

Government Relations and Ethics Bulletin

September 2009

Fasken Martineau DuMoulin LLP

COMING INTO FORCE OF LOBBYING LEGISLATION IN ALBERTA

Alberta becomes sixth Canadian Province to create a lobbyists' registry

Nicolas Leblanc, Montréal

On September 28, 2009, the Alberta Legislature proclaimed the *Lobbyists Act*¹ (the “Act”) into force. Alberta becomes the sixth Canadian province to do so, after Quebec, Ontario, British Columbia, Nova Scotia, Newfoundland and Labrador and the federal government.

Pursuant to this new legislation, lobbyists will be required to register their lobbying activities on the publicly available on-line registry. The Act also prohibits a person from lobbying on certain subject-matter where that person, or a person associated with that person, is holding a contract for providing paid advice on that subject-matter, and *vice versa* - a first for Canadian lobbying legislation.

Consultant lobbyists currently carrying on lobbying activities in the Province shall file a first return within thirty (30) days of the coming into force of the Act, namely September 28, 2009. For organization lobbyists, the first return shall be filed within two (2) months.

BACKGROUND

The enactment of the Act fulfills one of Premier Ed Stelmach's campaign promises and is the first piece of legislation to have been reviewed by the new all-party Standing Committee on Government Services.

This enactment is part of a larger initiative to foster one of the first priorities of Premier Stelmach's government of “governing with integrity and transparency”.² Other recent enactments include the *Conflicts of Interest Amendment Act*, 2007,³ enacted along with the *Lobbyists Act* and proclaimed into force on April 1, 2008, which broadens post-employment cooling off rules for public office holders, and the *Alberta Public Agencies Governance Act*,⁴ not yet in force for the most part, which seeks to enhance transparency in the governance of public agencies.

² *Governing with integrity and transparency*, News release, May 29, 2007, online at <http://alberta.ca/home/NewsFrame.cfm?ReleaseID=/acn/200705/21551D994D948-F30A-9EB5-A8CFCCB2C5144DC5.html>

³ Bill 2, 26th Legislature – 3rd Session (2007), S.A. 2007 c. 28.

⁴ Bill 32, 27th Legislature – 2nd Session (2009), S.A. 2009, c. A-31.5.

¹ S.A. 2007, c. L-20.5.

Vancouver

Calgary

Toronto

Ottawa

Montréal

Québec City

London

Paris

Johannesburg

www.fasken.com

Even before the Act's proclamation into force, certain corrections were required to be made to the Act by way of the *Lobbyists Amendment Act*, 2009.⁵

OVERVIEW AND HIGHLIGHTS

The framework of the Act is similar to that of other lobbying legislation in Canada. Those familiar with such legislation will notice that the Act borrows from several existing pieces of legislation, including the federal *Lobbying Act* and Quebec's *Lobbying Transparency and Ethics Act*.

Principles

The preamble states that the Act is predicated upon the public interest of having free and open access to government, on the legitimacy of lobbying public office holders, on the desirability that the public and public office holders be able to know who is engaging in lobbying activities and who is contracting with government and on the principle that a system for registration of paid lobbyists should not impede free and open access to government.

These principles are also found in other lobbying legislation in Canada, including the preamble to the federal *Lobbying Act*, with the exception of the reference to government contracting. In this last respect, the Alberta *Lobbyists Act* is the first such legislation to contain prohibitions on lobbying while providing paid advice to the government on a certain subject-matter.

Framework

The Act requires lobbyists to file a return with the Lobbyists Registry when they engage in lobbying activities prescribed by the Act. Therefore, the important concepts among those which are defined in the Act are those of "lobbyists", of "lobby" and of "public office holders".

Types of Lobbyists

The Act creates two types of lobbyists.

Consultant Lobbyists

The first type, **consultant lobbyists**, are persons who, for payment, undertake to lobby on behalf of a client, whatever the "amount" of lobbying. There is no minimum threshold to the amount of lobbying one must engage in before becoming a consultant lobbyist; every communication that falls within the definition of "lobby" must be the subject of a return to the Lobbyists Registry.

The aspect of payment is an important component of this definition; where one engages in lobbying for a client but receives no payment and is not otherwise an organization lobbyist, one is not a "lobbyist" for the purposes of the Act.

