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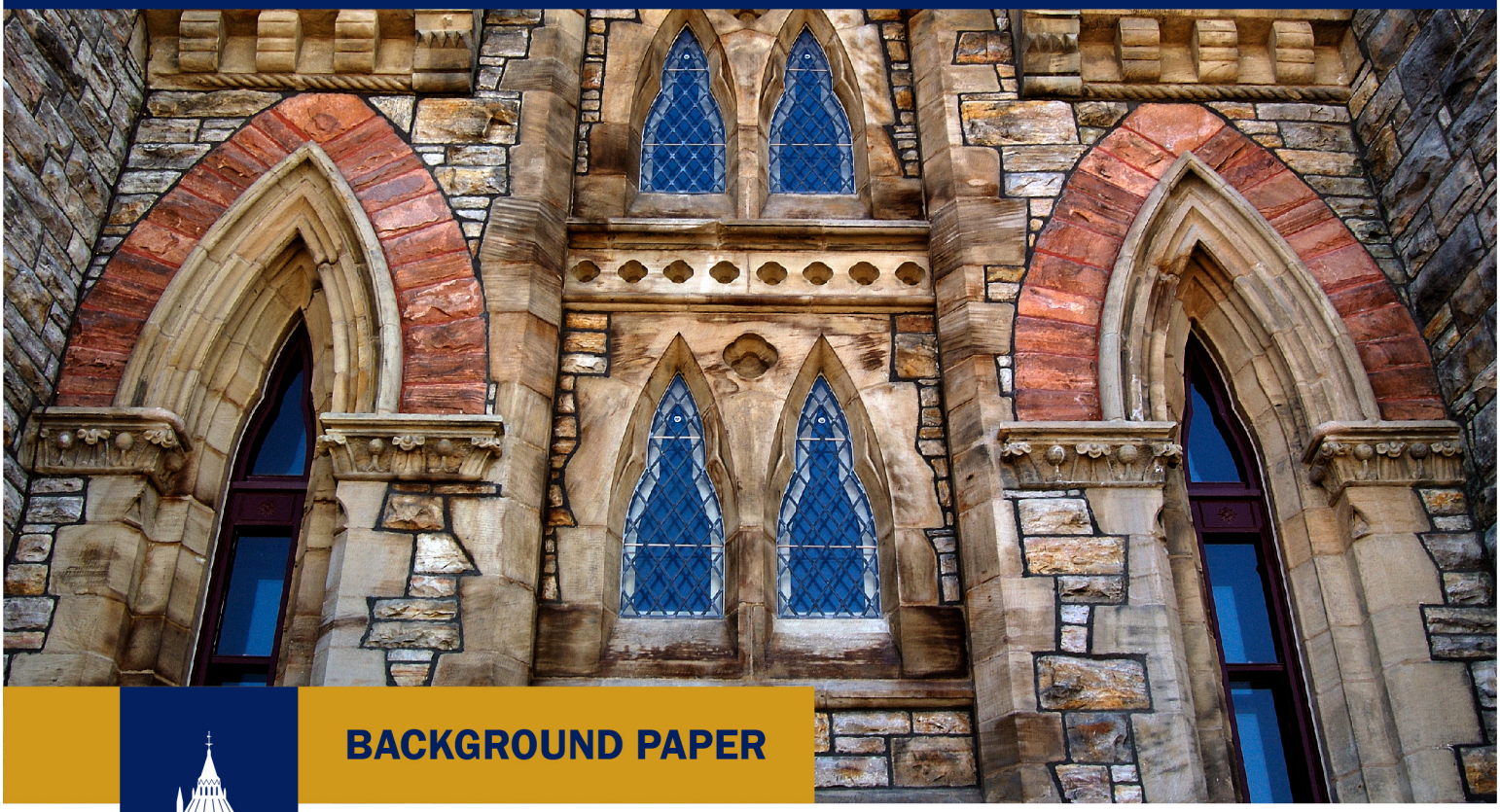

BACKGROUND PAPER

THE FEDERAL LOBBYING SYSTEM: THE *LOBBYING ACT* AND THE *LOBBYISTS' CODE OF CONDUCT*

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The Federal Lobbying System:
The Lobbying Act *and the* Lobbyists' Code of Conduct
(Background Paper)

Publication No. 2011-73-E

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EXECUTIVE SUMMARY

The preamble to the *Lobbying Act* states that free and open access to government is an important matter of public interest, that lobbying public office holders is a legitimate activity, that it is desirable for public office holders and the public to be able to know who is engaged in lobbying activities, and that a system for the registration of paid lobbyists should not impede free and open access to government.

In 2008, substantive amendments to the *Lobbyists Registration Act* came into force; it was renamed the *Lobbying Act* because it now focused on regulating the activities of lobbyists rather than simply monitoring them through a registration system.

The current *Lobbyists' Code of Conduct*, which came into force on 1 December 2015, sets out the ethical standards that lobbyists are required to meet in order to conserve public confidence in "the integrity, objectivity and impartiality of government decision-making." As such, it complements the disclosure and registration requirements of the *Lobbying Act*.

The following legislative amendments resulted from the adoption of the *Lobbying Act*:

- replacement of the position of Registrar of Lobbyists with that of Commissioner of Lobbying, an independent officer of Parliament, with expanded investigative powers and an education mandate;
- identification of a new category of public office holder within the federal government, called Designated Public Office Holder (DPOH), a key decision-maker in government;
- imposition of a five-year post-employment prohibition on a DPOH becoming a lobbyist once that individual has left office;
- new filing requirements for lobbyists and an obligation, when requested by the Commissioner of Lobbying, for DPOHs or former DPOHs to confirm information that is provided by lobbyists about communications with DPOHs;
- a ban on making or receiving any payment or other benefit that is contingent on the outcome of any consultant lobbyist's activity; and
- extension from two to 10 years of the period during which possible infractions or violations under the *Lobbying Act* and the *Lobbyists' Code of Conduct* may be investigated and prosecution may be initiated.

