. Others dismiss that suspicious attitude as unreasonable and uninformed. They say lobbyists help organizations to navigate the complexities of government and take important messages to the right ears. Lobbying can be a legitimate way for diverse interests to bring their views before the people who will shape and make decisions.

In general, lobbying is neither as bad as some fear nor as good as some hope. And in any case, it is not going to go away; nor should it — as long as it is properly done. Some lobbying practices, especially those that are not out in the open, undermine the democratic ideal. Lobbying can best contribute productively to the democratic dialogue when everyone can see and understand what is going on. Thus, one key to overcoming scepticism about lobbying is a clear understanding of what lobbyists should and should not be able to do. That may be achieved through a code of conduct for lobbyists.

Another key is transparency in lobbying, through a lobbyist registry. All councillors should clearly understand that they are not lobbyists. A lobbyist advances the private interests of his or her client. A councillor is an elected official holding a public office who is to act at all times in the public interest. On some occasions, councillors may advocate for policies or programs that are in the public interest, and that will also benefit the private interests of some suppliers. But this is very different from the much more limited role of a lobbyist.

4.2 Interim Voluntary Lobbyist Registry

In the absence of a formal lobbyist registration by-law, in February 2003 Toronto City Council had approved the establishment of an interim, voluntary lobbyist registry system. A councillor who participated in this project required all lobbyists to sign in when they came to the councillor’s office. Each month, the councillor forwarded a copy of the register to the City Clerk’s Office, which then made the register available for inspection. The system was not entirely user-friendly: the list of councillors who submitted their registries was available through the Internet, but the content of those registries — that is, details of the lobbying activity — was not accessible on-line.

Even though Toronto councillors had voted overwhelmingly to create the lobbyists registry, only a minority of them made lobbyists register their activities. There were four explanations for such low participation. First, some councillors did not support lobbyist registration (on the ground that meeting with the public is part of an elected official’s job) and did not participate in the voluntary system. Second, other councillors did not, on principle, meet with lobbyists, and therefore had nothing to report. Third, some councillors took the position that until there was a formal, binding registry that operated under proper legislative authority, they would not support what they saw as a “half measure.” Fourth, some councillors simply had not met with lobbyists.

30 Toronto, City Council, Clause 4a embodied in Report No. 14 of the Administration Committee, as adopted by the Council of the City of Toronto at its regular meeting held on February 4, 5 and 6, 2003.
31 Guy W. Giorno, “Lobbyist registration helps transparency,” The Lawyers Weekly (September 30, 2005), at 16
32 Guy W. Giorno, “Register this: It takes two to lobby,” The Globe and Mail (September 27, 2005) at A19.
during a given month. Despite all of these explanations, participation in Toronto’s voluntary system was still disappointingly low.\textsuperscript{33}

4.3  \textbf{David Miller Campaign Platform}

The creation of a permanent, enforceable municipal lobbyist registry was a key plank in the 2003 election platform of David Miller, now the Mayor of Toronto. His campaign platform explained how the lobbyist registry would work:\textsuperscript{34}

\begin{quote}
The citizens of Toronto are entitled to know who is attempting to influence decisions made by city staff and their elected representatives on behalf of private interests. The registry will include the names of lobbyists, the clients for whom they are working, and the specific issues on which they are attempting to influence decisions. The registry will be maintained by and made accessible to the public through the Integrity Commissioner.
\end{quote}

4.4  \textbf{Funding}

Toronto’s first Lobbyist Registrar, Marilyn Abraham, originally estimated that a 2007 operating budget of $933,000 would be required to implement and enforce the By-law passed by City Council in February 2007. This figure reflected pro-rating of a full-year estimate because Abraham had commenced work in mid-year. In May the Registrar downgraded her 2007 request to $802,000; again, this was a pro-rated figure, equivalent to $1,069,400 annually.\textsuperscript{35}

Before that request could be considered by the Budget Committee, two City Councillors closely aligned with the Mayor visited the Registrar and strongly encouraged her to reduce her request even more.\textsuperscript{36} At their urging, the Registrar cut 1.0 FTE from her planned staff complement, and reduced her request to $711,304 pro-rated during 2007, which was equivalent to $950,616 annually.\textsuperscript{37} The position that the Registrar eliminated from her proposed organization was supposed to have been responsible for enforcement,\textsuperscript{38} and it is doubtful that the reduced amount of $711,304 would have been sufficient for proper implementation of the By-law, especially not to support investigations into illegal lobbying.\textsuperscript{39}

When the Registrar’s budget reached the floor of City Council, July 17, even the reduced request for $711,304 was rejected on a 18-21 vote. Instead, City Council voted 29-9 to give the Lobbyist


\textsuperscript{36}  Author’s conversation.