Consultant lobbyists include all professionals such as lawyers, accountants, architects and engineers, to name but a few, who, as part of the services they provide to their clients, engage in lobbying activities

Organization Lobbyists

The second type, **organization lobbyists**, are persons who are either employees, officers or directors of an organization and who receive payment for the performance of their functions or are sole proprietors or partners in a partnership (notice that in the latter two cases, there is no requirement that the individual receive payment) and whose lobbying activities or whose duty to lobby on behalf of the organization exceed a certain threshold. The threshold has been set at 100 hours annually and is reached as soon as the lobbying activities of all persons within the organization totals at least 100 hours annually. In computing this 100 hours threshold, one considers both actual lobbying activities (which have already occurred) and individuals' duty to lobby (which may be prospective) that may be part of their overall duties

⁵ S.A. 2009, c. 5.

in an organization. Therefore, if it expected that 100 hours will be devoted to lobbying overall during the year, the threshold is met for the organization.

Regulations⁶ enacted pursuant to the Act specify that for the purpose of determining whether lobbying amounts to 100 hours annually, only the time spent communicating with public office holders is considered, the time spent preparing for the communication is not included. This differs from other jurisdictions, including at the federal level⁷ and in Quebec,⁸ where time spent preparing for and following up on communications is considered.

The Act is the first to include a fixed threshold in the definition of organization lobbyists; corresponding definitions in other lobbying legislation merely require that the lobbying activities constitute a significant part of a person's duties within the organization, allowing room for interpretation in what is "significant" and leaving it up to the officer responsible for enforcement to issue guidelines on that matter.

The types of "organizations" subjected to the Act include, regardless of their legal status (whether incorporated or not and including partnerships and sole proprietorships): businesses, trades, industries, enterprises and professional or voluntary organizations; trade unions or labour organizations;

chambers of commerce or boards of trade; non-profit organizations, associations, societies, coalitions or interest groups and governments other than the Government of Alberta.

Lobbying Activities

The Act also contains a definition of "lobby", which means, in relation to a consultant or organization lobbyist, to **communicate** with a **public office holder** in an **attempt to influence** one or more listed types of **government decisions**. As outlined in bold, there are four main aspects to the definition of lobby. Those familiar with the field of lobbying will notice that the Act retains the notice of "influence", which was removed from the federal Lobbying Act in 2008.

The listed types of government decisions include:

- The development, introduction, amendment, passage, defeat or enactment of any **legislative proposal, bill, resolution, regulation and order in council** of the Government or of a prescribed Provincial entity;
- The development, establishment, amendment or termination of any **program, policy, directive or guideline** of the Government or of a prescribed Provincial entity;
- The award of any **grant or financial benefit** by or on behalf of the Government or a prescribed Provincial entity;
- A decision by the Executive Council or a member thereof with regard to the **privatization** of a public enterprise or institution or of the provision of goods or services to the Government.

Moreover, in the case of consultant lobbyists only, lobbying also includes:

- **Arranging a meeting** between a public office holder and any other individual;

⁶ *Lobbyists Act General Regulation*, A.R. 247/009, s. 2.

⁷ See *Interpretation Bulletin: A Significant Part of Duties*, Office of the Commissioner of Lobbying of Canada, July 2009, on-line: <http://www.oclc.gc.ca/eic/site/lobbyist-lobbyiste1.nsf/eng/nx00111.html>.

⁸ See Notice 2003-01, *Interpretation of the expression "a significant part" used in the definition of enterprise lobbyist and of organization lobbyist in section 3 of the Lobbying Transparency and Ethics Act*, Commissaire au Lobbyisme du Québec, February 14, 2003, on-line http://www.commissairelobby.qc.ca/en/documents/x_fichiers/843_avis_2003-01_en.pdf.

- Communicating with a public office holder in an attempt to influence the **awarding of any contract** by or on behalf of the Government or a prescribed Provincial entity.

Public Office Holders

As can be seen from the definition of “lobby”, one only engages in lobbying where one communicates with a public office holder. Public office holders are:

- Members of the Legislative Assembly and an individual on an MLA’s staff;
- Employees of departments;
- Individuals appointed to a board, committee or council pursuant to Section 7 of the *Government Organization Act*; and
- Employees, officers, directors or members, as the case may be, of a prescribed Provincial entity.

“Prescribed Provincial entity” refers to those Provincial agencies pursuant to the *Financial Administration Act* which are prescribed pursuant to regulations and includes, among others, the Alberta Energy and Utilities Board, the Alberta Securities Commission and the Alberta Grain Commission. Note that some Provincial agencies are specifically excluded from the list of prescribed Provincial entities, such as Alberta Treasury Branches and entities related thereto and the Alberta Gaming and Liquor Commission.

As with all Canadian Lobbying Legislation, save for Quebec’s and Toronto’s, the Act does not apply to municipalities.