In 2011 and 2012, the House of Commons Standing Committee on Access to Information, Privacy and Ethics conducted the five-year statutory parliamentary review of the *Lobbying Act*. The committee tabled a report in the House of Commons, which contained 11 recommendations on amending the Act, but none of these recommendations have resulted in legislative amendment to date. While the parliamentary review of the *Lobbying Act* is supposed to take place every five years as provided for in the Act, the second review should have taken place in 2017 but had not yet occurred at the time this paper was revised.

THE FEDERAL LOBBYING SYSTEM: THE *LOBBYING ACT* AND THE *LOBBYISTS' CODE OF CONDUCT*

1 INTRODUCTION

The term "lobbying" refers generally to any effort to communicate with legislators or other public officials against or in favour of a specific cause.

Lobbying at the federal level was first governed by the *Lobbyists Registration Act*. It came into force in 1989 and established a registration system intended to foster the public's right to know and to be informed regarding who was trying to influence government policy in Canada. In 2008, following substantive amendments brought about by the *Federal Accountability Act* in 2006, the Act was renamed the *Lobbying Act* because it no longer simply monitors the activities of lobbyists by means of a registration system, but it now regulates them. Currently, more than 6,800 lobbyists are registered to lobby federal public office holders.[1]

In addition to the *Lobbying Act*, the first version of the *Lobbyists' Code of Conduct* (the Code), which came into force in March 1997, set out ethical standards for lobbyists to follow in order to conserve public confidence in the "integrity, objectivity and impartiality of government decision-making."[2] As such, the Code complements the disclosure and registration requirements of the *Lobbying Act* and lobbyists are required to comply with its provisions. The current version of the Code came into force on 1 December 2015.

This paper provides a review of the legislative history of the *Lobbying Act*[3] and outlines how the Act and the *Lobbyists' Code of Conduct* operate in practice.[4] It also considers the issues raised in the course of the five-year review of the Act, which took place in 2011 and 2012.

2 LEGISLATIVE HISTORY OF THE *LOBBYING ACT*

2.1 THE *LOBBYISTS REGISTRATION ACT*

On 30 September 1989, following extensive consultations and considerable debate, the *Lobbyists Registration Act* came into force in Canada.[5] The legislation sought to make the activities of lobbyists transparent without impeding access to government. The Act was a response to public perceptions at the time that individuals seeking to influence the government through political or personal contacts were abusing the system. Indeed, between 1965 and 1985, more than 20 private members' bills were introduced in the House of Commons on the subject of lobbyist regulation in response to political scandals or public outcry.[6]

It was believed that the enactment of the *Lobbyists Registration Act* would lead to a reliable and accurate source of information on the activities of lobbyists, which would dispel much of the mystery surrounding lobbying and thus remove the atmosphere of conjecture and innuendo that can accompany such activities. The Act required paid lobbyists to register and disclose certain information through a public registry.[7] Under the Act, the Registrar of Lobbyists was responsible for administering the information disclosure provisions of the Act and maintaining the public registry. The Act did not attempt to regulate lobbyists or the manner in which lobbying was conducted.

The *Lobbyists Registration Act* evolved significantly over time,[8] in large part because of statutory review provisions in the legislation that required periodic parliamentary reviews of its provisions and operation.[9] The last full review of the *Lobbyists Registration Act* was conducted in 2001 by the House of Commons Standing Committee on Industry, Science and Technology (Industry Committee). In its report, the committee made several recommendations aimed at improving the operation of the Act.[10]

Bill C-15, An Act to amend the Lobbyists Registration Act, responded to some of the major recommendations of the Industry Committee's report. This bill specifically sought to improve enforcement of the Act and expand investigative powers under the Act, simplify and harmonize the registration requirements for lobbyists and clarify and improve the language of the Act. For example, Bill C-15 clarified the definition of lobbying in three ways:

- It broadened the scope of activities for which registration was required by removing the expression "in an attempt to influence" from the Act. This change meant that all communications on matters prescribed in the Act were now considered lobbying, not just those intended to influence government decision-making.
- It specified that simple requests for information were not considered lobbying.
- It removed the exemption from the requirement to register when a communication was initiated by a public office holder.[11]

Although Bill C-15 received Royal Assent on 11 June 2003, it did not come into force until 20 June 2005, along with *Regulations Amending the Lobbyists Registration Regulations*. The delay was necessary in order to update the *Lobbyists Registration Regulations* as well as the electronic filing system for online registrations.

Bill C-15 also added a new section, section 14.1, to the Act, which specified that a parliamentary review of the provisions and operation of the Act must be undertaken every five years.

2.2 THE *LOBBYING ACT*

In December 2006, the *Federal Accountability Act* made substantive amendments to the *Lobbyists Registration Act*, including renaming the law the *Lobbying Act*.[12]

The amendments were, in part, designed to implement the recommendations of Justice John Gomery in his 1 February 2006 report of the Commission of Inquiry into the Sponsorship Program and Advertising Activities,[13] a commission into concerns raised in the 2003 report of the Auditor General of Canada.[14] In its February 2006 report, the Gomery Commission recommended that the Registrar of Lobbyists should report directly to Parliament on matters concerning the application and enforcement of the *Lobbyists Registration Act*, and the Office of the Registrar of Lobbyists should be provided with sufficient resources to enable it to publicize and enforce the requirements of the Act, allowing its staff to investigate and prosecute violations of the Act. The report also recommended that the limitation period for investigation and prosecution should be increased from two years to five from the time the registrar becomes aware of an infringement.

