



FACT SHEET

ETHI COMMITTEE APPEARANCE 2021-05

Preliminary recommendations

IMPROVING THE LOBBYING ACT: PRELIMINARY RECOMMENDATIONS

These preliminary recommendations aim to improve the *Lobbying Act* and the *Lobbyists Registration Regulations*. Further details on each recommendation is available in the submission provided to the House of Commons Standing Committee on Access to Information, Privacy and Ethics in February 2021.

These changes would strengthen the federal lobbying regime by improving the values of:

T Transparency	F Fairness	C Clarity	E Efficiency
Information about lobbying activities is reported and available to the public	Requirements and processes are applied equally and equitably	Requirements and processes are simple and easy to understand and apply	Requirements and processes do not require more time or resources than necessary

1	Amend the in-house lobbyist registration threshold Amend the <i>Lobbying Act</i> to remove the “significant part of duties” registration threshold for in-house lobbyists and replace it with an obligation to register lobbying activities by default unless a limited exemption based on objective criteria applies..	Act 7(1)(b)	T	F	C	E
2	Harmonize registration time limits Amend the <i>Lobbying Act</i> to harmonize the registration deadline for consultant and in-house lobbyists to 15 days.	Act 5(1.1) • 7(2)	T	F		
3	Make reporting requirements the same for all in-house lobbyist registrations Amend the <i>Lobbying Act</i> to make all corporations and organizations subject to the same registration requirements.	Act 7(3)	T	F	C	E
4	Deem members of boards of directors to be employees of corporations and organizations Amend the <i>Lobbying Act</i> to deem paid members of boards of directors to be employees of corporations and organizations for the purposes of the Act.	Act 7(3) • 7(6) Regulations 5(a) • 5(b)	T		C	E
5	Expand reporting requirements for monthly communication reports Amend the <i>Lobbyists Registration Regulations</i> so that monthly communication reports are required for all oral communications with designated public office holders and list all those who participated in the communication.	Act 5(3)(a) Regulations 6 • 7 • 9 • 10	T	F	C	
6	Add reporting of additional contextual information in monthly communication reports Amend the <i>Lobbying Act</i> to require that registrants disclose prescribed contextual information in their monthly communication reports.	Act 5(3) • 7(4)	T			E



<p>7 Harmonize the five-year prohibition on lobbying Amend the <i>Lobbying Act</i> to harmonize the five-year post-employment prohibition on lobbying by making former designated public office holders subject to the same post-employment restrictions regardless of whether they are employed by a corporation or an organization.</p>	Act 10.11(1)		F	C	E
<p>8 Introduce new compliance measures Amend the <i>Lobbying Act</i> to add a range of compliance measures, including training, administrative monetary penalties and temporary prohibitions, to allow for greater flexibility and proportionality in addressing contraventions of the Act.</p>	New	T	F		E
<p>9 Make orders enforceable Amend the <i>Lobbying Act</i> to allow orders, i.e. summonses and production orders, issued by the Commissioner of Lobbying to become orders of the Federal Court.</p>	Act 10.4(2)		F	C	E
<p>10 Allow referrals to appropriate authority Amend the <i>Lobbying Act</i> to allow referrals relating to alleged offences under the <i>Lobbying Act</i> or other federal or provincial legislation to be made not only to peace officers, but also to any other appropriate authority, including the Commissioner of Lobbying's provincial counterparts.</p>	Act 10.4(6)(c) • 10.4(7)			C	E
<p>11 Provide immunity against civil or criminal proceedings Amend the <i>Lobbying Act</i> to provide immunity against civil or criminal proceedings for the Commissioner of Lobbying and those acting on behalf or under the direction of the Commissioner.</p>	New			C	





POSSIBLE QUESTIONS

1. How should the lobbying regime address volunteers?

Context: Question received from MP Charlie Angus in March 2021 who was “seeking clarification about the rules regarding the ability of volunteers to officially register through the Lobbying Registry” after Craig Kielburger stated before ETHI that it is “not possible for a “volunteer” to register as a lobbyist and that “it is literally not legally possible for me as a volunteer to register”.