\textsuperscript{37}  City of Toronto, Report from Lobbyist Registrar to City Council, “Amendment to Lobbyist Registrar’s Budget Report of May 15, 2007” (July 6, 2007).

\textsuperscript{38}  See note 36.

\textsuperscript{39}  Author, letter to Mayor and City Councillors (July 12, 2007).
Registrar just $366,949. The motion expressly stated that this amount was chosen because it is the operating budget of each City Councillor’s office. The illogical premise was that the Registrar’s responsibilities — implement a registry, educate the community, conduct investigations, enforce the law and address illegal lobbying — were analogous to whatever it is that City Councillors do in their offices.

After seeing her budget slashed, the Lobbyist Registrar informed City Council that she was withdrawing her recommendation to bring the By-law into effect August 20, 2007. As she explained:

The proposed budget reflected the (earlier) policy directions of Council on its lobbyist registry as set out in the enacted by-law.

The current by-law and the registration system under it were predicated on the proposed budget being passed.

As the budget for the Office of the Lobbyist Registrar budget was substantially cut, the by-law will need to be reworked to reflect the change in resources, for example, registration time lines.

As a result of City Council’s decision, which has been called a “disgrace” and proof that City Councillors do not actually want the Lobbying By-law to be enforced, implementation of the By-law has been delayed indefinitely, to mid-2008 at least.

5. United States Experience

A few critics have levelled the extreme allegation that lobbyist registration laws — especially the changes contained in the Federal Accountability Act — will interfere with communication between members of the public and their government. In fact, the United States experience belies the claim that lobbyist legislation will damage the lobbying industry or dissuade public servants from vital and necessary contact with stakeholders.

In many respects, United States lobbying laws — especially those at the state level — require much greater disclosure than any Canadian legislation. For example, as of March 1, 2006:

- At least 12 states made lobbyists submit photographs when registering (for use in government-issued lobbyist ID cards).
- The federal government and 19 states required that lobbyists disclose their salaries and/or compensation.

40 City of Toronto, City Council, Minutes, Meeting No. 11 (July 16, 17, 18, 19, 2007), at 80-84, votes on Item 11.32.
41 City of Toronto, Memorandum from Lobbyist Registrar to Mayor and City Council (July 18, 2007).
• 28 states made lobbyists disclose their spending on members of public officials’ households. (3 states prohibited lobbyists from spending on members of public officials’ households.)

• The U.S. federal government and 49 states made lobbyists file spending reports. In 31 states, these spending reports must report the total amount spent in each category of activity (e.g., gifts, entertainment, postage). In 12 states, expenditures must be itemised no matter how small. In 26 states, all expenditures above a certain threshold (e.g., $25) must be itemised. 37 states required identification of the recipient of each itemised expenditure and 36 states required reporting of the date of each itemised expenditure.

• 20 states required registration before any lobbying occurs.

• 19 states made lobbyists disclose direct business associations with public officials, candidates or members of their households.

• Seven states prohibited lobbyists from giving gifts; 19 states limited lobbyists’ gifts and also made lobbyists report gifts; 23 states merely required lobbyists to report the gifts they received.

• Three states (Kentucky, South Carolina, Tennessee) prohibited lobbyists from making any campaign contributions. 22 states prohibited lobbyists from making campaign contributions while the legislature is in session. Nine states made lobbyists report on their political contributions.

• The federal government and 48 states made lobbyists file reports even when they had engaged in no activity.

• In 36 states, the legislation allowed for lobbyists’ reports to be audited. In 15 of these states the audits were mandatory or routine.

• 11 states published lists of lobbyists who file late or fail to file.