The following changes were brought about by the amendments to the *Lobbyists Registration Act* that came into force on 2 July 2008, at the same time as its official name change to the *Lobbying Act*:

- replacement of the position of Registrar of Lobbyists with that of Commissioner of Lobbying, an independent officer of Parliament, with expanded investigative powers and an education mandate;
- identification of a new category of public office holder within the federal government, called Designated Public Office Holder (DPOH), a key decision-maker in government;
- imposition of a five-year post-employment prohibition on a DPOH becoming a lobbyist once that individual has left office;
- new filing requirements for lobbyists and an obligation, when requested by the Commissioner of Lobbying, for DPOHs or former DPOHs to confirm information that is provided by lobbyists about communications with DPOHs;
- a ban on making or receiving any payment or other benefit that is contingent on the outcome of any consultant lobbyist's activity;[15] and
- extension from two to 10 years of the period during which possible infractions or violations under the *Lobbying Act* and the *Lobbyists' Code of Conduct* may be investigated and prosecution may be initiated.

In March 2011, the House of Commons Standing Committee on Access to Information, Privacy and Ethics (ETHI Committee) began the five-year statutory parliamentary review of the *Lobbying Act*. After conducting a review of the Act from

December 2011 to May 2012, the committee reported to the House of Commons in May 2012.[16] The report contained 11 recommendations to amend the Act, none of which have resulted in legislative amendment to date. The government's response to the report was tabled in the House in September 2012.[17]

3 THE PRESENT SYSTEM

3.1 THE *LOBBYING ACT*

3.1.1 Administration of the Act: The Commissioner of Lobbying

The *Lobbying Act* replaced the position of Registrar of Lobbyists with that of Commissioner of Lobbying, an independent officer of Parliament responsible for promoting an understanding of, acceptance of and compliance with the Act. The commissioner's mandate includes education, particularly with respect to lobbyists, their clients and public office holders, and some enforcement through limited measures (see section 3.1.5 of this paper, "Offence Provisions and Sanctions"). The Act also provides the commissioner with broad investigatory powers in relation to both the legislation and the Code.[18] All investigations are to be conducted in private, and the commissioner must report to Parliament on his or her findings and conclusions. The commissioner is also required to table an annual report before Parliament on the administration of the Act. In addition, a special report may be prepared on any matter of importance that falls within the commissioner's mandate.

Despite enhanced investigatory powers, the commissioner, like the former Registrar of Lobbying, does not have the authority to impose administrative or monetary penalties as alternatives to criminal charges under the Act.[19] The commissioner must cease an investigation and advise the appropriate authorities where he or she has reasonable grounds to believe that a person has committed an offence under this Act or any other Act of Parliament or of a provincial legislature.

3.1.2 Lobbying in the Context of the Act

3.1.2.1 Lobbying

The *Lobbying Act*'s preamble provides that free and open access to government is an important matter of public interest, that lobbying public office holders is a legitimate activity, that it is desirable that public office holders and the public be able to know who is engaged in lobbying activities, and that a system for the registration of paid lobbyists should not impede free and open access to government.

The *Lobbying Act* defines and enumerates activities that, when carried out for compensation, are considered to be lobbying. These activities are detailed in the *Lobbying Act*. Generally speaking, they include communicating with public office

holders about changing federal laws, regulations, policies or programs; obtaining a financial benefit such as a grant or contribution; and, in certain cases, obtaining a government contract. As well, in the case of consultant lobbyists (individuals who lobby on behalf of clients), arranging a meeting between a public office holder and another person qualifies as lobbying.[20]

3.1.2.2 Public Office Holders and Designated Public Office Holders

Public office holders, as defined under the Act, are virtually all persons occupying an elected or appointed position in the federal government, including members of the House of Commons and the Senate and their staff.[21] The *Lobbying Act* also contains the definition "designated public office holder." The term refers to key decision makers within government and includes ministers of the Crown, their exempt staff, senior public servants (e.g., deputy or assistant deputy ministers) and other positions designated by regulation (e.g., certain senior members of the Canadian Forces). The Act also treats as a DPOH any member of a prime minister's transition team. DPOHs are subject to post-employment limitations on lobbying, and lobbyists have particular disclosure requirements when meeting with DPOHs.

On 20 September 2010, regulations entered into force amending the *Designated Public Office Holder Regulations*.[22] The amendments added members of Parliament, senators and certain staff of the Office of the Leader of the Opposition to the list of designated public office holders.

3.1.2.3 Types of Lobbyists

The *Lobbying Act* applies to paid lobbyists who communicate with federal public office holders on behalf of a third party. Two types of lobbyists are identified by the Act:

- *Consultant lobbyists*. Individuals who lobby on behalf of clients must register as consultant lobbyists.
- *In-house lobbyists (employed by corporations and organizations)*. Senior officers of corporations and organizations[23] must register as in-house lobbyists when one or more employees lobby and where the total lobbying duties of all employees would constitute a significant part of the duties of one employee.[24]

Section 10 of the *Lobbying Act* authorizes the Commissioner of Lobbying of Canada to issue advisory opinions and interpretation bulletins with respect to the enforcement, interpretation or application of the Act. In 2009, then-commissioner Karen E. Shepherd relied on this provision to issue an interpretation bulletin on the concept of "a significant part of the duties" of an employee in order to assist in-house lobbyists in complying with section 7 of the *Lobbying Act*, which sets out the circumstances in which in-house lobbyists are required to provide information.[25]

In this interpretation bulletin, the Commissioner established the threshold after which lobbying represents a significant part of an employee's duties at 20% of overall duties. She also suggested approaches for calculating the 20% threshold and provided examples of activities that are not subject to the registration requirement and, therefore, should not be factored into the calculation of significant portion of duties.

