

New Lobbyists' Code Will Restrict Dealings with Canada's Federal Government and Agencies

Lobbying Law Bulletin

Canada's new *Lobbyists' Code of Conduct*, released May 25 by Lobbying Commissioner Karen Shepherd, will significantly restrict the activities of lobbyists and others seeking to influence federal decision making.^[1] Now is the time for businesses, organizations and individuals that deal with federal politicians, departments and agencies to take steps to prepare for the Code's broad impact.

Most significantly, the new Code will restrict:

- Lobbying of government officials with whom one shares a relationship close enough to create a sense of obligation. (This rule is the revised version of an earlier proposal to prohibit the lobbying of friends and relatives.)
- Providing hospitality, gifts, favours or benefits to any federal official, regardless of whether the official is actually being lobbied.
- Lobbying of an official by someone who helped the official get elected.

The Code applies to all individuals who are required to file lobbyist registrations (including corporate and organizational CEOs who must file registrations on behalf of their employees) and to all lobbyists required to be listed in a registration, regardless of whether a registration is actually filed.

Conflict of Interest and the "Obligation" Test

The most significant change contained in the new Code is use of a "sense of obligation" test to determine whether a lobbyist's activity or relationship with a government official creates a conflict of interest that precludes the lobbyist from lobbying that official.

Specifically, if a personal or business relationship creates a sense of obligation between a government official and a lobbyist then the lobbyist is prohibited from lobbying the official (new Rule 8) or arranging a meeting with the official (new Rule 7). In the case of political activity (in support of a politician) that creates a sense of obligation, the lobbyist would be prohibited from lobbying the elected official and the elected official's staff for a "specified period" (new Rule 9), though the length of the period has not yet been identified.

An earlier draft of new Rules 7 and 8 defined the prohibited relationship between lobbyists and government official as "relative," "friend" or having "financial or business dealings."^[2] The final texts of new Rules 7 and 8 replace these terms with a single test:

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"shar[ing] a relationship that could reasonably be seen to create a sense of obligation."

The "sense of obligation" test is drawn directly from the Federal Court of Appeal judgment in *Democracy Watch v. Campbell*.^[3] According to the Court:

"A lobbyist's stock in trade is his or her ability to gain access to decision makers, so as to attempt to influence them directly by persuasion and facts. Where the lobbyist's effectiveness depends upon the decision-maker's personal sense of obligation to the lobbyist, or on some other private interest created or facilitated by the lobbyist, the line between legitimate lobbying and illegitimate lobbying has been crossed. The conduct proscribed by [reference to Rule 8 of the current Code] is the cultivation of such a sense of personal obligation, or the creation of such private interests."^[4]

The Lobbying Commissioner has embraced the Court of Appeal ruling and, through the new Code, she will prohibit any lobbying of an official whom a reasonable person believes would feel a sense of obligation to the lobbyist.^[5]

In a related change consistent with the *Democracy Watch* ruling, the new Code rewords the current Rule 8 (conflict of interest) to eliminate its awkward and confusing construction.

[Current Rule 8:] "Lobbyists shall not place public office holders in a conflict of interest by proposing or undertaking any action that would constitute an improper influence on a public office holder."

The current Rule 8 begins by stating that lobbyists shall not place officials in a conflict of interest, and then links this requirement to the concept of "improper influence." The combination of these separate concepts led some, including the former Ethics Counsellor, wrongly to conclude that Rule 8 proscribed only conflicts created by improper influence.^[6] The Court of Appeal explained that the two concepts were not distinct, and that "improper influence" meant nothing more and nothing less than placing a government official in a conflict.^[7]

The Commissioner has responded to the Court of Appeal ruling by eliminating the confusing reference to "improper influence" and leaving behind a clear, simple prohibition against placing officials in a conflict of interest:

[New Rule 6, based on revision of current Rule 8:] "A lobbyist shall not propose or undertake any action that would place a public office holder in a real or apparent conflict of interest."

This new rule is followed by four additional new rules (new Rules 7 to 10) that elaborate on the prohibition against placing a federal official in a conflict of interest. New Rules 7 to 9 were addressed at the start of this section. New Rule 10 is discussed below.

Further Rules and Restrictions

The following are the additional new rules and restrictions that will apply to federal lobbyists:

- A lobbyist is prohibited from giving or promising a government official – including an official who is not being lobbied – any gift, hospitality, favour, or other benefit, "unless it is a normal expression of courtesy or protocol." (new Rule 10) Note that the

wording of the prohibition does not apply to offering a gift or benefit that the government official declines or refuses.

