



Lobbying and Canadian Charities: To Register or not to Register

By Mark Blumberg (September 7, 2008)

On July 2, 2008, the *Lobbying Act*¹ came into force and many non-profits and charities are completely unaware of its existence or its effect on their activities. Lobbying is defined broadly under section 7 of the *Lobbying Act* and includes the development of any legislative proposal by the Federal Government, or lobbying on the passage, defeat or amendment of any bill or resolution, advocating for amendments to any regulation, “the development or amendment of any policy or program of the Government of Canada”, or “the awarding of any grant, contribution or other financial benefit by or on behalf of Her Majesty in right of Canada”.²

Although since 1989 there has been some form of federal lobbyist registration act, it is only recently that certain weaknesses in the legislation that made enforcement unlikely

¹ For an unofficial copy of the *Lobbying Act* provided by Office of the Commissioner of Lobbying of Canada see [http://ocl-cal.gc.ca/epic/site/lobbyist-lobbyiste1.nsf/vwapj/Unofficial_Lobbying_Act_May_9_2008.doc/\\$FILE/Unofficial_Lobbying_Act_May_9_2008.doc](http://ocl-cal.gc.ca/epic/site/lobbyist-lobbyiste1.nsf/vwapj/Unofficial_Lobbying_Act_May_9_2008.doc/$FILE/Unofficial_Lobbying_Act_May_9_2008.doc)

² The Office of the Commissioner of Lobbying of Canada lists some examples of communications which would likely require registration: “Enquiries about a specific application for a grant, a contribution, a tax credit or a contract; Communication to determine what additional information is required to have the application or project approved; and negotiations about terms related to a specific financial benefit.”

have been removed. There is no longer a requirement that a prosecutor needs to show that the lobbying had acted "with the intent to influence" a public office holder. This will allow prosecutions under the *Lobbying Act* to be made more easily.

In this short article, I will discuss some of the issues that Canadian non-profits and charities need to keep in mind when lobbying the Federal Government. As an aside, when interacting with provincial governments³ or municipal governments⁴ there may be other lobbyist requirements.

Many have a positive view of volunteers going to Ottawa to lobby for an issue that they care about, especially if one cares about the same issue but does not have the flexibility to go to Ottawa or the time to lobby. They are participating in the political process.

On the other hand, for some the word "lobbyist", usually a paid professional, has a negative connotation. We think of mercenaries hired by tobacco companies to weaken or eliminate laws to protect children. Or how about former bureaucrats or politicians cashing in on their connections made while in office to help a multinational maintain a tax loophole that benefits a few well connected companies at the expense of all Canadians.

The story of lobbying is a bit more complicated than these two extremes and many organizations, including charities, which are involved with the political process, are not just using unpaid volunteers but are increasingly using experienced and knowledgeable staff to lobby the government on issues of concern to charities and their stakeholders.

³ For example, Ontario has the Office of the Integrity Commissioner and *Lobbyists Registration Act, 1998* (<http://lobbyist.oico.on.ca>).

⁴ For example, Toronto has the Toronto Lobbyist Registry.

Types of Lobbyists

The *Lobbying Act* identifies three types of lobbyists namely:

- 1) Consultant lobbyists, ie. people who are paid to lobby for clients (the traditional view of lobbyists).
- 2) In-house lobbyists (corporations). These are employees of a for-profit business who lobby for their employer as a significant part of their duties (20% or more).
- 3) In-house lobbyists (organizations). These are employees of not-for-profit organizations (including charities) in which one or more employees lobby. They work in a setting where the collective time devoted to lobbying for all employees works out to be the same as a significant part of one employee's duties (20% or more) as we will discuss in more detail below.