3.1.3 Five-Year Post-Employment Ban for Designated Public Office Holders

DPOHs, including members of Parliament and senators, are prohibited by law from lobbying for five years after leaving office.[26] The five-year lobbying ban also applies to persons identified by the prime minister as having provided support and advice to him or her during the transition period from election to swearing-in as prime minister. The five-year period starts from the time the member ceases to carry out his or her functions with the team. Anyone who contravenes this provision commits an offence and is liable on summary conviction to a fine not exceeding $50,000. The commissioner also has the power to make public any offence committed under this section as well as the name of the offender. The prohibition does not apply to individuals who were DPOHs through employment exchange programs.

A former DPOH may apply to the commissioner for an exemption from the five-year post-employment ban. In determining whether to grant an exemption, the commissioner considers whether doing so would be in keeping with the purpose of the Act and the criteria set out in the Act (i.e., if the applicant was a DPOH for only a short time, or was employed on an acting or administrative basis only, or was employed as a student). The commissioner is required to make public every exemption granted, along with his or her reasons for doing so. The list of individual exemptions from the five-year prohibition on lobbying granted since the *Lobbying Act* came into force in 2008 is available on the website of the Office of the Commissioner of Lobbying of Canada.[27]

The exemption criteria for members of a prime minister's transition team differ from the exemption criteria for other DPOHs. For example, the following factors can be considered for transition team members: the circumstances under which the member left the team, the authority and influence the member possessed while on the team and the degree to which the member's new employer might gain unfair commercial advantage upon hiring the member. Indeed, transition team members are very closely involved in senior government offices – often in the staffing of high-level positions – and they could thus potentially exercise considerable influence over these offices if they were permitted to lobby them within five years of leaving the team.

3.1.4 Disclosure Requirements and the Registry of Lobbyists

3.1.4.1 Initial Return

The *Lobbying Act*, as with the *Lobbyists Registration Act* before it, requires lobbyists to register, in an initial return, all types of communication with public office holders. Information is submitted in the form and manner prescribed by regulation (the *Lobbyists Registration Regulations*); the forms and regulations function as an integral part of the implementation of the *Lobbying Act*. The regulations also set out certain additional information to be disclosed in returns beyond the information required by the Act. This information includes, but is not limited to, the name of the client or employer, the subject of the lobbying, the federal institution being lobbied, the lobbying methods used, whether the lobbyist was formerly a public office holder, the public office(s) held, as well as confirmation on whether the lobbyist was a DPOH, and the last date on which they held that position.

3.1.4.2 Monthly Returns

In addition to the initial registration requirement, the *Lobbying Act* contains provisions that require lobbyists to file monthly returns if they carry out any oral and arranged communications with DPOHs. Oral and arranged communications include telephone calls, meetings and any other communications that are arranged in advance.

The return must disclose, for each communication that takes place in a given month, the date of the communication with a DPOH, the name and title of all DPOHs who were the object of the communication, and the subject of the communication. The lobbyist must submit the return to the Commissioner of Lobbying no later than the 15th day after the end of the month covered by the report.[28]

3.1.4.3 Registry of Lobbyists

Section 9 of the *Lobbying Act* provides the Commissioner of Lobbying with the mandate to establish and maintain a Registry of Lobbyists. The Registry of Lobbyists is considered by the Commissioner of Lobbying to be the primary tool to increase transparency of federal lobbying activities.[29] The registry is a free, publicly accessible web-based database.

Lobbyists must certify the accuracy of information in their monthly returns. These returns are then validated for completeness by the staff in the Office of the Commissioner of Lobbying before being posted in the registry. There is no registration fee for lobbyists.

3.1.5 Offence Provisions and Sanctions

The *Lobbyists Registration Act* contained penalties for non-compliance with the legislation (e.g., failure to register) and for submitting false or misleading information. The *Lobbying Act* added offence provisions for failure to file a requisite return or for a DPOH to make a false or misleading statement in response to a request for information from the commissioner. Anyone convicted of these offences by way of summary conviction is liable to a maximum fine of $50,000 (up from $25,000 under the *Lobbyists Registration Act*) or imprisonment for up to six months, or both. Where proceedings are by way of indictment, the maximum fine is $200,000 (up from $100,000 under the *Lobbyists Registration Act*) or imprisonment for up to two years, or both. The Act also provides that anyone convicted of contravening any other provision of the Act, except in relation to the Code, will be liable to a maximum fine of $50,000 (up from $25,000 under the *Lobbyists Registration Act*). The limitation period for instituting proceedings by way of summary conviction under the Act is not later than five years after the commissioner became aware of the facts and not later than 10 years after the offence was committed.[30]

The commissioner may prohibit anyone who has been convicted of an offence under the Act from lobbying for up to two years. The commissioner must be satisfied that the prohibition is necessary and in the public interest, and he or she must also take into consideration the gravity of the offence and the existence of any previous convictions. In addition, the commissioner has the power to make publicly available any information related to a person convicted of an offence under the Act, including the person's name, the nature of the offence, the punishment imposed and any lobbying prohibition the commissioner may have imposed.