The United States experience is proof that lobbyist registration will not damage the lobbying industry or choke off communication between public servants and stakeholders. U.S. jurisdictions regulate lobbying more extensively and more rigorously than does Canada. Most U.S. jurisdictions require greater and more detailed lobbyist disclosure than does Canada. Nobody seriously contends, however, that lobbying laws are threatening the U.S. lobbying industry. No one credibly argues that American lobbyists have too little contact with government officials.

**B. OVERVIEW OF THE LAWS**

1. **Types of Lobbyists**

The laws typically distinguish between lobbyists who are working for clients and employees of a company who lobby as part of their job. The former are called consultant lobbyists. The latter
are known as in-house lobbyists (or enterprise lobbyists (Quebec) or organization lobbyists (Alberta)). When employees or a corporation communicate with government officials on behalf of the corporation, they are subject to the in-house lobbyist provisions of the laws.

The federal, British Columbia, Nova Scotia and Ontario statutes treat in-house lobbyists slightly differently depending on whether or not the employer is an “organization” (a defined term that typically refers to corporations without share capital and to unincorporated associations). Quebec does not use the term “in-house lobbyist” but draws a similar distinction between organizations and enterprises. These jurisdictions differ in their treatment of certain types of commercial employers (e.g., under federal law a business partnership is placed with non-profit entities in the “organization” category, while in Ontario a business partnership is placed in the same category as business corporations) but are fairly uniform in defining non-profit corporations as “organizations.

The two laws (the Newfoundland and Labrador statute and the proposed Alberta legislation) that do not distinguish between types of employers use the term “organization” to refer to all employers, including business corporations and non-profit entities.

2. Registration of In-House Lobbyists

2.1 Obligation to File Returns

The question of who files the returns (each individual employee or the CEO/senior officer for everyone) has been addressed in section A.2.1, at page 3.

2.2 Individuals Named in the Return

Under the federal Act as it currently exists, the six-month return must include the name of every employee of a non-profit organization or business partnership any part of whose duties is to lobby. In the case of a business corporation, the return must name senior officers who lobby in any amount and other employees only if federal lobbying consumes at least 20 per cent of their duties on an individual basis.

Under the proposed Alberta law, the six-month return would include the name of every employee who engages in provincial (Alberta) lobbying on behalf of the employer.

In British Columbia, the return would name only those employees for whom a significant part of duties is to engage in provincial (B.C.) lobbying on behalf of the employer. “Significant” is defined as 20 per cent of one’s time.

The legislation in each of Newfoundland and Labrador, Nova Scotia and Ontario would require reporting of the name of every employee any part of whose duties is to lobby provincially (in Newfoundland and Labrador, Nova Scotia or Ontario, as the case may be) if the cumulative volume of provincial lobbying (within that province), by all employees, would be equivalent to at least 20 per cent of one individual’s duties if performed by one individual.
In Quebec, a return must be filed if (a) the cumulative volume of lobbying across the entire company is 12 days or more during a fiscal year, or (b) the individual who lobbies is a manager or director, or (c) the lobbying has a significant impact on the company.

2.3 Public Office Holders

The list of federal public office holders is broad and includes the following:

- Senators
- Members of the House of Commons (MPs)
- Anyone on the staff of a Senator or MP
- Employees of the federal government
- An individual appointed to office or a body by or with the approval of the federal Cabinet or a federal Cabinet minister
- Officers, directors and employees of federal boards, commissions and other tribunals (including officers, directors and employees of a federal Crown corporation that exercises statutory jurisdiction)

Communication constitutes lobbying under a provincial statute only if it is with a provincial public office holder in that jurisdiction.

The definitions of “public office holder” under British Columbia, Newfoundland and Labrador, Nova Scotia, Ontario, Quebec and proposed Alberta law all include the following categories:

- Members of the Legislative Assembly or National Assembly or House of Assembly
- Anyone on the staff of an MLA/MNA/MHA/MPP
- Employees of the provincial government
- Officers of the provincial government
- An individual appointed to office or a body by or with the approval of the provincial Cabinet or a provincial Cabinet minister
- Officers, directors and employees of specified categories of provincial entities, that vary among the provinces, specifically: government corporations (British Columbia), Crown agencies (Newfoundland and Labrador), agencies of...