It is interesting to note that according to the Office of the Commissioner of Lobbying of Canada website, the Active Lobbyists were as follows:

Consultant lobbyists:	874
In-House Corporation lobbyists:	1729
In-House Organization lobbyists:	2432
Total lobbyists:	5035

The “In-House Organization lobbyists” are non-profits and charities and therefore almost half of all registered lobbyists are from non-profits and charities. In actuality, the total number of lobbyists should be larger but many individuals, corporations and organizations are not aware of their obligations to register. Many non-profits and

charities that are involved with advocacy and lobbying are not registered and perhaps should be registered.

When do Non-Profits and Charities have to register?

The *Lobbying Act* only requires non-profits and charities to register if they have people employed by the non-profit or charity whose duties include lobbying the Federal Government. If a non-profit's lobbying efforts are being exclusively conducted by volunteers then that non-profit is not required to register, no matter how much time, effort or energy it expends on the initiative.

The charity must file a return when one or more employees communicate with federal public office holders on behalf of the employer and the *Lobbying Act* provides that registration is required if the "duties constitute a significant part of the duties of one employee or would constitute a significant part of the duties of one employee if they were performed by only one employee." The Office of the Commissioner of Lobbying of Canada interprets "significant part of duties" as meaning more than 20% of an employee's time or efforts or if you add all the employees together more than 20% of one full time employee's overall duties. There are certain exemptions in calculating the 20% such as a testimony to a parliamentary committee when it is a matter of public record, a standard request for information or documents etc. There are some other limited exceptions when the communication is requested by the public office holder – but they do not apply when dealing with grants, contributions or other financial benefits.

For In-House Lobbyists, if the Charity meets at any point in time the threshold for registration then the **registration must be filed by the charity within two months after the day on which the requirement to file a return first arises**. This is more generous than the requirement that Consultant Lobbyists, who have to file within ten days of undertaking a lobbying activity.

Lobbyists' Code of Conduct⁵

In addition to the *Lobbying Act* there is also a short *Lobbyists' Code of Conduct* the purpose of which is to promote ethics, standards, and transparency in lobbying. The *Code of Conduct* complements the *Lobbying Act*.

Why non-profits and charities should be covered by the *Lobbying Act*

I have heard many in the non-profit and charity sector who are shocked that their charity may have to register. They cannot understand who in their right mind would require them to register, which involves expenditures of the very limited time, effort and resources of the non-profit or charity.

There are a number of important reasons to have the *Lobbying Act* apply to the non-profit and charity sector in Canada.

First, it is in the public interest to know who is lobbying and trying to influence the federal government and on what. With the non-profit sector involving approximately 160,000 organizations, of which 83,000 are registered charities, the sector is broad and diverse. The sector is an important part of the Canadian economy and society and the more information we have on what it is doing the better. Many non-profits may be incorporated as non-profits but no reasonable person would think that some of them have any public benefit – they are there to benefit their members – in some cases the members may be a few tobacco companies or it may be a few automobile dealerships getting together to market or to lobby for zoning changes. Other non-profits may be very respected by some, such as Greenpeace, but controversial to say the least. If the issues

⁵ A copy of the *Lobbyists' Code of Conduct* can be found at <http://ocl-cal.gc.ca/epic/site/lobbyist-lobbyiste1.nsf/en/nx00019e.html>

that non-profits and charities were dealing with were thousand dollar issues, I would understand why they should not register. But we live in a world where the federal government alone spends something along the lines of \$35 billion dollars on grants and contributions each year, much to the non-profit and charitable sector. Decisions made about funding can have profound effects on neighbourhoods, cities, regions and even foreign countries.

Charities, generally more so than non-profits, are highly respected and sought after for public policy advice. As charities are playing an increasingly important role in our society, it is understandable that some would want them to also disclose paid lobbying efforts or lobbying by their staff. This will help the media, government officials and the general public know who is lobbying who and on what. Lobbying whether we like it or not is an important part of our democratic process and the free access by anyone to the registry helps the average person know more about what is happening in Ottawa. It also provides an opportunity for charities that are interested in advocacy to discuss with other charities the process and perhaps to join with them on particular issues of concern to different charities.

