

# “Making a Strong Law Even Stronger”

Presentation to the  
Standing Committee on Government Services  
concerning Bill 1, the *Lobbyists Act*

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August 24, 2007

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## 1. INTRODUCTION: A STRONG START<sup>1</sup>

Bill 1, the *Lobbyists Act*, should be applauded for attempting to improve the transparency of lobbying, to curb abuses, to eliminate improper influence on public policy and to promote public confidence in the integrity and accountability of government decision-making.

The starting point of any analysis must be an understanding of how Bill 1 would operate. Contrary to the suggestions of some, the bill would not *prohibit* lobbying. Indeed, it would hardly *restrict* lobbying. What it would do is to require *registration* of lobbying.

The distinction is worth repeating to commentators and spokespersons at both extremes of the issue. On the one hand, those who exaggerate that Bill 1 will sound the death knell for lobbying should be reminded that the new rules do not constitute a ban, except to those unwilling to comply with them. On the other hand, those who would prefer that Bill 1 eradicate lobbying should remember that accessing government is not a privilege but a right.

Indeed, for Albertans and all Canadians, making representations to government is a fundamental democratic right. Its roots reach back to the *Magna Carta*, which confirmed the right of nobles to seek redress of grievances, and the *Bill of Rights, 1689*, which declared “That it is the right of the subjects to petition the King ...”

Government is larger and more complex than it was during the 13<sup>th</sup>-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 — across the country and at all levels of government — have shaken Canadians’ faith in the 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.

Lobbyist registration is necessary to respond to these problems and to restore people’s confidence in the public policy process. **Lobbyist registration is based on the principle that, while everyone has a democratic right to influence government policy, nobody has the right to influence government policy in secret.** On the contrary, access must be open and transparent, because citizens have a right to know all the factors and influences that affect government decision-making.

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<sup>1</sup> We gratefully acknowledge the assistance of Noah Billick, student-at-law.

In that context, Bill 1 is a positive, welcome and necessary development. It responds to recent abuses — which, it must be noted, occurred *outside* Alberta — addresses public expectations, and protects the government decision-making process.

The proposed *Lobbyists Act* is a strong law. It incorporates some of the best practices found in lobbying law elsewhere in Canada. In at least two ways, Bill 1 would lead the nation in strength and vigour.<sup>2</sup> This new law will place Alberta at the forefront of provinces that have created lobbyist registries to restore public trust in the integrity of government decision-making without compromising the democratic right of free and open access to government.

At the same time, this legislation can be improved. A few loopholes should be closed and a small number of weak provisions should be amended to make Bill 1 even stronger and more effective.

## **2. STRONG FEATURES THAT SHOULD BE KEPT**

We begin by identifying some of the positive and progressive elements of Bill 1, and urging the Legislative Assembly to preserve them.

### ***2.1 Zero Threshold for Registration of Organization Lobbying (In-House Lobbying)***

Under most other Canadian lobbying laws,<sup>3</sup> the requirement to report on in-house lobbying — known as *organization lobbying* in Bill 1 — does not kick in unless the total amount of lobbying by all employees of the company or organization meets or exceeds 20 per cent of one employee’s time. Determining whether this threshold is met is a complex exercise that often causes confusion.

Bill 1 takes a simpler, cleaner and more understandable approach: any amount of organization lobbying (in-house lobbying) triggers the reporting requirement.

### ***2.2 Prohibition Against Lobbying Government and Providing Advice at the Same Time***

In Quebec, the *Code de Déontologie des Lobbyistes* (Lobbyists’ Code of Ethics) prohibits an individual retained to provide advice to a government official from lobbying the official’s department, agency or branch of government.<sup>4</sup>

On the other hand, the question of whether federal law prohibits the practice has been in doubt since a 2001 ruling by the former Ethics Counsellor, Howard Wilson, that it would be acceptable for a firm both to lobby on behalf of private sector clients and to provide advisory services to government departments, so long as it uses “firewalls” (or “Chinese walls”) to ensure that

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<sup>2</sup> We refer to the law’s anti-conflict provisions and its enhanced enforcement through administrative penalties, both of which are discussed below.