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44 Judges and lieutenant governors are excluded from the definition of “public office holder.”
45 Except under the proposed Alberta law.
46 Certain appointees are exempt: those appointed on the recommendation of the Assembly (BC, ON), and judges, JPs and members of adjudicative tribunals (NL, NS).
47 As defined in the Financial Administration Act (British Columbia).
48 As defined in the Auditor General Act (Newfoundland and Labrador).
government (Nova Scotia\textsuperscript{49}), Crown agencies, boards or commissions (Ontario),
government agencies and enterprises\textsuperscript{50} (Quebec) and provincial entities
designated by Cabinet (Alberta\textsuperscript{51}).

Additional categories of “public office holder” are unique to each jurisdiction:

**Newfoundland and Labrador:** school board trustees; directors and assistant directors of school
boards; members of hospital boards, the board of the Newfoundland and Labrador Health Care
Association and the St. John's Nursing Home Board; chief executive officers, directors and
assistant directors of hospitals and the Newfoundland and Labrador Health Care Association and
the St. John's Nursing Home Board.

**Newfoundland and Labrador, Nova Scotia:** officers of the House of Assembly and their
employees.

**Ontario:** members of the Ontario Provincial Police.

**Quebec:** appointees to, and employees of, non-profit agencies established for the purpose of
managing and providing financial support for activities of a public nature out of funds
originating principally from the provincial government, without itself delivering products or
services to the public.

**Quebec:** municipal government officials

**Alberta:** members of provincial entities designated by Cabinet (in addition to employees,
officers and directors, already listed above

### 2.4 What Constitutes Communication by In-House Lobbyists?

The federal Act does not actually use the term “lobby” — instead, it refers to communication,
with a federal public office holder, on behalf of the employer, “in respect of” any of the
following five types of government decision:

- The development of any legislative proposal by the federal government or by a
  Senator or MP
- The introduction of any Bill or resolution in either the Senate or the House of
  Commons, and the passage, defeat or amendment of any Bill or resolution that is
  before either the Senate or the House of Commons

\textsuperscript{49} As defined in the *Auditor General Act* (Nova Scotia).

\textsuperscript{50} As defined in the *Auditor General Act* (Quebec).

\textsuperscript{51} Bill 1 would allow the provincial Cabinet to “prescribe” (*i.e.*, designate) the entities whose employees, officers,
directors and members are “public office holders.” In prescribing the entities, Cabinet can choose from among
provincial agencies described in the *Financial Administration Act* (Alberta), and bodies and entities appearing on
the most recent List of Government Entities or listed in the most recent Annual Report of the Government of
Alberta.
• The making or amendment of any regulation\textsuperscript{52}
• The development or amendment of any federal government policy or program
• The awarding of any grant, contribution or other financial benefit by or on behalf of the federal government

For a communication to be subject to the federal Act, it need not attempt to influence one of the above decisions. It suffices that the communication be “in respect of,” that is, about, the decision.

The provincial laws all define the term “lobby” in terms that tend to parallel the activities that are “registerable” under federal law. However, the provincial definitions of “lobby” only include communication with a public office holder that is made \textit{in an attempt to influence} a specified type of government decision. The exception is Quebec, where lobbying consists of communication “in an attempt to influence or that may reasonably be considered by the initiator of the communication as capable of influencing” a government decision.

3. REGISTRATION OF CONSULTANT LOBBYISTS

3.1 Consultants

Individuals, other than employees and officers, who receive payment or compensation from a business or organization must register and file returns if they engage in registerable activity (federal) or lobby public office holders (provincial), on behalf of the business or organization.

The registration requirement only applies to a non-employee/non-officer who is paid by the business or organization.

A consultant lobbyist is individually responsible to file returns concerning his or her own lobbying activity — except in Alberta, where the proposed law provides for filing by the senior officer of the consultants’ company or firm. If two or more consultants engage in lobbying for the same entity, then each one must file a separate return. A consultant lobbyist must report on any lobbying, no matter how brief or incidental.

3.2 Registerable Activity or Lobbying by Consultants

For consultant lobbyists, the definition of “lobby” (or the extent of registerable activity under the federal law) is similar to the definition of “lobby” applicable to in-house lobbyists, except that in most jurisdictions the definition for consultant lobbyists is broader.