Another good thing about the *Lobbying Act* is that it is fun and informative for people who do not have anything to do with their free time! It is almost as addictive as Facebook! I hear that some employers may be banning employees from accessing the registry during work hours! Take a look at the registry and you will be amazed at the organizations involved with lobbying the federal government and the issues. Try the link: http://www.ocl-cal.gc.ca/epic/site/lobbyist-lobbyiste1.nsf/en/h_nx00274e.html Many organizations and charities use the lobbying register as an 'advertisement' for what they are trying to do. For example, you can see the Canadian Red Cross – a detailed description of the organization, what federal funding it receives, the thirteen employees who may be lobbying on behalf of the organization, which government departments they will be lobbying and on what, the techniques they will use, the subject matter and

detailed description of each lobbying project. I certainly was not aware of the scope of that organization.

Criticism of the *Lobbying Act*

Although the *Lobbying Act* is not supposed to impede free access by non-profits to politicians and others in government, it is possible to conceive that the registry may cause a chill with organizations reducing their interaction with government in order to avoid the requirement to register as a lobbyist. I don't think that this will happen and in reality I see more interest by Canadian charities and non-profits engaging the Canadian government as they realize conducting charitable activities and ignoring government and other large actors is futile. It will however impose some burden on non-profits and charities.

Relationship between requirements under the *Lobbying Act* and restrictions under the *Income Tax Act* on Canadian charities undertaking political activities

There is really no relationship. The *Lobbying Act*, above a certain threshold, requires a charity to register within two months but does not impose much by way of restrictions on charities. The *Income Tax Act* and common law does not restrict non-profits (that are not registered charities) from either partisan or non-partisan political activities. After all the federal incorporated non-profit political parties are certainly partisan, but clearly not registered charities. On the other hand the *Income Tax Act* does restrict Canadian registered charities in the type and quantity of political activity. The Charities Directorate of the Canada Revenue Agency in its policy statement entitled Political Activities (CPS - 022) has set out CRA's position on political activities by registered

charities⁶. Under the *Income Tax Act*, a registered charity can be involved in non-partisan political activities as long as it devotes substantially all (90%) of its resources to charitable activities. Any political activity has to help accomplish the charity's purposes and remain incidental (generally 10% or less) in scope. A registered charity cannot be involved in partisan political activities, which is something to keep in mind always but especially during an election. A political activity is considered partisan if it involves direct or indirect support of, or opposition to, a political party or candidate for public office. Therefore, activities could be either prohibited activities, political activities or charitable activities. Few charities spend close to the 10% of resources on political advocacy and many could expend far more resources than they currently do. Any charity undertaking political activities should read carefully Political Activities (CPS - 022) and understand it.

Exempt Individuals and Organizations

Certain categories of individuals and organizations are exempted from the *Lobbying Act* registration requirement including provincial members of parliament and their staff, provincial government employees, municipalities and certain others involved with municipal affairs, members of band councils, members of certain aboriginal groups who exercise some self-government, diplomats, and United Nations personnel. Charities and non-profits are not exempt by virtue of them being a charity or non-profit.

Monthly Returns

In some cases all lobbyists may have an additional requirement to file a monthly return. If a non-profit that is registered under the *Lobbying Act*, has an oral and arranged meeting

⁶ See the CRA policy statement on Political Activities (CPS - 022) located at <http://www.cra-arc.gc.ca/tx/chrts/plcy/cps/cps-022-eng.html>

with designated public office holder (DPOH) then it must file the monthly return. All lobbyists are required to file the monthly return not later than fifteen days after the end of every month, if any of the following four conditions exist:

- 1) Communication with a designated public office holder took place during the month being reported upon;
- 2) Information contained in an active return is no longer correct or additional information that the lobbyist has become aware of should be included in an active return;
- 3) The lobbying activities have terminated or in the case of in-house lobbyists' (corporations and organizations) activities, they no longer require registration; or
- 4) Five months have elapsed since the end of the last month for which a return was filed (a total of six months since it was filed).