<sup>3</sup> Federal, Newfoundland and Labrador, Nova Scotia, Ontario.

<sup>4</sup> R.Q. c. T-11.011, r.0.2, s. 13.

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.<sup>5</sup>

We have some doubt about the correctness of Mr. Wilson's determination, which he based on rule 4 of the federal Lobbyists' Code of Conduct<sup>6</sup> (which deals with confidential information) and while ignoring rule 6, which prevents the representation of competing interests without informed consent.

Section 6 of Bill 1 ensures that there would be no such confusion in Alberta. It wisely would prohibit lobbying on the same subject matters related to which the lobbyist or an associate holds a contract or provides paid advice. Alberta would be the first Canadian jurisdiction to impose such a rule. This well-reasoned rule will address public concern and reduce the risk of conflict of interest.

We say that Alberta would be the *first* jurisdiction to impose this particular rule because the Quebec restriction is significantly different. Bill 1 would prohibit lobbying while advising/holding a contract on the *same subject matter*. The Quebec law prohibits lobbying while advising the *same branch of government*. In our view, both restrictions are sound public policy.

This committee might consider amending section 6 to incorporate the Quebec prohibition (lobbying a branch of government while advising the same branch) alongside the prohibition currently proposed (lobbying on a subject matter while advising on the same subject matter).

### **2.3 Directors, Sole Proprietors and Partners**

Elsewhere in Canada, the treatment of directors and partners is confusing and counter-intuitive. Because directors and partners are not employees, they do easily fit within the definition of in-house lobbyist (known as *organization lobbyist* under Bill 1).

The federal registrar uses a legal fiction to treat corporate directors<sup>7</sup> as if they were external consultants engaged by the company. Whether or not there is logic in this position, in our experience it tends to confuse the individuals affected, there is often non-compliance, and the interpretation is not easily understood in the business, non-profit and lobbying communities.

The definition of "organization lobbyist" in clause 1(1)(g) of Bill 1 would address this situation simply, directly, understandably and cleanly, by confirming that directors, partners and sole proprietors are covered by the organization-lobbyist provisions (*i.e.*, in-house lobbying provisions) of the legislation. This is a rational, simple solution to what elsewhere has been a complex problem.

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<sup>5</sup> Canada, Office of the Ethics Counsellor, Industry Canada, "The Issue of Chinese Walls [*sic*]" (January 22, 2001).

<sup>6</sup> *Canada Gazette Part I*, Vol. 131, No. 6 (February 8, 1997), at 330-332.

<sup>7</sup> Provided the directors are not employees and are remunerated. Volunteer directors are not affected by federal law. Directors who are also employees fall under the in-house lobbying provisions of federal law.

## **2.4 Administrative Penalties (section 18)**

The administrative-penalties section of the Act is ground-breaking, novel and creative. It will make enforcement easier. Indeed, by presenting an alternative to the slow, cumbersome process of charge/prosecution/conviction, section 18 makes it that much more likely that Bill 1 will actually be enforced.

Elsewhere in Canada, there have been only three prosecutions for lobbying offences, all of which resulted in convictions. (All three prosecutions occurred in Quebec, where enforcement of lobbying law is active and vigilant.) Section 18 shows that the drafters in this Province intend for Bill 1 to be enforced; it demonstrates that the new Act is not just window dressing. Section 18 will help the Registrar to uphold the law and it facilitates strong enforcement.

Not only do we recommend keeping section 18, we would urge other jurisdictions to adopt a similar provision.

## **3. LOOPHOLES TO CLOSE**

### **3.1 *Unregistered Lobbying is Not an Offence***

As drafted, Bill 1 would place all of the legal responsibility on *designated filers*, and none on the lobbyists themselves.

