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PEI Reintroduces Lobbying Law: Strong Enforcement, Fewer Gaps than Previous Bill

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Overview

Lobbying Law Bulletin

Prince Edward Island Premier Wade MacLauchlan has re-introduced legislation to establish a lobbyist registry in the province.[1] The bill restricts revolving door lobbying, includes strong enforcement provisions, and closes several gaps that had appeared in proposed legislation tabled during the previous legislative session.[2] It contains improvements that appear to respond to expert criticism of the previous bill.[3]

Bill No. 24, 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 8.

Prince Edward Island is the only Canadian province without a lobbying transparency law,[4] an omission that was often the subject of criticism.[5]

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, outsourcing and contracting out. In the case of consultants, lobbying would also include the 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. 24 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.

Fewer Gaps

The Premier's earlier bill proposed to carve 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). Bill 24, the current proposal, closes most of these gaps.

For example, the predecessor bill would have exempted lawyer-lobbyists from the requirement to disclose their lobbying on draft and proposed legislation.^[6] Bill No. 24 does not propose to exempt lawyer-lobbyists.^[7]

Bill No. 24 also drops a proposal in the earlier bill that would have excluded from the law any lobbying that fell into a class of submissions or communications exempted by the provincial Cabinet.^[8]

The current bill would, however, maintain three gaps that appeared in the previous legislation. It would exclude from the registration requirements of the law:

1. Lobbyists who fall into a class of persons exempted by the provincial Cabinet.
2. Lobbying by businesses and organizations where the amount is less than "significant" as determined by the provincial Cabinet.
3. All lobbying by officers, directors or employees of the Federation of Prince Edward Island Municipalities.

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

The first of these exemptions is not without precedent. Alberta, Manitoba, New Brunswick, Newfoundland and Labrador and Saskatchewan allow Cabinet to exempt entire classes of lobbyists from the statutory requirements. In Québec, certain categories of persons, bodies or agencies are excluded from the definition of "lobbyist" by regulation.

The second 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 Québec law. In federal jurisdiction and in New Brunswick and 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*.^[9]

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 are also subject to expert criticism. The lobbying commissioners and registrars of the four largest jurisdictions in Canada (federal, Ontario, Quebec, and BC), based on their deep experience, have individually recommended eliminating the registration thresholds and moving to a system where all in-house lobbying is registered. 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 the amount. Bill No. 24 would treat consultant lobbying in this manner.

The third exemption is similar to carve-outs from the Newfoundland and Labrador and Nova Scotia laws, but does not appear in the laws of most other provinces. Provincial lobbyist registration laws typically do not exempt advocacy organizations by name.

Registration

Consistent with the approach of most Canadian jurisdictions, the PEI law would impose the registration filing requirement on each individual consultant lobbyist, in the case of consultant lobbying.^[10]

In the case of in-house lobbying, Bill No. 24 (unlike its predecessor) would place the responsibility for registration of in-house lobbying, not on the CEO, but on the individual employees of a business corporation or partnership. This model is employed in the two other Maritime provinces, but nowhere else in Canada.^[11] In the case of lobbying by a not-for-profit organization, the CEO (senior officer) of the organization would file one return covering every employee and officer who lobbies.

A consultant lobbyist would be required to file the first return within 10 days of starting to lobby, and thereafter to renew semi-annually. Filing of the first in-house lobbyist return would be

required within two months after an employee becomes an in-house lobbyist,[12] and thereafter semi-annually. These deadlines are consistent with those in other jurisdictions.

While the previous bill did not list the required content of lobbyist registration returns, Bill No. 24 details what must be reported. The required content is consistent with what is required to be reported on lobbyist registrations in other Canadian jurisdictions.

The current bill corrects an oversight in the predecessor bill by providing that online public access to the lobbyist registry will be mandatory, not optional.

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
- 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*. [13] 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. 24 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. 24 would create 24 separate offences, namely:

- Lobbying when one is not registered on the registry of lobbyists.[14]
- 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 an employee of a business becoming an in-house lobbyist and semi-annually thereafter.
- In the case of an in-house lobbyist already employed when the new law comes into effect, failure to file a return within two months.
- Failure of the CEO (senior officer) of an organization to file an in-house lobbying return within two months of employing one or more in-house lobbyists, and semi-annually thereafter.
- Failure to include required content in a consultant lobbying return.
- Failure of an in-house lobbyist for a business to include required content in an in-house lobbying return.
- Failure of the CEO of an organization to include required content in an in-house lobbying return.
- Failure to correct or to update information in a return within 30 days of a change.[15]
- 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 a clarification request from the Registrar.[16]
- Receiving or paying a contingency fee (success fee) for consultant lobbying.[17]
- 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.[18]

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. 24 could significantly affect their interests.

Contact the Author

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[1] *Lobbyists Registration Act*, Bill No. 24, 3rd Session, 65th General Assembly.

[2] On December 14, 2016, the Premier introduced an earlier version of the proposed *Lobbyists Registration Act* (Bill No. 57, 2nd Session, 65th General Assembly) but it did not progress beyond first reading during that legislative session. The bill died when the session ended. The Government announced its intention to reintroduce the bill during the current legislative session, which commenced November 14, 2017.

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

[4] Lobbying laws are in effect in all of the remaining nine provinces.

[5] See, for example, Kerry Campbell, "P.E.I. lobby registry has room for improvement, says advocate: Draft legislation contains 'gaps' which would allow some lobbying to remain undisclosed" (December 19, 2016), CBC News.

[6] The exemption proposed by the earlier bill would have applied 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 would not have been limited to a bill drafted by the lawyer or client. The wording would also have exempted lawyer-lobbying on Government or Opposition legislative proposals as well as any resulting consultation. Effectively this would have permitted a lawyer to lobby, without registering, on any proposed legislation and on any bill before the Assembly.

[7] The exemption of lawyer-lobbyists is virtually unprecedented — found in only one other jurisdiction in Canada: *Lobbyists' Registration Act* (Nova Scotia), subs. 3(3). Elsewhere, many lobbying regulators have stressed that lawyers are not above the law. For example: Ontario, Office of the Integrity Commissioner, Lobbyists Registration Office, Interpretation Bulletin #7 (updated July 1, 2016), "Lawyers who engage in lobbying activity on behalf of a client."

[8] Bill No. 57, 2nd Session, clause 2(2)(g).

[9] In Manitoba, "significant" means 100 hours of lobbying annually across the employer organization. In Québec, "significant" was formerly 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, but that interpretation was struck down by the Québec Court of Appeal.

[10] Only Alberta does not require separate individual filings by consultant lobbyists.

[11] Only New Brunswick and Nova Scotia place the registration obligation on the individual in-house lobbyists for a business.

[12] 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.

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

[14] Two separate offence provisions, one for consultant lobbyists and one for in-house lobbyists.

[15] Three separate offence provisions, one for consultant lobbyists, one for in-house lobbyists for a business and one for CEOs (senior officers) who file in-house lobbying registrations on behalf of organizations.

[16] *Ibid.*

[17] Two separate offence provisions, one for receiving a contingent payment or one for making it.

[18] Two separate offence provisions, one for consultant lobbyists and one for in-house lobbyists.

Authors