Related recommendation: Does not exist

Proposed answer

- The Lobbying Act is currently meant to regulate lobbyists – those who are paid to communicate with public officials. It is meant to regulate those who lobby as a profession.
- At present, individuals who communicate with federal public office holders without remuneration are not required to register their communications in the Registry
- However, nothing in the Lobbying Act currently precludes volunteers from registering, as a consultant or in-house lobbyist, if they choose to do so, including for the purposes of transparency
- The Act could be amended to address volunteers, but would be concerned about having a chilling effect on volunteerism and stressing already limited resources of both the OCL and volunteer organizations
- The rules would need to be clear that the Act is not meant to include private citizens working for a cause close to their heart; this would also mean that there would be new post-employment obligations for MPs and Senators.
- Considering that there are currently no post-employment in the MPs and Senators Code of Conduct, I think there would need to be discussions with my colleagues the Conflict of Interest and Ethics Commissioner and the Senate Ethics Counsellor on this issue.
- The City of Toronto requires volunteers to register when they lobby for the benefit of the interests of the represented entity (no minimum threshold of hours)
 - This is in keeping with the City of Toronto’s approach that all lobbyists must register, with no minimum threshold of lobbying excluded even for in-house lobbyists.



2. Will these new reporting requirements be too onerous on DPOHs?

Context: from Lobby Monitor article "GRIC members worry about "compound effect" of lobbying commissioner's proposed rule changes" 04/08/2021

"For us, if the end result is a framework that seeks to capture every conversation that any [designated public office holder] has with anyone outside of the government ... it's pretty clear that's going to be impractical"

"These changes could create a "compound effect" that would put DPOHs in a position of needing to record every conversation with everyone they encounter, just in case that communication is reported"

Related recommendation: Recommendation 5 - Amend the Lobbyists Registration Regulations so that monthly communication reports are required for all oral communications with designated public office holders and list all those who participated in the communication.

Proposed answer

- I disagree that expanding the reporting requirements for monthly communication reports will be impractical
- At present, monthly communication reports are required where an oral communication with a designated public office holder is "arranged in advance" and "initiated" by a lobbyist.
 - In addition, oral communications initiated by a public office holder must be reported when they concern the awarding of a grant, contribution or other financial benefit, or the lobbyist is a consultant and the communication is about the awarding of a contract.
- Purpose of the lobbyist registration regime is to instill public trust in government decision making; this is a reasonable requirement to place on lobbyists
- The DPOHs responsibility would be to keep as much detail of this information as possible in the event we would ask to confirm the accuracy of what is reported in the Registry.
- This article made me wonder how many meetings between DPOHs and lobbyists are taking place that are not "oral and arranged" and are currently going undocumented by DPOHs and unregistered in the Registry



3. What are your views on BC's approach to requiring businesses and organizations selling goods or services to the provincial government to register, provided the activity is outside of "an established contract procurement or sales process."

Context: Issued also raised in Lobby Monitor article "GRIC members worry about "compound effect" of lobbying commissioner's proposed rule changes" 04/08/2021

"Cullen told The Lobby Monitor that Bélanger's recommended changes for stricter reporting requirements "don't go as far as they could," when compared to some provincial jurisdictions.

...

The lobbying rules in B.C. also stipulate that businesses and organizations selling goods or services to the provincial government are considered to be lobbying, provided that activity is outside of "an established contract procurement or sales process."

"Companies that aren't really, in the traditional sense, lobbying, may be engaged in sales and marketing activity and dialoguing with public office holders," said Cullen. "If you're going to contact the provincial government in B.C., or one of the entities like a university or a crown corporation that's captured by their law, to promote products, that kind of activity would be considered lobbying in B.C. It's not at the federal level."

Related recommendation: Does not exist

Proposed answer

- In BC, the definition of lobbying, applicable to both in-house and consultant lobbyists, includes "to communicate with a public office holder in an attempt to influence... (v) the awarding, amendment or termination of any contract, grant or financial benefit by or on behalf of the government of British Columbia or a Provincial entity"
- According to BC's registrar, if an organization is strictly following an established process with the government or a Provincial entity, that any other member of the public would follow, this is not considered to be lobbying, like a procurement or sales process, such as submitting a bid in response to a request for proposals (RFP)
- However, an attempt to influence the contents of an RFP in anticipation of, or prior to a formal procurement process being initiated, or "campaigning" for a product or service or against a competitor, would likely qualify as lobbying.
- At the Federal level, currently only consultants need to register when they communicate with POHs about the awarding of any contract by or on behalf of Her Majesty in right of Canada (per s. 5(1)(a)(vi))
- Section 7, applicable to in-house lobbyists, does not require registration of communications in respect of the awarding of federal contracts to procure products and services.
- Expanding the Act to include a similar approach to what is BC could certainly be considered and I can reflect on it and come back to committee on that issue when the



Act is being reviewed. However, again the Act would need to be clear as to what is in and what is out as there are already public processes and transparency with respect to procurement.