Therefore if a charity is registered as a lobbyist it needs to:

- 1) Review at the end of every month whether a return will need to be filed by the 15th of the next month; and
- 2) At most 6 months can elapse without a return being filed.

The monthly return would include the name of the DPOH with whom the communication took place, the position title of the DPOH, the name of the branch/department that the DPOH served, the date of the communication and the subject matter of the communication. The meeting must be both oral and arranged – so if you happen to see a DPOH at the gym and chat with them for 10 minutes you do not have to report it – although they may be angry that you are interrupting their exercise so you can forget about that policy change! Writing, faxing or e-mailing a DPOH is obviously not oral and therefore not included.

Many have suggested that the monthly requirement is onerous for non-profits and charities and I would agree. Perhaps in a couple of years when there is a review of the legislation, Canadian registered charities should ask to be exempted from the monthly filing requirement. That being, it is the law for now and such filings when done monthly will be more relevant and up-to-date, and charities that do lots of political work will get into a routine of collecting and filing the information.

Who is responsible for filing?

The “officer responsible for filing returns” means the employee who holds the most senior office in a corporation or organization and is compensated for the performance of their duties. Typically this is the ED/CEO who needs to worry. A caution for the ED/CEO of a charity – when the senior VP suggests you don’t have to register and take the requirements of the *Lobbying Act* seriously remember that when you are in jail or sacked by the charity, the senior VP will do a good job in your position!

Exempt Activities?

According to the Office of the Commissioner of Lobbying of Canada, here are some examples of non-profit activities that would be exempt from the requirement to register and should not be included in a calculation of the significant part of duties test:

- communications restricted to a straightforward request for publicly available information;
- general enquiries about the terms and conditions of programs and application processes;
- preparation and presentation of briefings to parliamentary committees;

- participation in consultations, hearings, roundtables, or like activities when the name of the participants, the government participating organizations and the subject matters are readily available publicly;
- employees making submissions to federal public office holders on the employer's behalf with respect to the enforcement, interpretation or application by that official of any existing federal statute or regulation;
- routine dealings with government inspectors and other regulatory authorities.

Volunteers

Unpaid volunteers who lobby on behalf of individuals or organizations, such as non-profits, are also exempt from the registration requirements. Members of a non-profit or directors of a non-profit who are paid by the non-profit to lobby (i.e. receive remuneration beyond reimbursement of expenses), even though they are not professional lobbyists and not employees of the non-profit, are caught under the legislation and will need to register as consultant lobbyists just as individuals hired by a for-profit company would have to. As an aside, if a charity is paying a board member for services it could get into significant ethical and perhaps legal trouble and it should review that practice carefully with legal counsel.

“Significant Part of the Duties” and The 20 Percent Rule

The Office of the Commissioner of Lobbying of Canada in a Bulletin entitled “A Significant Part of Duties (“The 20% Rule”)”⁷ discusses what the interpretation of “a

⁷ See <http://www.ocl-cal.gc.ca/epic/site/lobbyist-lobbyiste1.nsf/en/nx00111e.html>

significant part of the duties" as used in section 7 of the *Lobbying Act* and how it applies to employees of non-profits or charities.

The senior officer must determine for the non-profit "whether or not lobbying constitutes a significant part of the duties of those employees who communicate with public office holders and who are subject to the 20% rule."

The Office of the Commissioner of Lobbying of Canada suggests various approaches including:

- 1) Estimate the time spent preparing for communicating (researching, drafting, planning, compiling, travelling, etc) and actually communicating with public office holders. For instance, a one-hour meeting may require nine hours of preparation. In this case, the time related to lobbying with a public office holder would be the total 10 hours.
- 2) In situations where the time related to lobbying is difficult to estimate, the officer responsible for filing will have to estimate the relative importance of lobbying within the various duties for which the employee is responsible and determine the proportion related to lobbying activities.