Requirement to File a Return

The Act requires lobbyists to register lobbying activities that fall within the scope of the Act.

For consultant lobbyists, the filing of a return is required within 10 days of the lobbyist entering into

an undertaking to lobby. For organization lobbyists, a return is to be filed within two months of the day on which an individual within that organization becomes an organization lobbyist.

The duty to file a return rests with the designated filer, namely the senior officer of an organization who occupies the highest ranking position and receives payment for the performance of his or her function. Where there is no senior officer, the designated filer is the consultant or organization lobbyist, as the case may be.

In that respect, the Act is the first in Canada to use the concept of a senior officer acting as designated filer for both consultant and organization lobbyists.

Changes to the information contained in a return shall be filed within 30 days of the change occurring. Likewise, where information that was required to be provided on a return becomes known after the return was filed, such information shall be filed within 30 days of the knowledge thereof being acquired. When an undertaking is completed or where an individual ceases to be an organization lobbyist, the designated filer shall inform the Registrar thereof within 30 days.

Content of Return

The return will include information about the lobbyist and the organization or the client, about the lobbying activities and about the communications entered into. Some differences exist between consultant and organization lobbyists’ returns. In all cases, the lobbyist must indicate his name and address and whether the lobbyist is a former public office holder. The return must also include a description of the subject-matter of the lobbying activities and the type of government decision concerned. The return must name the departments and the prescribed Provincial entities to be lobbied and the methods of communication to be used. It must contain a declaration regarding compliance

with the prohibition on providing paid advice provisions (discussed below).

Some Exempted Activities

The Act lists several activities which are exempted from the application of the Act and for which no registration requirement exists. These exempted activities include submissions made:

- In proceedings that are a **matter of public record** to a **committee of the Legislative Assembly** or to a body or person having jurisdiction or powers conferred by or under an act;
- To a public office holder by an individual on behalf of a person or organization concerning the **enforcement, interpretation or application of any act or regulation** or the **implementation or administration of any program, policy, directive or guideline** by that public office holder with respect to that person or organization; or
- In response to a **request initiated by a public office holder** for advice or comment.

Similarly, certain persons, such as government or municipal employees, diplomatic agents, persons acting as volunteers without receiving payment and other categories of individuals prescribed by regulations, when acting in their official capacity, are exempted from the application of the Act.

Notably, among those exempted persons are directors, officers or employees or a non-profit organization, association, society, coalition or interest group not constituted to serve management, union or professional interests nor having a majority of members that are profit-seeking enterprises or representatives of such enterprises. This exemption would cover, for instance, coalitions formed by citizens with respect to public/political issues. This exemption is found in some other lobbying legislation in Canada, notably in the exclusion regulations pursuant to the Quebec act.

Prohibition on Providing Paid Advice

In addition to the above, the Act prohibits any person from lobbying on a subject-matter if that person or a person associated with that person is holding a contract to provide paid advice to the Government or a prescribed Provincial entity on the same subject matter, and vice-versa.

A person “associated with” a person “X” includes a corporation of which X is a director, senior officer or the beneficial owner of shares thereof; an individual, partnership or corporation of which X is an employee; a partnership of which X or a corporation associated with X is a partner and a person or group of persons acting as agent for X.

If, on the coming into force of the Act, a person is in a situation contrary to the requirements of the Act, that person or the person associated with him or her has 60 days to either cease to hold the contract for providing paid advice or cease lobbying on that subject matter.

Registrar and Ethics Commissioner

The application of the Act rests with the Registrar, who is designated by the Ethics Commissioner. Bradley V. Odsen, Q.C., was appointed Registrar, *Lobbyists Act* and General Counsel of the Office of the Ethics Commissioner on May 4, 2009. Neil R. Wilkinson is the third Ethics Commissioner for Alberta and was appointed on November 19, 2008.

The Registrar and/or Ethics Commissioner hold various administrative and investigative powers pursuant to the Act. The Registrar may impose certain administrative penalties. Where a person has been convicted of an offence, the Ethics Commissioner may ban that person from lobbying and from filing a return for up to two years.

The Ethics Commissioner may issue non-binding advisory opinions and interpretation bulletins, although none have been issued to date.

Offences

Pursuant to the Act, failure to file a return as prescribed, to update a return, to abide by the prohibitions respecting the provision of paid advice and to abide by a prohibition from carrying lobbying activities imposed by the Ethics Commissioner is an offence, punishable by a fine of not more than \$25,000 for a first offence, and \$100,000 for subsequent offences. Moreover, lobbying without a return being filed as required by the Act, and the provision of knowingly false or misleading information, after exercising reasonable diligence, is also an offence.