\textsuperscript{52} The definition of “regulation” is that in the \textit{Statutory Instruments Act}, R.S.C. 1985, c. S-22, subs. 2(1), and is very broad: “a statutory instrument (a) made in the exercise of a legislative power conferred by or under an Act of Parliament, or (b) for the contravention of which a penalty, fine or imprisonment is prescribed by or under an Act of Parliament, and includes a rule, order or regulation governing the practice or procedure in any proceedings before a judicial or quasi-judicial body established by or under an Act of Parliament, and any instrument described as a regulation in any other Act of Parliament.”
Under federal law, registerable activity for a consultant lobbyist includes all the things that constitutes registerable activity for in-house lobbyists, plus communicating in respect of the awarding of any contract by or on behalf of the government and arranging a meeting between a public office holder and any other person.

In Alberta (proposed), Ontario, Nova Scotia the definition of “lobbying” for consultant lobbyists is the same as the definition for in-house lobbyists, subject to adding communication made to a public office holder in an attempt to influence the awarding of any contract by or on behalf of the provincial government, and arranging a meeting between a public office holder and any other person.

In British Columbia, in the case of consultant lobbyists, lobbying also includes arranging a meeting between a public office holder and any other person.

In Newfoundland and Labrador and Quebec, the definition of “lobbying” is the same for consultant lobbyists as it is for in-house lobbyists.

### 3.3 Outside Directors

Under federal law and in all provinces except Alberta and Quebec, an outside director (i.e., a director who is not an employee) who receives remuneration (apart from reimbursement of expenses) is treated as a consultant lobbyist if he or she lobbies on behalf of the corporation. (The Quebec law includes as an in-house lobbyist anyone with a “job or function” within a business or on behalf of a non-profit entity. The proposed Alberta law would treat compensated directors the same as employees and compensated officers.)

The consequences of being treated as a consultant lobbyist are significant.

Except in Alberta and Quebec, a remunerated outside director would have to register if he or she lobbied (provincial) or engaged in registerable activity (federal), including attempting to arrange a meeting between a public office holder or communicating about (federal) or in an attempt to influence (provincial) the awarding of a government contract.

In these jurisdictions, registration by a director would be required no matter how small the amount of lobbying or registerable activity. Registration is not required of a director who receives no remuneration.

### 4. Exempt Activities

#### 4.1 Federal

There are a limited number of circumstances in which a communication is exempt from the Act. Exempt communication does not need to be covered by the CEO’s return and an employee engaged solely in exempt communication does not need to be named in it.
Exempt communication with federal public office holders includes the following:

- An oral or written communication restricted to a request for information.
- An oral or written submission made to a parliamentary committee in a proceeding that is a matter of public record.
- An oral or written submission made to any body or person having jurisdiction or powers conferred by or under an Act of Parliament, in proceedings that are a matter of public record.
- Any oral or written communication made to a public office holder by an individual on behalf of any person or organization with respect to the enforcement, interpretation or application of any Act of Parliament or regulation by that public office holder with respect to that person or organization.

It goes without saying that if there is no communication with the federal government, then there is nothing to report. Activities that stop short of communicating with public office holders are not subject to the Act. For example, holding a news conference or engaging in public education would not be covered by the Act.

Apart from these exemptions, communication with a federal public office holder about any of the enumerated types of government decision is subject to reporting under the Act. There is no exemption for casual conversion or for communication at a social event. Communication is covered no matter where it occurs and no matter what the format (oral, written, electronic). There is no exemption for communication initiated by the federal government.

4.2 Exempt Activities: Provincial

Provincial legislation typically contains exemptions that mirror the federal exemptions of certain activities, including exemptions of oral and written submissions made to:

- A legislative committee in proceedings that are a matter of public record
- Any body or person having jurisdiction or powers conferred by or under provincial legislation, in proceedings that are a matter of public record
- A public office holder by an individual on behalf of any person or organization concerning the enforcement, interpretation or application of any provincial Act or regulation by that public office holder with respect to that person or organization
- A public office holder by an individual on behalf of any person or organization concerning the implementation or administration of any program, policy, directive or guideline by the public office holder with respect to the person

53 The legal result would be different if the public education included an appeal to members of the public to contact government officials in an effort to influence their decision.

