

## FEDERAL LOBBYING AND UNDUE INFLUENCE RULES

### I. INTRODUCTION

On July 25, 2022, the Federal Court of Canada issued its decision in *National Council of Canadian Muslims v Canada (Attorney General)*, 2022 FC 1087 regarding the communication between Justice David Spiro and the University of Toronto (“**Spiro Decision**”). In the Spiro Decision, Justice Kane found that a Canadian Judicial Council Review Panel noted a substantive distinction between “voicing concern about the publicity that may arise from [a University of Toronto] appointment and actively lobbying against the appointment ... .” (paragraphs 41 and 159). Justice Kane determined that this finding was reasonable (paragraph 164).

As explained below, the distinction accepted by Justice Kane between “voicing concern” and “actively lobbying” is not a distinction available to lobbyist governed by the *Lobbying Act* RSC 1985, c 44 (4<sup>th</sup> Supp) (“**Lobbying Act**”).

This article will identify the rules and definitions that lobbyists and public officials should keep in mind as they communicate with each other.

### II. FEDERAL LOBBYING

Federal lobbying laws are triggered by communication:

1. to a public office holder;
2. from a person about a government decision; and
3. for compensation.

See section 5 of the *Lobbying Act*.

### III. GIFTS AND UNDUE INFLUENCE

Canada has enacted laws governing the conduct of public office holders as they engage with lobbyist and the public. Generally speaking, such laws govern the following activities by public office holders:

1. acting in conflict of interest;
2. receiving gifts or other benefits while in office or after leaving office;
3. lobbying after leaving office.

In addition to the *Lobbying Act*, those laws include:

1. *Conflict of Interest Act*, SC 2006, c 9, s 2;
2. *Parliament of Canada Act*, RSC 1985, c P-1;

3. Government of Canada, Conflict of Interest and Post-Employment Code for Public Office Holders (2006);
4. Canada, Treasury Board Secretariat, Values and Ethics Code for the Public Sector (2012), forms part of the conditions of employment in the Public Service of Canada;
5. Values and Ethics Code for the Public Service (Canada), Chapter 3, “Post-Employment Measures”;
6. Conflict of Interest and Post-Employment Code for Public Office Holders (Canada).

Finally, the *Criminal Code*, RSC 1985, c C-46, makes it a crime to:

1. bribe a Member of Parliament (s 119.1(b));
2. commit a fraud or breach of trust in connection with a public office (s 122);
3. offer or accept a loan, benefit or advantage to a public office holder in exchange for influencing a government decision (s 121.1(a));
4. pay or demand payment of a secret commission to or from a public office holder (s 121.1(c));
5. peddle influence (ss 121 to 125 inclusive);
6. make or solicit political donations in order to secure a government contract (s 121.1(f)).

#### **IV. PARLIAMENTARY REVIEW OF FEDERAL STATUTE**

The *Lobbying Act* has a mandatory statutory review every five years. However the last statutory review undertaken by the House of Commons Standing Committee on Access to Information, Privacy and Ethics was completed in 2012. A review, therefore, has been due since 2017.

In February 2021, the Commissioner of Lobbying of Canada published a report titled *Improving the Lobbying Act: Preliminary Recommendations*. This report outlines 11 recommendations for revision to the *Lobbying Act*. A summary of the recommended changes can be found at [this link](#).

#### **V. REGULATED COMMUNICATION**

##### **A. General Considerations**

Communication with public office holders will require registration where the threshold set by *Lobbying Act* has been exceeded.

Assistance in preparing communication and advice on the methodology of communication is not covered by the *Lobbying Act*. This means that legal, public relations and strategic advice between advisor and client is not covered.

Under the *Lobbying Act*, intent is not a consideration. All communication is covered, so long as there is an intent to communicate from an objective perspective, regardless of whether the communicating party actually intended to do so.

## **B. Communication Regulated**

Activities which trigger the responsibility to register include communication with a public office holder in respect of:

1. the introduction, passage, defeat or amendment of any bill or resolution that is before the federal Parliament or a provincial legislature;
2. the making or amendment of any regulation;
3. the development or amendment of any policy or program of a government;
4. the awarding of any grant, contribution or other financial benefit by or on behalf of a government;
5. the awarding of any contract by or on behalf of a government; or
6. the arrangement of a meeting between a public office holder and any other person to discuss the subjects described above.