3.2 THE *LOBBYISTS' CODE OF CONDUCT*

In 1995, the *Lobbyists Registration Act* was amended and a provision made for a mandatory code of conduct for lobbyists and the submission of an annual report to Parliament on this code. After extensive consultations with all registered lobbyists and with parliamentarians, journalists and academics, review by the House of Commons Standing Committee on Procedure and House Affairs and publication in the *Canada Gazette*, the *Lobbyists' Code of Conduct* came into effect on 1 March 1997.[31]

The Code establishes standards of conduct for all lobbyists who communicate with federal public office holders and forms a counterpart to the obligations that federal officials are required to observe in their interactions with the public and with lobbyists. The Code begins with a preamble setting out its purpose and context. This is followed by a series of principles that, in turn, are followed by specific rules. The principles establish the operational parameters of the Code and set the framework through which the Code's goals and objectives are to be attained, but they do not establish precise standards. The rules provide detailed requirements for behaviour

in certain situations. The specific obligations or requirements under the Code can be broken down into three categories: transparency, confidentiality and conflict of interest.

The Commissioner of Lobbying is responsible for investigating possible breaches of the Code and such investigations must be conducted in private. In February 2007, the introductory message to the Code was amended to provide that an investigation may be triggered by an alleged breach of either a principle or a rule of the Code. Previously, the Ethics Counsellor held that only the breach of a rule could trigger an investigation.[32] Where a formal investigation has been conducted, the commissioner must table a report in Parliament citing the investigation's findings, conclusions and reasons for those conclusions. The *Lobbying Act* does not prescribe penalties for breaches of the Code (nor did the *Lobbyists Registration Act* before it); neither does the *Lobbying Act* specify how Parliament is to respond to a reported breach of the Code. Furthermore, there is also no limitation period for pursuing breaches of the Code.

On 16 October 2014, Karen E. Shepherd, who was then Commissioner of Lobbying of Canada, published a revised *Lobbyists' Code of Conduct*, together with a background paper outlining the rationale behind the changes to the Code.[33] The Commissioner invited all interested parties to share their views on the revised Code during consultations that took place from 16 October 2014 to 19 December 2014. On 21 May 2015, the Commissioner submitted the revised *Lobbyists' Code of Conduct* to ETHI Committee members to solicit their views on the new version. On 7 November 2015, the Commissioner published her proposed changes in the *Canada Gazette*. The current version of the Code came into force on 1 December 2015.

To facilitate application of the rules of the Code, the Office of the Commissioner of Lobbying of Canada issued guidance on how to mitigate conflicts of interest regarding preferential access (rules 7 and 8 of the Code), political activities (rule 9 of the Code) and gifts (rule 10 of the Code).[34]

Citing the Oliphant Inquiry,[35] the Office's website states that the Commissioner of Lobbying considers the following principles to assess whether a lobbyist has placed a public office holder in a real or apparent conflict of interest:

> Would an informed person, viewing the matter realistically and practically and having thought the matter through, think that an action taken by a lobbyist has created a sense of obligation on the part of the public office holder, or a tension between the public office holder's private interests and the duty of the public office holder to serve the public interest?[36]

Of note with respect to the interaction between lobbying and conflict of interest: on 22 March 2018, the Office of the Commissioner of Lobbying of Canada (OCL) and the Office of the Conflict of Interest and Ethics Commissioner (OCIEC) entered into a "Memorandum of Understanding," the purpose of which is to

> establish a framework to foster co-operation between the OCIEC and the OCL on matters of education and outreach in order to provide guidance to public office holders and lobbyists in respect of their obligations under their respective regimes and to ensure consistency, comprehensiveness and clarity in such matters.[37]

4 STATUTORY REVIEW OF THE *LOBBYING ACT*

Bill C-15 (2003) added to the *Lobbyists Registration Act* – now the *Lobbying Act* – section 14.1, which mandates that a parliamentary review of the Act must be undertaken every five years:

> 14.1(1) A comprehensive review of the provisions and operation of this Act must be undertaken, every five years after this section comes into force, by the committee of the Senate, of the House of Commons, or of both Houses of Parliament, that may be designated or established for that purpose.
>
> (2) The committee referred to in subsection (1) must, within a year after the review is undertaken or within any further period that the Senate, the House of Commons, or both Houses of Parliament, as the case may be, may authorize, submit a report on the review to Parliament that includes a statement of any changes to this Act or its operation that the committee recommends.

Section 14.1 came into force on 20 June 2005.[38]

On 15 December 2010, the House of Commons unanimously adopted a motion to designate the ETHI Committee as the committee charged with conducting the parliamentary review of the *Lobbying Act* in the House of Commons.[39]

Prior to dissolution of the 40th Parliament, the ETHI Committee had the opportunity to hear testimony from then-commissioner of Lobbying of Canada Karen E. Shepherd on two occasions: on 14 December 2010, in anticipation of the statutory review; and on 23 March 2011, the formal beginning of the review, when the Commissioner made several recommendations to amend the Act in order to improve its functioning.

During her appearance before the committee on 14 December 2010, Commissioner Shepherd raised issues that the committee might wish to consider in the context of the legislative review. She noted certain areas of the Act that could be further explored, namely, the enforcement mechanisms in the Act, the scope of application of the Act, and the disclosure requirements under the Act.[40]

Later, during her opening remarks to the committee on 23 March 2011, Commissioner Shepherd noted that while the federal lobbying system was working rather well, amendments could nonetheless improve its functioning.[41]

In a document titled *Administering the* Lobbying Act*: Observations and Recommendations Based on the Experience of the Last Five Years*, Commissioner Shepherd summarized her nine recommendations for reform of the Act:

- **Recommendation 1**: The provisions regarding the "significant part of duties" should be removed from the *Lobbying Act* and consideration should be given to allowing limited exemptions.
- **Recommendation 2**: The Act should be amended to require that every in-house lobbyist who actually participated in the communication be listed in monthly communication reports, in addition to the name of the most senior officer.
- **Recommendation 3**: The prescribed form of communications for the purposes of monthly communication reports should be changed from "oral and arranged" to simply "oral."
- **Recommendation 4**: The Act should be amended to require lobbyists to disclose all oral communications about prescribed subject-matters with DPOHs, regardless of who initiates them.
- **Recommendation 5**: The Act should be amended to make explicit the requirement for consultant lobbyists to disclose the ultimate client of the undertaking, as opposed to the firm that is hiring them.
- **Recommendation 6**: The provision of an explicit outreach and education mandate should be maintained in the *Lobbying Act* to support the Commissioner's efforts to raise awareness of the legislation's rationale and requirements.
- **Recommendation 7**: The Act should be amended to provide for the establishment of a system of administrative monetary penalties for breaches of the Act and the Code, to be administered by the Commissioner of Lobbying.
- **Recommendation 8**: The requirement for the Commissioner to conduct investigations in private should remain in the *Lobbying Act*.
- **Recommendation 9**: An immunity provision, similar to that found in sections 18.1 and 18.2 of the *Auditor General Act*, should be added to the *Lobbying Act*.[42]

In May 2012, the ETHI Committee tabled a report in the House of Commons on its first five-year review of the *Lobbying Act*. The committee made 11 recommendations for legislative change. The Government's response to the Committee's report, tabled in the House in September 2012, grouped the Committee's recommendations into three categories: those that the Government supports, those whose intent with which the Government concurs and "will consider means of implementing them that maximizes their effectiveness while minimizing administrative burden," and those of

which the Government takes note and will continue to study carefully.[43] Table 1, below, presents the ETHI Committee's recommendations as grouped by the Government in its response to the report. None of these recommendations has led to legislative change to date.

Table 1 – House of Commons Standing Committee on Access to Information, Privacy and Ethics Recommendations Grouped by Government Response

Recommendations Supported by the Government	Recommendations Whose Intent with Which the Government Concurs	Recommendations of Which the Government Takes Note and Will Continue to Study Carefully
Recommendation 5: Ensure monthly communications reports contain the names of in-house lobbyists who attended oral pre-arranged meetings [in addition to the senior reporting officer].	Recommendation 1: All public servants serving in a Director General's position, or serving in a more senior position than Director General, should now be considered Designated Public Office Holders and held subject to all applicable laws governing this designation.	Recommendation 2: Remove the "significant part of duties" threshold for in-house lobbyists.
Recommendation 9: The five-year ban should be retained, and post-employment restrictions on public office holders should be interpreted and administered by a single authority.	Recommendation 3: Eliminate the distinction between in-house lobbyists (corporations) and in-house lobbyists (organizations).	Recommendation 10: Enshrine the administrative review process in the Act.
	Recommendation 4: Require in-house lobbyists to file a registration, along with the senior officer.	Recommendation 11: Empower the Commissioner of Lobbying to impose administrative monetary penalties. Perhaps consider temporary bans for breaches of the law (as in the Newfoundland and Labrador and Quebec provincial legislation).
	Recommendation 6: Allow board members (corporations and association directors), partners and sole proprietors to be included in an in-house lobbyist's returns.	
	Recommendation 7: Impose an explicit ban on the receipt of gifts from lobbyists.	
	Recommendation 8: Prohibit an individual or entity from lobbying the government on a subject matter, if they have a contract to provide advice to a public office holder on the same subject matter.	

Source: Table prepared by the authors based on information obtained from Government of Canada, Government's Response to the recommendations of the Third Report of the Standing Committee on Access to Information, Privacy and Ethics, *Statutory Review of the* Lobbying Act*: Its First Five Years*, 17 September 2012.

The second five-year review of the *Lobbying Act*, which was supposed to have been conducted in 2017 in accordance with the Act, did not take place that year. During her appearance before the ETHI Committee in May 2018, Nancy Bélanger, who was appointed Commissioner of Lobbying of Canada on 30 December 2017, said the following: "We are also preparing for the pending legislative review of the *Lobbying Act*. We will be ready to meet with you when this exercise begins."[44] The Office of the Commissioner of Lobbying of Canada's *Annual Report 2018–19*, tabled in Parliament on 18 June 2019, echoes the same idea: "The statutory review of the *Lobbying Act* is anticipated. The Commissioner's recommendations to strengthen the Act continue to be developed and she will be ready to share them when called for by Parliament."[45]

Commissioner Bélanger appeared before the ETHI Committee on 9 March 2020 to provide an overview of her work. At that time she said that

> the *Lobbying Act* has been up for statutory review since 2017. I have developed a targeted number of recommendations to enhance the federal framework for lobbying. These recommendations are values-based, aimed at enhancing transparency, fairness, clarity and efficiency. Should the *Lobbying Act* be reviewed, I am ready to share a summary of my recommendations or a more comprehensive document detailing the rationale for each of them.[46]

Commissioner Bélanger noted that she had made 11 recommendations pertaining to registration and compliance. With respect to registration, she expressed her desire to eliminate the "significant part of the duties" threshold because of how difficult it is to apply. The Commissioner recommended that registration be by default with very clear criteria. She also recommended requiring registration after three months if an organization meets the prescribed threshold or if it requests more than $10,000 for its lobbying services.[47]

With regard to monthly communication reports, Commissioner Bélanger argued that

> who organizes the meeting should not matter to Canadians, and whether it's arranged in advance should not matter. Those one-hour conversations while you wait for your plane together should matter. To me, that's an important one. Whoever is in the room while the lobbying is occurring should be named.[48]

5 CONCLUSION

In its 2001 report on the *Lobbyists Registration Act*, the Industry Committee concluded its study by describing the lobbyists registration system as a "work in progress." The committee noted that, just as our thinking must continue to evolve on the subjects of transparency and access to government, so too must our legislative

framework remain flexible and responsive to change. This observation remains relevant today. Further, the parliamentary reviews of the *Lobbying Act*, which should take place every five years, could help the Act stay current as our parliamentary democracy continues to evolve. However, it should be noted that the second five-year review of the Act had not yet taken place at the time this paper was revised.