54 Prior to 2005, the Act exempted communications that responded to a written government request for advice or comment. That exemption was repealed.
A public office holder in direct response to a request from the public office holder for advice or comment; in British Columbia, Newfoundland and Labrador, Ontario and Quebec the request must be in writing

C. CHANGES TO FEDERAL LAW (FEDERAL ACCOUNTABILITY ACT)

1. What’s New

1.1 New Title

The name of the Act will be changed to reflect its expended scope: the Lobbyists Registration Act becomes the Lobbying Act. As mentioned, this denotes the law’s extension from registration to regulation of lobbying.

1.2 New Category: “Designated Public Office Holder”

The Act will create a new category of federal official, called a “designated public office holder.” Designated public office holders will be subject to new restrictions and obligations, and lobbyists and their employers will be subject to new requirements when they deal with designated public office holders.

The term “designated public office holder” includes the following: 55

- Ministers.
- Individuals employed in ministers’ offices who are appointed under subs. 128(1) of the Public Service Employment Act.
- Deputy ministers, chief executive officers, other individuals holding the senior executive position in a department, associate deputy ministers, assistant deputy ministers, and individuals occupying positions of similar rank. 56

1.3 Commissioner of Lobbying

The position of Registrar will be eliminated and replaced with a new officer, the Commissioner of Lobbying, who will be an Officer of Parliament. The Commissioner will hold office for a term of seven years. During that time, he or she may be removed only for cause, on address of the Senate and House of Commons. 57

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55 New definition in subs. 2(1) of the Lobbying Act, enacted by Fed.A.A., note 3, subs. 67(2).
56 The definition includes these positions only where located within paragraphs (a), (a.1) and (d) of the definition of “department” in s. 2 of the Financial Administration Act: namely, departments, divisions or branches of the federal public administration, and departmental corporations, all of which are listed in Schedules I and II and column I of Schedule I.1 of that Act.
57 Ibid., subs. 4.1(2), enacted by s. 68.
1.4 **Detailed Monthly Returns**

Consultant lobbyists and organizations and corporations that employ in-house lobbyists will still be required to file initial returns. The introduction of detailed, monthly reporting will replace the requirement to file semi-annual renewals.\(^{58}\)

A monthly return must be filed by the 15\(^{th}\) day of each month. Its content will cover the activity during the preceding month.\(^ {59}\) Filing of the first monthly return will be required by the 15\(^{th}\) day of the month following the month in which the initial return was filed.

The monthly return will not report on all communication with public office holders. It will only cover communication “involving” a designated public office holder and then only where that communication is of a “prescribed type.” In other words, Cabinet will determine what types of communication will be subject to monthly reporting and, by implication, what types of communication will not be covered.\(^ {60}\) Unless Cabinet specifically prescribes a type of communication, it will escape monthly disclosure.

The government has not announced what types of communication will be “prescribed” as subject to detailed monthly reporting. However, it has been suggested that only “planned” communication might need to be included in the monthly returns, a proposal that was criticised as being open to abuse by lobbyists and likely to cause a spike in “unplanned” lobbying such as communication during social events.\(^ {61}\)

A monthly return must state, for each communication (of a prescribed type) involving a designated public office holder: name of the designated public office holder; date of the communication; particulars to identify the subject matter of the communication, including any particulars prescribed by regulation; any other information that is prescribed by regulation.

1.5 **Review by Present and Former Designated Public Office Holders**

New section 9.1 will allow the Commissioner of Lobbying to ask any present or former designated public office holder to confirm the accuracy and completeness of information contained in a monthly return.

This provision is a modified version of a proposal contained in the Conservatives’ election platform, namely to “Require ministers and senior government officials to record their contacts with lobbyists.”\(^ {62}\)

\(^{58}\) *Lobbyists Registration Act*, paras. 5(1.1)(b) and 7(2)(b), repealed by *Fed.A.A.*, note 3, subss. 69(1) and 70(1).


\(^{61}\) Guy W. Giorno, testimony, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, 39\(^{th}\) Parliament, 1\(^{st}\) Session, 24\(^{th}\) meeting (October 4, 2006), Issue No. 11 at 44, 57.