## **C. Asking Questions of Public Office Holders**

The *Lobbying Act* does not apply in respect of any oral or written communication made to a public office holder by an individual on behalf of any person or organization if the communication is restricted to a request for information.

## **D. Definition of Public Office Holder**

With few exceptions, the following are public officer holders:

1. Members of Parliament and Senators;
2. employees of the federal government;
3. officers, directors and employees of federal government agencies, boards and commissions.

There are some exceptions to the above in connection with public procurement or tender processes. However, the circumstances are limited and care should be taken to only refrain from registration where there is no doubt.

## **E. Exempt Persons**

The rules governing lobbying do not require registration by the following when acting in their official capacities:

1. Members of the House of Commons, the Senate and provincial legislatures, and their staff members;
2. employees of federal or provincial governments;
3. elected officials and employees of municipalities;
4. members and employees of First Nation or aboriginal governments or their institutions;
5. diplomats, consular officers and other representatives, in Canada, of foreign governments;
6. officials of an agency of the United Nations in Canada and of any other international organization granted privileges and immunities under federal law.

## **F. Exempt Activities**

Certain activities are exempt from the application of the *Lobbying Act*, even if they would ordinarily constitute lobbying. Exempt activities include the following:

1. submissions made to a committee of the Senate or House of Commons or of Parliament, or to any person or body having jurisdiction or powers conferred thereby, in proceedings that are a matter of public record;
2. communication made to a public office holder by an individual on behalf of any person or organization with respect to the enforcement, interpretation or application of any legislation or regulation by that public office holder with respect to that person or organization;
3. communication made to a public office holder by an individual on behalf of any organization, if the communication is restricted to a request for information.

Further, the *Lobbying Act* limits the disclosure of information that would reasonably be expected to threaten an individual's safety.

## **VI. LOBBYISTS**

### **A. Introduction**

The *Lobbying Act* governs two different kinds of lobbyists. The first is the consultant lobbyist. Consultant lobbyists are individuals paid by a party to engage in lobbying activity, but who are not employees of the party.

The second kind of lobbyist is an employee of a party that engages in lobbying on its own behalf, called an in-house lobbyist.

## **B. Consultant Lobbyists**

The consultant lobbyist must register in the event of any regulated communication by the lobbyist to a public office holder on behalf of a client. There is no minimum level of communication required. Furthermore, each and every consultant lobbyist must register personally at the time each new client is secured and lobbying commences.

## **C. In-house Lobbyists**

Corporations and organizations are required to file returns under the *Lobbying Act* where communication with public officials constitutes a significant part of the duties of one employee ('or would constitute a significant part of the duties of one employee if they were performed by only one employee'). See section 7(1) of the *Lobbying Act*. An Interpretation Bulletin issued by the Commissioner of Lobbying of Canada has established The 20% rule to determine when the "significant part" threshold has been met. Under The 20% rule, "assuming a five day work week, one individual would have to lobby the equivalent of one day per week to reach the threshold." Given that reporting is monthly, a return must be filed once an employee or group of employees engages in lobbying for more than 34 hours in one calendar month.

## **VII. RETURNS BY PUBLIC OFFICE HOLDERS**

The *Lobbying Act* allows, but does not require, the Commissioner of Lobbying to confirm for accuracy and completeness certain filed information. Furthermore, the *Lobbying Act* allows the Commissioner to report on the failure of a public office holder to respond to such a request. However, it does not make a response mandatory.

## **VIII. CONCLUSION**

In Canada, an organization that interacts with federal officials must be vigilant to:

1. monitor all communication with the public office holders on behalf of the organization;
2. register online with the Commissioner of Lobbying upon passing the threshold for registration;
3. refrain from placing office holders in conflicts of interest through the conferral of gifts or benefits;
4. ensure that former public office holders employed within the organization respect any cooling off periods imposed by law.