Thus, if John lobbies and there has been no reporting, then only John's designated filer may be guilty of an offence. It would not be an offence for John to lobby or to continue lobbying, even if he knows that the designated filer has failed to submit a return!

This is a serious omission. We do not exaggerate when we state that under Bill 1, as presently drafted, it is not unlawful for an individual to engage in unregistered lobbying.

We recommend that this loophole be closed. In fact, it has already been closed in two provinces:

Section 25 of the *Lobbying Transparency and Ethics Act* (Quebec): "No person may lobby a public office holder without being registered in the registry of lobbyists in respect of such lobbying activities."

Section 19 of the *Lobbyist Registration Act* (Newfoundland and Labrador): "A consultant lobbyist or in-house lobbyist shall not lobby a public-office holder unless that person is registered in the registry of lobbyists with respect to those lobbying activities."

A similar provision should be added to Bill 1, and breach of that provision should be an offence.

### **3.2 *Code of Conduct for Lobbyists is Missing***

The other serious omission from Bill 1 is the lack of a code of conduct for lobbyists.

Codes of conduct are required by federal law and the laws of Quebec and Newfoundland and Labrador. (Each Code is established under the Act, not contained in the Act.)

Contravention of the Code in Quebec or in Newfoundland and Labrador is an offence. (Contravention of the federal Code is not an offence, though we do not believe that is a good example to follow.)

A lobbyists' code of conduct ensures that lobbying is conducted with honesty and integrity and it protects the public interest in the ethical development of government policy. Our recommendation is that all provinces whose statutes do not provide for a code of conduct<sup>8</sup> should follow the examples of Quebec and Newfoundland and Labrador. Because Bill 1 has not yet been passed, Alberta has an opportunity to get it right the first time.

Providing for a lobbyists' code of conduct and making its violation an offence would strengthen this legislation and allow Alberta truly to claim that it has the strongest, toughest lobbying law in Canada.

#### **4. OTHER IMPROVEMENTS**

##### ***4.1 Designated Filer for Consultant Lobbying***

Bill 1 would make Alberta the only place in Canada where each individual consultant lobbyist is not required to file his or her own individual return. We have not seen any argument or justification for relieving individual consultant lobbyists of the reporting obligation that they already bear in five other provinces and at the federal level.

We are referring to subsection 4(1), which provides that a *designated filer* is responsible for reporting on consultant lobbying.

The single-filer approach makes sense in the case of organization lobbying (in-house lobbying) where the company or organization has a principal business other than lobbying. It does not make sense in the case of consultant lobbyists whose full-time avocation is lobbying; there is no rationale for relieving them of the burden of conducting their core business in an open and transparent manner.

Requiring a separate return from each individual consultant lobbyist helps to promote accountability and transparency. This is probably why the practice is consistently applied everywhere else in Canada. There is no justification for Alberta to adopt a weaker standard.

##### ***4.2 Post Lobbyist Registry on the Web***

In this day and age, the registry should be electronically available. Especially when returns are filed in electronic form, there is no compelling reason not to have the registry available online. Web access maximizes accessibility of information and transparency of process.

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<sup>8</sup> The British Columbia, Nova Scotia and Ontario laws do not provide for a lobbyists code of conduct.

We expect that the Registrar is going to post the information online. In fact, in other jurisdictions, the registries are online in the absence of a statutory requirement. However, it is better that this be an express requirement in the Act and not left to discretion. We recommend that Bill 1 make it mandatory for the Registrar to post the registry online.

As an alternative to making Web posting mandatory, Bill 1 could take the approach of the *Lobbyists' Registration Act* (Nova Scotia). Subsection 11(4) of the Nova Scotia legislation provides: "For greater certainty, the Registrar may make the Registry available electronically online, including through the Internet."

The Nova Scotia wording still leaves the decision with the Registrar, but hints at the expectation of Web posting.