NOTES

1. According to the Office of the Commissioner of Lobbying of Canada's annual report for 2018–2019, there were 6,819 registered lobbyists. See Office of the Commissioner of Lobbying of Canada, *Annual Report 2018–19*, 2019, p. 8.
2. Office of the Commissioner of Lobbying of Canada, *The Lobbyists' Code of Conduct* (introduction).
3. *Lobbying Act*, R.S.C. 1985, c. 44 (4th Supp.).
4. Office of the Commissioner of Lobbying of Canada, *Lobbyists' Code of Conduct* [the Code] (text of the Code), 1 December 2015.
5. Essentially, two principal viewpoints on how to regulate the lobbying industry in Canada emerged from a series of hearings on the subject held by the House of Commons Standing Committee on Elections, Privileges and Procedure in 1986–1987. Some argued against a registration system for lobbyists, asserting that it would involve too much paperwork and high administrative costs, and would interfere with client confidentiality. They suggested that a system of self-regulation by the lobbying industry would be a more cost-effective and less objectionable means of achieving ethical standards of behaviour. Others, however, contended that a registration system would endow lobbying with a sense of legitimacy. It would ensure the public's right to know and be informed regarding who is trying to influence government policy, thereby ensuring the health of Canadian democracy. The standing committee sided with the proponents of a registration system and, six months after the report had been tabled, the government introduced Bill C-82, The Lobbyists Registration Act.
6. House of Commons, Standing Committee on Access to Information, Privacy and Ethics [ETHI], *Evidence*, 1st Session, 38th Parliament, 14 June 2005, 0905 (Karen Shepherd, Director, Lobbyists Registration Branch, Department of Industry).
7. Only persons who are paid to communicate with federal public office holders are subject to the *Lobbying Act*, and before that, to the *Lobbyists Registration Act* (see section 3.1.2 of this paper, "Lobbying in the Context of the Act"). Volunteers, for example, are not required to register pursuant to the legislation.
8. Initially, the reporting requirements for registered lobbyists were so few that many people argued that the *Lobbyists Registration Act* was simply a "business card" law. The Act was subsequently amended in 1995, 1996, 2003, 2004 and 2006.
9. For more on what took place during these parliamentary reviews, see Paul Pross, "*The* Lobbyists Registration Act*: Its Application and Effectiveness*," in Donald Savoie et al., *Restoring Accountability – Research Studies: Volume 2 – The Public Service and Transparency*, Research paper prepared for the Commission of Inquiry into the Sponsorship Program and Advertising Activities, as part of writing its Phase 2 report, *Restoring Accountability: Recommendations*.
10. House of Commons, Standing Committee on Industry, Science and Technology, *Transparency in the Information Age: The Lobbyists Registration Act in the 21st Century*, 1st Session, 37th Parliament, June 2001.
11. Office of the Commissioner of Lobbying of Canada, *Administering the* Lobbying Act*: Observations and Recommendations Based on the Experience of the Last Five Years*, 13 December 2011, p. 9.
12. *Federal Accountability Act*, S.C. 2006, c. 9.
13. Commission of Inquiry into the Sponsorship Program and Advertising Activities, "Advertising, Sponsorship Initiatives and Lobbying," Chapter 9 in *Restoring Accountability: Recommendations*, *Part Three – Transparency*, Ottawa, Public Works and Government Services Canada, 1 February 2006, pp. 171–174.

14. Office of the Auditor General of Canada, *The Sponsorship Program*, Chapter 3 in *Report of the Auditor General of Canada – November 2003*, 2003. Commissioner Gomery was given a two-part mandate with power issued under the *Inquiries Act*. The first part of the mandate was to investigate and report on questions and concerns addressed in the 2003 Report of the Auditor General of Canada relating to the sponsorship program and advertising activities of the Government of Canada. The second part of the mandate was for Commissioner Gomery to make any recommendations that he considered advisable, based on his findings – particularly with regards to accountability, governance, compliance and enforcement.

15. A consultant lobbyist is an individual (for example, a lawyer, accountant, public relations specialist or other professional) paid to lobby on behalf of a client.

16. House of Commons, ETHI, *Statutory Review of the* Lobbying Act*: Its First Five Years*, 1st Session, 41st Parliament, May 2012. The report was concurred in by the House later, in May 2013.

17. Government of Canada, Government's Response to the recommendations of the Third Report of the Standing Committee on Access to Information, Privacy and Ethics entitled *Statutory Review of the* Lobbying Act*: Its First Five Years*, 17 September 2012.

18. The former Registrar of Lobbyists had no investigatory powers under the *Lobbyists Registration Act*, although he or she could conduct investigations into possible breaches of the Code.

19. Under the *Lobbyists Registration Act*, when staff from the Office of the Registrar of Lobbyists received a request or complaint from the general public, media, a member of Parliament or an organization, or when officials of the branch believed there was a possible contravention of the Act or Code, the branch would assemble and review factual evidence to determine whether a formal investigation was warranted. Where there was an indication of a possible contravention of the Act, the matter was turned over to the Royal Canadian Mounted Police (RCMP). As well, the Registrar of Lobbyists was required to notify police forces where there were reasonable grounds to believe that a criminal offence had been committed under the Act. No charges were ever laid for contraventions of the *Lobbyists Registration Act*, leading some observers to conclude that the legislation could not be adequately enforced.

