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PEI Government Introduces Long-Awaited Lobbying Law -- Strong Enforcement, but Many Gaps

Includes rare exemption for lawyers who lobby

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Prince Edward Island Premier Wade MacLauchlan has introduced a bill[1] in response to long-standing calls for a lobbyist registry in the Province.[2] While the bill restricts revolving-door lobbying and includes strong enforcement, gaps in the proposed law mean many lobbying activities would continue to be undisclosed.

Bill No. 57, the *Lobbyists Registration Act*, will be of interest to any business that has dealings with PEI legislators or government officials, as well as to consultants and their clients. The proposed law received first reading December 14.

Prince Edward Island is the only Canadian province without a lobbying transparency law,[3] an omission that was often the subject of criticism.[4]

Scope of the Bill

The proposed law defines lobbying in a manner consistent with the definition in other provincial statutes. Lobbying would be communication with a public-office holder in an attempt to influence any of: the development of legislation, regulations, and government policies and programs; government grants, contributions and financial benefits; and privatization, out-sourcing and contracting out. In the case of consultants, lobbying would also include the

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1 *Lobbyists Registration Act*, Bill No. 57, 2nd Session, 65th General Assembly.

2 See, for example, Guy W. Giorno, "Taxpayers deserve to know who's influencing government" (July 22, 2011), *The Guardian*.

3 Lobbying laws are in effect in eight of ten provinces. In a ninth province, New Brunswick, the *Lobbyists' Registration Act* has been enacted but will not come into effect until a future date to be selected by the provincial Cabinet.

4 Fasken Martineau (July 22, 2011), "Guy Giorno's commentary on the need for a lobbying law in Prince Edward Island"

arrangement of meetings with public-office holders and attempting to influence the awarding of a government contract.

Grass-roots communication would constitute an exception to the principle that lobbying involves direct communication to a public office holder. Grass-roots communication involves communication to members of the public in an attempt to put pressure on public-office holders. It is best thought of as a form of lobbying in which the lobbyist communicates indirectly with a public-office holder, by enlisting the public's help. Bill No. 57 would require reporting of grass-roots communication by lobbyists. (This is typical of other lobbying statutes in Canada. Everywhere except British Columbia, Manitoba, New Brunswick and Quebec, lobbyists must report on their grass-roots communication.)

As is common across Canada, public-office holders would include everyone who holds an elected, employed or appointed position in the provincial government, and anyone appointed to an office by the Cabinet or a Minister. Members, officers and employees of educational authorities would also be public-office holders.

Gaps

The proposed law carves out several activities (lobbying that would not be subject to the Act) and numerous categories of people (lobbyists who would not need to be registered).

For example, Bill No. 57 would exempt lawyer-lobbyists from the requirement to disclose their lobbying on draft and proposed legislation.[5] The exemption of lawyer-lobbyists is virtually unprecedented – found in only one other jurisdiction in Canada.[6] Elsewhere, many lobbying regulators have stressed that lawyers are not above the law.[7]

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5 The exemption would apply to, "any communication by a barrister in respect of the drafting of any legislative proposal for introduction in the Legislative Assembly or any consequential consultation." Note that this exemption is not limited to a bill drafted by the lawyer or client. The wording would also exempt lawyer-lobbying on Government or Opposition legislative proposals as well as any resulting consultation. Effectively this means a lawyer would be permitted to lobby, without registering, on any proposed legislation and on any bill before the Assembly.

6 *Lobbyists' Registration Act* (Nova Scotia), subs. 3(3).

7 For example: Ontario, Office of the Integrity Commissioner, Lobbyists Registration Office, Interpretation Bulletin #7 (Oct. 28, 2011), "Are lawyers who engage in lobbying activity on behalf of a client required to register as lobbyists?"

The proposed law would also exclude:

1. Lobbying that falls into a class of submissions or communications exempted by the provincial Cabinet.

2. Lobbyists who fall into a class of persons exempted by the provincial Cabinet.

3. Lobbying by businesses and organizations where the amount is less than "significant" as determined by the provincial Cabinet.

(The provincial Cabinet would define the scope of these exemptions by making regulations under the Act.)

The first exemption is without precedent in Canada. No Canadian statute gives Cabinet the power to waive the transparency requirements for certain types of lobbying.

The second exemption follows some precedent. Alberta, Manitoba, New Brunswick (whose law is not yet in effect), Newfoundland and Labrador and Saskatchewan allow Cabinet to exempt entire classes of lobbyists from the statutory requirements.