- There is already significant transparency and accountability around the procurement process at the Federal level:
 - Buyandsell.gc.ca
 - Standing offers and supply arrangements database
 - Procurement Ombudsman

4. Have you considered placing a positive obligations on DPOHs to report unregistered lobbying or prohibit meeting with unregistered lobbyists, like in the City of Toronto?

Context: question was asked from CBA Ethics and Lobbying committee

Related recommendation: Does not exist

Proposed answer

- In Toronto, lobbyists are prohibited from lobbying unless they have registered:
 - § 140-10 No person shall lobby a public office holder without being registered as required under
- In Toronto, there is also a positive duty on employees involved in a purchasing process to report breaches of the lobbying by-law to the Registrar as soon as reasonably practicable if they have “reasonable grounds to believe that a breach of this chapter has occurred or will occur”
 - Note: Every person who contravenes a provision of Toronto’s by-law is guilty of an offence. First conviction is liable to a fine of not more than \$25,000 and on each subsequent conviction to a fine of not more than \$100,000.
- At present there is no positive obligation on D/POHs to report breaches of the Act to my office, but we do welcome such reports and will act accordingly upon them
- Further, under s. 9.1, DPOHs already have an obligation to confirm information in the registry upon request from my Office. If they fail to respond, I can report this failure to Parliament. Every month, we randomly verify 5% of monthly communication reports. In my time as Commissioner, I have never had to report a failure to respond to a verification request.
- In our outreach activities, we also encourage DPOHs to check the registry before meeting with someone from the private sector to determine if they are a registered lobbyist. Note taking should follow accordingly.
- This is also something that could be added but what are the consequences if someone does not provide me with such information. I can investigate them for failure to report?



5. Have you considered recommending “anti-avoidance” type language for the lobbying act, like that found in the Income Tax Act (General Anti-Avoidance Rule/GAAR)?

Context: question was asked from CBA Ethics and Lobbying committee

The GAAR Framework: *Canada Trustco Mortgage Co. v Canada* [2005 SCC 54]

Three step test for the application of GAAR:

1. Does a tax benefit arise from the transaction or series of transactions (of which the transaction is a part)?
2. Is the transaction that gives rise to the tax benefit an avoidance transaction?
3. Is the avoidance transaction that gives rise to the tax benefit abusive? The central enquiry when determining abuse (taking a textual, contextual and purposive approach) is whether the transaction frustrates or defeats the object, spirit or purpose of the relevant income tax provisions.

Related recommendation: Recommendation 8 - Amend the Lobbying Act to add a range of compliance measures, including training, administrative monetary penalties and temporary prohibitions, to allow for greater flexibility and proportionality in addressing contraventions of the Act.

Proposed answer

- According to tax law scholar David G. Duff,¹ the application of most modern general anti-avoidance rules (GAARs) turns on two elements:
 - a “subjective element,” which considers the purpose for which the transaction or arrangement resulting in the tax benefit or advantage was undertaken or arranged; and
 - an “objective element,” which considers the object or purpose of the relevant provisions to determine whether the tax benefit resulting from the transaction or arrangement is consistent with this object or purpose.
- Investigations conducted by the OCL proceed on the basis of strict liability; taking into consideration a subjective element as proposed under a GAAR-type scheme would be a change for the office.
- The definition of lobbying used to contain a subjective element: “an attempt to influence”
 - That language was removed because “in order to successfully obtain a prosecution, it must be demonstrated beyond a reasonable doubt that an individual had attempted to influence a public office holder. The criminal nature of the offence required a very high standard of proof, which was analogous to the standard required to prove the more serious offence of

¹ Professor of Law and Director, Tax LLM Program, Peter A. Allard School of Law, University of British Columbia, from his paper: “General Anti-Avoidance Rules Revisited: Reflections on Tim Edgar’s “Building a Better GAAR”, Canadian Tax Journal / Revue Fiscale Canadienne (2020) 68:2, 579 - 611 <https://doi.org/10.32721/ctj.2020.68.2.sym.duf>



influence peddling under the Criminal Code. It was very difficult to secure a conviction under the LRA. "²

- If the Lobbying Act were to be amended to include a GAAR-type scheme, would need to ensure it was prosecutable.
- This would require a further analysis based on other models and caselaw before I would be comfortable in saying that this should be recommended. But I can look into it and be prepared to discuss this when there is a review of the Act.

² A, Paul Pross, "The Lobbyists Registration Act: Its Application and Effectiveness," *Restoring accountability - research studies: volume 2 - The Public Service and transparency*, edited by John H. Gomery, Commissioner (2006).