#### **4.3 *Strict Liability Offences vs. Mens Rea Offences***

Section 19 of the proposed legislation seems to draw a distinction between strict liability offences and offences requiring intent.

However, when it comes to penalty, no distinction is drawn. (It would be left to the courts, in sentencing, to determine how the nature of the offence would affect the penalty.)

On the other hand, the federal Act sets out different penalty ranges for strict liability and *mens rea* offences.

Bill 1 should do likewise.

### **5. NON-PROFIT ORGANIZATIONS**

Given our expertise in lobbying law, we thought that it would be helpful for us to comment on the controversy surrounding the impact of Bill 1 on charities and other non-profit organizations.

To begin, we note the obvious, that not all non-profit organizations are registered charities. In considering proposals to modify the impact of the law on non-profit organizations, members of this Committee should inquire whether the modification is meant to affect all non-profit bodies, or just charities.

#### **5.1 *Lobbying by Charities is not Already Regulated***

Contrary to a claim that we have read, lobbying by registered charities is not currently regulated, certainly not in the manner proposed by Bill 1.

Under the *Income Tax Act*, charities are subject to restrictions on their *political activities*. This is not the same thing as restrictions on *lobbying*. As explained in a paper presented by Guy W. Giorno earlier this year, the federal *Income Tax Act* definition of political activity differs from the lobbying law concept of lobbying. To be fair, some political activity *is* lobbying. However, some activity that Canada Revenue Agency treats as political is not lobbying and some

lobbying is not considered by Canada Revenue Agency to constitute political activity. For more detailed analysis of this point, we refer to you to the paper.<sup>9</sup>

Further, to the extent that political activity by charities is regulated, the regulation takes the form of a restriction on the amount of political activity in which charities engage. (As a rule of thumb, political activity cannot exceed the use of 10 per cent of a charity's resources.) As noted above, political activity is not lobbying. Further, charities are not required to make public disclosure of their political activities (identifying subject matters and naming employees and government departments) in the same way that lobbying laws require disclosure of lobbying activity.

With great respect, we believe it is incorrect to say that lobbyist registration would be redundant or that it duplicates rules to which charities are already subject.

### ***5.2 Some Non-Profits Exist to Lobby***

As previously mentioned, many non-profit entities are not charities. Some of these non-profits were created and exist for the primary purpose of lobbying.

In weighing the suggestion to exempt non-profits from Bill 1, members of the Committee should consider the existence of non-profit lobby groups. Would it make sense as a matter of public policy to enact a lobbyist registration law that exempts lobby groups?

### ***5.3 Use of Public Funds to Lobby***

Many non-profit entities (both charities and non-profits that are not charities) receive money from federal, provincial and municipal governments.

One purpose of lobbying law is to make transparent and open any efforts by tax-subsidised entities to influence public policy. Bill 1 was drafted to meet this objective, and so were Canada's federal and other provincial lobbying laws.

We note that Bill 1, like the other lobbying laws in Canada, requires disclosure of all government funding, not just government funding used to lobby. There are at least two reasons for this. First, not all government funding is earmarked for lobbying and, in fact, many governments as a matter of policy will not directly fund lobbying. Second, government funding that an agency receives for non-lobbying purposes can have the effect of freeing up other resources so they can be used for lobbying; the result can be an indirect subsidy toward lobbying activity; in any event, there is a public interest in knowing which entities that receive taxpayer funding also engage in lobbying.

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<sup>9</sup> Guy W. Giorno, "Nuts and Bolts of Lobbying by Charities," unpublished paper presented to 2007 National Charity Law Symposium (May 10, 2007). The paper is available online at [www.LobbyingLaw.ca](http://www.LobbyingLaw.ca) under the heading [Selected Papers and Publications](#).

#### **5.4 *Other Jurisdictions***

With one exception (the fact that registration kicks in when there is any lobbying, not when a 20-per-cent threshold is reached), Bill 1 proposes to affect non-profit entities the same as most other lobbying laws in Canada.