The third exemption, which excludes in-house lobbying from the registration requirements unless its volume is "significant," follows the pattern of federal, Manitoba, New Brunswick, Nova Scotia and Quebec law. In federal jurisdiction and in Nova Scotia, "significant" is defined as 20 per cent of an employee's duties or 20 per cent of the duties of an employee-equivalent. This is also the threshold in Newfoundland and Labrador, where the 20-per-cent figure is specified in the Act.[8]

In all provincial jurisdictions (and federal jurisdiction) in-house lobbying is not registered unless it exceeds a minimum volume. At the same time, these minimum volume thresholds have also subject to expert criticism. The lobbying commissioners and registrars of the four largest jurisdictions in Canada (federal, Ontario, Quebec, BC), based on their deep experience, have individually recommended eliminating the registration thresholds and moving to a system

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[8] The New Brunswick definition of "significant" has not yet been determined. In Quebec, "significant" is interpreted to mean 12 days of lobbying annually across the entire business or organization, or lobbying by an executive or member of the board of directors, or lobbying that has a significant impact on the business or organization. In Manitoba, "significant" means 100 hours of lobbying annually across employer organization.

where all in-house lobbying is registered. (The regulators' recommendations are analyzed here). The Government of Prince Edward Island is either unaware of this expert advice, or has determined that it does not apply to PEI.

Everywhere in Canada, minimum thresholds do not apply to consultant lobbying; in other words, consultant lobbying must always be registered, regardless of amount. Bill No. 57 would treat consultant lobbying in this manner.

Registration

Consistent with the approach of most Canadian jurisdictions, the PEI law would impose the registration filing requirements on:

- Each individual consultant lobbyist, in the case of consultant lobbying.[9]
- The CEO (senior officer) of a business or organization, filing one registration covering every employee and officer who lobbies, in the case of in-house lobbying.[10]

A consultant lobbyist would be required to file the first return within 10 days of starting to lobby, and thereafter to renew semi-annually. The CEO (senior officer) would be required to file the first in-house lobbying return for the business or organization within two months,[11] and thereafter to renew semi-annually. These deadlines are consistent with those in other jurisdictions.

Revolving-Door Restriction

The law proposes to prohibit a small number of public officials from lobbying after leaving office. Former occupants of the following positions would be prohibited from both consultant lobbying and in-house lobbying for a period of six months after ceasing to hold public office:

- Ministers
- MLAs
- Officers of the Legislative Assembly

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9 Only Alberta does not require separate individual filings by consultant lobbyists.

10 Only New Brunswick (law not yet in effect) and Nova Scotia place the registration obligation on the individual in-house lobbyists for a business.

11 That is, within two months of first employing one or more officers or employees whose collective volume of lobbying is "significant" as defined in the regulation.

- Deputy ministers (including anyone holding an equivalent position in the Premier's office)
- Secretary to Treasury Board
- Clerk or Clerk Assistant of the Executive Council
- Individuals holding any other position that is specified by the regulations

In the case of former Ministers, the above restriction would operate alongside the existing restriction under the *Conflict of Interest Act*.[12] Under that statute, for six months after ceasing to hold office, a former Cabinet minister may not make representations to the Government, whether on his or her own behalf or that of another person, concerning a contract or benefit. A former Minister is also prohibited from contracting or accepting a benefit awarded by Cabinet or a government employee, or accepting a contract or benefit from any person who received a contract or benefit from a department of which he or she was the Minister.

One significant omission from Bill No. 57 is a code of conduct for lobbyists. Codes of conduct in federal jurisdiction, Quebec and Newfoundland and Labrador itemize specific ethical rules that lobbyists must follow. In Ontario a code of conduct is pending.

Enforcement

The proposed law would be enforced by prosecution. Bill No. 57 would create 17 separate offences, namely:

- Failure to file a consultant lobbyist return within ten days of commencing lobbying and semi-annually thereafter.
- In the case of consultant lobbying already taking place when the new law comes into effect, failure to file a return within ten days.
- Failure to file an in-house lobbying return within two months of employee one or more in-house lobbyists, and semi-annually thereafter.
- In the case of an in-house lobbyist already employed when the new law comes into effect, failure by the CEO (senior officer) to file a return within two months.
- Failure to include prescribed content in a consultant lobbying return.

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[12] R.S.P.E.I., c. C-17.1, s. 24.

- Failure to include prescribed content in an in-house lobbying return.
- Failure to correct or to update information in a return within 30 days of a change[13]
- Failure to terminate a registration within 30 days after a consultant lobbying undertaking is completed or terminated
- Failure to inform the Registrar within 30 days after an in-house lobbyist ceases to lobby or to be employed.
- Failure to respond within 30 days to an information request from the Registrar.[14]
- Receiving or paying a contingency fee (success fee) for consultant lobbying.[15]
- Violating the six-month revolving-door prohibition, *i.e.*, ban on lobbying by selected former public-office holders.
- Knowingly making a false or misleading statement in a return or other document submitted to the Registrar.
- While in the course of lobbying, knowingly placing a public-office holder in a position of real or potential conflict of interest.

On conviction, the maximum fine would be $25,000 for each offence.

Next Steps

Businesses and others who deal with Prince Edward Island legislative and government officials should continue to monitor developments carefully, as Bill No. 57 could significantly affect their interests.

For more information, please contact Guy Giorno, 613 696 6871, ggiorno@fasken.com.

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13 Two separate offence provisions, one for consultant lobbyists and one for CEOs (senior officers) who file in-house lobbying registrations.

14 *Ibid.*

15 Two separate offence provisions, one for receiving a contingent payment or one for making it.