Legislative review

The Act provides for a mandatory legislative review of the Act within 2 years after its coming into force and every 5 years thereafter.

Cooling Off Periods

Note that pursuant to the Conflicts of Interest Act, as recently amended, public office holders are subject to a cooling off period during which their activities with the public service, including lobbying

activities, are restricted. For former Ministers, this cooling off period is 12 months, whereas for former political staff members, the period is 6 months.

The above is a summary of the newly enacted Alberta *Lobbyists Act*. Other specific provisions and exemptions may be of interest to you or relevant to your particular situation. A more detailed analysis of the Act and relevant statutes and regulations will be published in the next update of *Lobbying in Canada / Lobbyisme au Canada*, authored by Pierre Meunier, André Turmel, Guy Giorno and Peter Hyndman and published at Thomson – Carswell. For more information about this new legislation or about lobbying legislation in Canada, please do not hesitate to contact the author of this newsletter or one of the members of our Government Relations and Ethics practice group.

Nicolas Leblanc

514 397 5262

nleblanc@fasken.com

For more information about our Government Relations and Ethics Group

Vancouver

Peter H. Stafford c.r.
604 631 4721
pstafford@fasken.com

Calgary

R. Greg Powers c.r.
403 261 6148
gpowers@fasken.com

Toronto

Thomas W. Barlow
416 868 3403
tbarlow@fasken.com

Ida Martin
416 865 4481
imartin@fasken.com

Sean Morley
416 865 4362
smorley@fasken.com

Sara Parchello
416 865 4442
sparchello@fasken.com

Hon. James S. Peterson P.C.
416 865 5489
jpeterson@fasken.com

Gerald L.R. Ranking
416 865 4419
granking@fasken.com

Gilbert Sharpe
416 868 3492
gsharpe@fasken.com

Ottawa

Stephen Acker
613 236 3882
sacker@fasken.com

Robert Buchan
613 236 3882
rbuchan@fasken.com

Joel Fortune
613 236 3882
jfortune@fasken.com

Gerald Kerr-Wilson
613 236 3882
jkerrwilson@fasken.com

J. Aidan O'Neill
613 236 3882
aoneill@fasken.com

Stephen Whitehead
613 236 3882
swhitehead@fasken.com

David Wilson
613 236 3882
dwilson@fasken.com

Montréal

Éric Bédard
514 397 4314
ebedard@fasken.com

Louis P. Bernier, Ad.E.
514 397 7463
lbernier@fasken.com

Raymond Chrétien
514 397 5230
rchretien@fasken.com

Francis Fox, c.p., c.r.
514 397 5251
ffox@fasken.com

Karine Joizil
514 397 4323
kjoizil@fasken.com

Howard Kaufman
514 397 5165
hkaufman@fasken.com

Nicolas Leblanc
514 397 5262
nleblanc@fasken.com

Christian Leblanc
514 397 7545
cleblanc@fasken.com

Louise Mailhot
514 397 5280
lmailhot@fasken.com

Jean Masson
514 397 7493
jmasson@fasken.com

Pierre B. Meunier
514 397 4380
pmeunier@fasken.com

André Turmel
514 397 5141
aturmel@fasken.com

Québec City

Audrey Gagnon
418 640 2054
agagnon@fasken.com

Pierre Lamontagne
418 640 2040
pmeunier@fasken.com

London

Robert Paydon
+ 44 207 917 8570
rpaydon@fasken.co.uk

The texts included in this collection are intended to provide general comments on government relations and ethics. They reflect the point of view of their respective author and are not opinions expressed on behalf of Fasken Martineau DuMoulin LLP or other member corporations. These texts are not intended to provide legal advice. Therefore, readers should seek out advice on issues specific to them before acting on any information set out in these texts. We would be pleased to provide additional information on request.

© 2009 Fasken Martineau DuMoulin LLP

Vancouver
604 631 3131
vancouver@fasken.com

Ottawa
613 236 3882
ottawa@fasken.com

London
+44 (0) 20 7929 2894
london@fasken.co.uk

Calgary
403 261 5350
calgary@fasken.com

Montréal
514 397 7400
montreal@fasken.co

Paris
+33 (0) 1 44 94 96 98
paris@fasken.com

Toronto
416 366 8381
toronto@fasken.com

Québec City
418 640 2000
quebec@fasken.com

Johannesburg
+27 (11) 685 0800
johannesburg@fasken.com