The Office of the Commissioner of Lobbying of Canada suggests that if one method does not result in clarity, you can use both together. The officer responsible will be accountable for the decision as to whether or not registration is necessary.

In terms of timelines for the 20% rule, the Office of the Commissioner of Lobbying of Canada suggests:

In order to provide a time basis for estimating the relative importance of lobbying activities, a six-month estimation period, should be used. In any given six-month

period, be it the last six months or the six months coming, if the total amount of time spent lobbying by all paid employees equals 20% or more of the employment time of one employee, this would be considered a significant part of duties and the corporation or organization must register. In addition, if the 20% threshold is reached during any given 30-day period during the six-month period, then registration would also be required.

Exception for Safety

It is interesting to note that in section 4(3): “Nothing in this Act shall be construed as requiring the disclosure of the name or identity of any individual where that disclosure could reasonably be expected to threaten the safety of that individual.” I find this exception too narrow. What about the disclosure of a meeting between an Canadian charity and the Canadian government that could result in aid workers on the ground in a foreign country, or the beneficiaries of their work, lives being put in jeopardy?

Prohibition on success fee

Under section 10.1 (1) a consultant lobbyist “shall not receive any payment that is in whole or in part contingent on the outcome of any matter... or on the individual’s success in arranging a meeting ...”. This prohibition does not apply to arrangements entered into before section 10.1 came into force!

Powers of the Commissioner

The Commissioner has significant powers of investigation included in section 10.4(2) of the *Lobbying Act* to:

- (i) summon and enforce the attendance of persons before the Commissioner and compel them to give oral or written evidence on oath, and
- (ii) compel persons to produce any documents or other things that the Commissioner considers relevant for the investigation.

As well, the Commissioner may “administer oaths and receive and accept information, whether or not it would be admissible as evidence in a court of law.”

Penalites

Lawyers love to talk about penalties. What is the use of educating people unless you leave them scared and confused at the end of the article and requiring substantial legal advice! Well yes, there are penalties namely up to two years in prison and/or a \$200,000 fine. There have been recently some penalties levied (two that I am aware of) and one can expect more in the future. Even if there were a small fine, the reputational cost to a charity could be significant especially for non-profits or charities that are reliant on funds from the general public and/or government agencies.

Education about requirements

The Office of the Commissioner of Lobbyists is now using a multi-pronged approach including educating the public about registration requirements and assisting with registrations when requested, monitoring media reports of lobbying activities and checking whether appropriate registrations have been made, sending out advisory letters, and investigating complaints that they receive . The Office of the Commissioner has

prepared guides,⁸ bulletins and advisory opinions with the view to assist those interested in the interpretation and enforcement of the *Lobbying Act*. Some of the material is specifically geared towards explaining the requirements to non-profits.⁹

Canadian non-profits and charities that undertake political advocacy or lobbying with the Federal Government need to consider whether their activities fall within the requirement to register under the *Lobbying Act*.

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⁸ The Commissioner has provided a General Guide to Registration at [http://www.ocl-cal.gc.ca/epic/site/lobbyist-lobbyiste1.nsf/vwapj/GuideToRegistration.pdf/\\$FILE/GuideToRegistration.pdf](http://www.ocl-cal.gc.ca/epic/site/lobbyist-lobbyiste1.nsf/vwapj/GuideToRegistration.pdf/$FILE/GuideToRegistration.pdf)

⁹ The OCL on its website has prepared a Powerpoint presentation specifically geared toward non-profit and charities:

[http://www.ocl-cal.gc.ca/epic/site/lobbyist-lobbyiste1.nsf/vwapj/The_LA_and_In-House_Lobbyists_Organizations.ppt/\\$FILE/The_LA_and_In-House_Lobbyists_Organizations.ppt](http://www.ocl-cal.gc.ca/epic/site/lobbyist-lobbyiste1.nsf/vwapj/The_LA_and_In-House_Lobbyists_Organizations.ppt/$FILE/The_LA_and_In-House_Lobbyists_Organizations.ppt)