20. Government of Canada, *The* Lobbying Act *– A Summary of New Requirements*, Ottawa, June 2008.

21. The Act defines "public office holder" as any officer or employee of the federal government, including members of the Senate or House of Commons and members of their staff, Governor in Council appointees, ministers, officers, directors or employees of any federal board, commission or tribunal, members of the Canadian Armed Forces and members of the RCMP.

22. *Designated Public Office Holder Regulations*, SOR/2008-117, as amended by SOR/2010-192, s. 1.

23. Section 2(1) of the *Lobbying Act* states that the definition of "organization" includes

> (a) a business, trade, industry, professional or voluntary organization,
>
> (b) a trade union or labour organization,
>
> (c) a chamber of commerce or board of trade,
>
> (d) a partnership, trust, association, charitable society, coalition or interest group,
>
> (e) a government, other than the Government of Canada, and
>
> (f) a corporation without share capital incorporated to pursue, without financial gain to its members, objects of a national, provincial, patriotic, religious, philanthropic, charitable, scientific, artistic, social, professional or sporting character or other similar objects.

24. Office of the Commissioner of Lobbying of Canada, *Lobbying at the federal level – At a glance*. With respect to the Registry of Lobbyists, the Office of the Commissioner of Lobbying of Canada groups lobbyists into three categories: "consultant lobbyists," "in-house lobbyists (organization)" and "in-house lobbyists (corporation)": Office of the Commissioner of Lobbying of Canada, *Registry of Lobbyists*.

25. Office of the Commissioner of Lobbying of Canada, *A significant part of duties ("The 20% rule")*.

26. Prior to the *Federal Accountability Act*, the *Conflict of Interest and Post-employment Code for Public Office Holders* provided that former ministers, senior public servants and designated ministerial staff could not act as consultant lobbyists or accept employment as in-house lobbyists for a period of five years after leaving office. Although public office holders were bound by this obligation under the Code, the Code did not have the force of law.

27. Office of the Commissioner of Lobbying of Canada, *Exemptions granted under the* Lobbying Act.

28. Government of Canada, *The* Lobbying Act – *A Summary of New Requirements*, Ottawa, June 2008.

29. Office of the Commissioner of Lobbying of Canada, , *Administering the* Lobbying Act*: Observations and Recommendations Based on the Experience of the Last Five Years*, 13 December 2011, pp. 11–19.

30. Under the *Lobbyists Registration Act*, proceedings by way of summary conviction could not be instituted later than two years after the time when the subject matter of the proceedings arose.

31. Office of the Commissioner of Lobbying of Canada, *The Lobbyists' Code of Conduct* (introduction).

32. In 1994, the Office of the Ethics Counsellor was established within Industry Canada. The Ethics Counsellor was a Governor in Council appointee who was required to provide the minister of Industry with an annual report on the exercise of his or her powers, duties and functions in relation to the *Lobbyists' Code of Conduct*. The report to the minister was then transmitted to Parliament. The Ethics Counsellor's mandate at that time also included the administration of the *Conflict of Interest and Post-Employment Code for Public Office Holders*.

33. Office of the Lobbying Commissioner of Canada, "Revised Lobbyists' Code of Conduct," Background paper, October 2014.

34. Office of the Lobbying Commissioner of Canada, *Guidance – Lobbyists' Code of Conduct*.

35. On 31 May 2010, Commissioner Jeffrey J. Oliphant submitted to the Government of Canada the final report of the commission of inquiry before him for two years into certain allegations respecting business and financial dealings between Karlheinz Schreiber and the Right Honourable Brian Mulroney. See Government of Canada, "Government of Canada receives Oliphant Commission Report," News release.

36. Office of the Lobbying Commissioner of Canada, *Guidance – Lobbyists' Code of Conduct*.

37. Office of the Lobbying Commissioner of Canada, *Memorandum of understanding*, 22 March 2018.

38. Privy Council Office, *PC Number: 2005-0919*, 17 May 2005.

39. House of Commons, *Journals*, No. 118, 3rd Session, 40th Parliament, 15 December 2010:

> By unanimous consent, it was ordered, – That the Standing Committee on Access to Information, Privacy and Ethics be the committee designated for the purposes of section 14.1 of the *Lobbying Act*.

40. House of Commons, ETHI, *Evidence*, 3rd Session, 40th Parliament, 14 December 2010, 1535 and 1540 (Karen Shepherd, Commissioner of Lobbying, Office of the Commissioner of Lobbying).

41. House of Commons, ETHI, *Evidence*, 3rd Session, 40th Parliament, 23 March 2011, 1530 (Karen Shepherd, Commissioner of Lobbying, Office of the Commissioner of Lobbying).

42. Office of the Commissioner of Lobbying of Canada, *Administering the* Lobbying Act*: Observations and Recommendations Based on the Experience of the Last Five Years*, 13 December 2011, p. 7.

43. Government of Canada, *Government's Response to the recommendations of the Third Report of the Standing Committee on Access to Information, Privacy and Ethics, Statutory Review of the* Lobbying Act*: Its First Five Years*, 17 September 2012..

44. House of Commons, ETHI, *Evidence*, 1st Session, 42nd Parliament, 8 May 2018, 0850 (Nancy Bélanger, Commissioner of Lobbying, Office of the Commissioner of Lobbying). This meeting focused on the consideration of the main estimates of the Office of the Commissioner of Lobbying of Canada for 2018–2019.

45. Office of the Commissioner of Lobbying of Canada, *Annual Report 2018–19*, p. 19.

46. House of Commons, ETHI, *Evidence*, 1st Session, 43rd Parliament, 9 March 2020, 1654 (Nancy Bélanger, Commissioner of Lobbying, Office of the Commissioner of Lobbying).

47. Ibid.

48. Ibid.