1.6 Ban on Contingency Fees

New section 10.1 will prohibit receiving or paying any contingency (or success) fee. As drafted, however, the section applies only to consultant lobbyists.

1.7 Five-Year Cooling-Off Period: Lobbying Act

New section 10.11 will, when it comes into force, prevent a former designated public office holder from carrying out certain activities as a consultant lobbyist or an in-house lobbyist for five years after the day on which he or she ceased to be a designated public office holder.

Most designated public office holders are already subject to the five-year prohibition on lobbying imposed by section 29 of the Conflict of Interest and Post-Employment Code for Public Office Holders. Note that the Code, except s. 29, ceased to exist July 9, 2007, when s. 27 of the Federal Accountability Act was proclaimed in force.63

1.8 One- or Two-Year Cooling-Off Period: Conflict of Interest Act

The new Conflict of Interest Act, which came into force July 9, 2007, creates a parallel, but slightly different, cooling-off period for a category of former officials known as former “reporting public office holders.”

The definition of “reporting public office holder” is different than that of “designated public office holder.” A reporting public office holder includes,64

- a minister of the Crown, minister of state or parliamentary secretary;
- a member of a ministerial staff who works on average 15 hours or more per week;
- a ministerial advisor;
- a Governor in Council appointee, or a ministerial appointee whose appointment is approved by the Governor in Council, who exercises his or her official duties and functions on a part-time basis but receives an annual salary and benefits;
- a Governor in Council appointee, or a ministerial appointee whose appointment is approved by the Governor in Council, who exercises his or her official duties and functions on a full-time basis;
- a full-time ministerial appointee designated by the appropriate minister of the Crown as a reporting public office holder.

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63 Fed.A.A., note 3, s. 27, repealing, inter alia, s. 72.061 of the Parliament of Canada Act. A special transitional provision provides that since s. 10.11 of the Lobbying Act (the five-year cooling-off period) was not in force on the date of repeal, the old cooling-off period in s. 29 of the Code continues to apply to public office holders who leave office until s. 10.11 of the Lobbying Act comes into force: see Fed.A.A., s. 3.1.

64 Conflict of Interest Act, subs. 2(1), enacted by Fed.A.A., note 3, s. 2.
A former reporting public office holder shall not enter into a contract of service with or accept an appointment to the board of directors of or employment with an entity with which he or she had direct and significant official dealings during his or her last year in office.65

A former reporting public office holder shall not make paid or unpaid representations on behalf of any other person or entity to any department, organization, board, commission or tribunal with which he or she had direct and significant official dealings during his or her last year in office.66

A former minister shall not make representations to a current minister who was a minister at the same time as the former minister.67

In the case of a former minister, the Conflict of Interest Act cooling-off period lasts for two years after his or her last day in office.68 For all other reporting public office holders, the cooling-off period is one year.69

1.9 Offences and Penalties

The maximum fine for the mens rea offence of knowingly making a false or misleading statement in any return or other document submitted to the Commissioner will be doubled to $50,000 (summary conviction) and $200,000 (indictment). The maximum prison sentence for the mens rea offence remains unchanged: six months (summary) or two years (indictment).70

Failure to file a return — a strict liability offence — will become subject to the same penalties as the mens rea offence of knowingly making a false or misleading statement: $50,000 fine or six months’ imprisonment or both (summary conviction) and $200,000 fine or two years imprisonment or both (indictment). All other offences under the Act will remain subject only to summary prosecution and conviction. The maximum fine for these offences will be doubled to $50,000.71

1.10 Two-Year Ban

Section 14.01 will give the Commissioner the discretion to impose a lobbying ban, of up to two years, on anyone convicted of an offence under the Act. The person would be prohibited from effecting any communication described in paragraph 5(1)(a) or arranging a meeting referred to in paragraph 5(1)(b) (both of which apply to consultant lobbyists), or effecting any communication referred to in paragraph 7(1)(a) (which applies to in-house lobbyists) for a period of not more than two years.

65 Ibid., subs. 35(1).
66 Ibid., subs. 35(2).
67 Ibid., subs. 35(3).
68 Ibid., subs. 36(2).
69 Ibid., subs. 36(1).
71 Ibid., subs. 14(2).
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