- The Code adds a new principle, "Respect for Democratic Institutions." It says that lobbyists should act in a manner that demonstrates respect for democratic institutions, including respect for government officials' duty to serve the public interest. (This text softens the language of an earlier draft, which stated that lobbyists "should act in a manner that does not diminish public confidence and trust in government."^[8])
- When a lobbyist meets the requirement to disclose the person organization or corporation on whose behalf he or she is communicating with government, the lobbyist now also must state the nature of the relationship with that person, organization or corporation. While most lobbyists already provide this information to government officials, all will now be required to explain the nature of the relationship (e.g., "I sit on the board of directors" or "I was hired by the parent corporation to lobby for its subsidiary").
- The requirement in Rule 2 to provide accurate and factual information to government officials is replaced by a requirement to *take all reasonable measures* to provide information that is accurate and factual. While this might seem like a softening of the current rule, in fact it will require that lobbyists exercise due diligence to ensure that their statements are accurate.
- The CEO of a company or organization (or the most senior employee, the one responsible for filing lobbyist registrations) must ensure that employees are informed of their obligations under the *Lobbying Act* and *Lobbyists' Code of Conduct*. This new obligation highlights the need for a lobbying compliance policy and proper training within each workplace.
- Recognizing that government officials often share confidential information with lobbyists, the Commissioner has created a new rule to address this occurrence: "A lobbyist shall use and disclose information received from a public office holder only in the manner consistent with the purpose for which it was shared. If a lobbyist obtains a government document they should not have, they shall neither use nor disclose it." (new Rule 5)

Other Changes

The new Code explains that it is intended to *complement* the codes of conduct applying to government officials and together with these other codes to contribute to public confidence in the integrity of government decision-making. This language reflects a return to the original intention of the 1993 Liberal "Red Book" (which first promised a lobbyists' code of conduct) that the code for lobbyists would correspond to the codes for public office holders.^[9]

Lobbyists are still required to act with honesty and integrity in dealings with government officials, but removed is the requirement to act with honesty and integrity in dealings with clients, employers, the public and other lobbyists.

The qualifier "while respecting confidentiality" is removed from the requirement that lobbyists be open and frank about their lobbying activities.

Consistent with the references to *communication* in paragraphs 5(1)(a) and 7(1)(a) of the Act, the new Code requires lobbyists to disclose the entities on whose behalf they are *communicating* with federal officials. (Currently they are required to disclose only entities for whom they are *making representations*.)

Current Rules 4 and 5, which protect clients and employers from the misuse or

unauthorized disclosure of confidential information, and Rules 6 and 7, which protect clients from lobbyists' conflicts of interest, are being removed entirely.[10] The Commissioner's rationale is that regulating interactions between lobbyists and clients/employer is beyond the appropriate scope of the Code.[11]

Consultant lobbyists will still be required to inform their clients of their (the lobbyists') obligations under the Act and Code, but in-house lobbyists will no longer be required to inform their employers. Instead, as explained earlier, the new Code makes it the employer's responsibility to provide this information to the in-house lobbyists.

Effective Date

The new Code's effective date has not yet been announced, but the Commissioner implied that it will come into force sometime after the summer. In the meantime, the Code will be reviewed by a House of Commons committee[12] although the committee's approval is not required before the Code takes effect.[13] Until the new Code comes into force, lobbyists continue to be bound by the 1997 *Lobbyists' Code of Conduct*.

The Lobbying Commissioner told the parliamentary committee that before the new Code takes effect she will develop guidance tools, including possibly an annotated version of the Code, and may hold explanatory round table discussions across the country.

How Much Stronger is the New Code?

In some ways the new Code merely clarifies the rules that have been in place since 1997. The Lobbying Commissioner has explained that the conflict of interest rules, in particular, "provide additional clarity to lobbyists." [14] While this is true, given what is being "clarified" is a prohibition on lobbying, the end result is to strengthen the new Code by making the boundaries of impermissible activity more clear and therefore easier to enforce. The replacement of one rule on conflict of interest (current Rule 8) with five new rules on conflict of interest (new Rules 7 to 10) will require increased diligence by companies and lobbyists, and likely will increase the number of administrative reviews and investigations into compliance with the Code.

Practical Implications

Contravention of the *Lobbyists Code of Conduct* is not an offence and does not result in a penalty. The Lobbying Commissioner can, however, investigate a possible breach of the Code and issue a public report declaring that a contravention has occurred. The adverse reputational impact of being found to have violated the *Lobbyists' Code of Conduct* is significant.

Any company, organization or individual that has dealings (or anticipates having dealings) with the Government of Canada, a federal agency, or a Member of Parliament, should take steps to ensure compliance with the new *Lobbyists' Code of Conduct*.

Best practices include the following:

- Updating internal policies on lobbying, gifts and hospitality, political activity and communications with government.
- Employee training
- A lobbying-law compliance audit
- Reviewing contracts with consultants for lobbying legal compliance
- Due-diligence processes to ensure lobbying law compliance

[1] Technically, lobbying can occur in the absence of an attempt to influence. Lobbying can include any communication in relation to a pending or possible government or parliamentary decision, whether or not the communication is intended to influence that decision. See *Lobbying Act*, para. 5(1)(a) and para. 7(1)(a).

[2] Canada, Commissioner of Lobbying, *Revised Lobbyists' Code of Conduct for consultation* (2014).

[3] 2009 FCA 79, [2010] 2 F.C.R. 139.

[4] *Ibid.*, at para. 53, Pelletier J.A.

[5] The reasonable-person standard is not explicitly part of the new Code, but the Lobbying Commissioner testified May 25 before the Standing Committee on Access to Information, Privacy and Ethics that she will interpret the new provisions from the perspective of "a reasonable Canadian."

[6] *Democracy Watch*, note 2, at para. 47.

[7] *Ibid.*, at paras. 48, 52.

[8] Canada, Commissioner of Lobbying, *Revised Lobbyists' Code of Conduct for consultation* (2014).

[9] Liberal Party of Canada, *Creating Opportunity: The Liberal Plan for Canada* (Sept. 1993), at 94-95.

[10] The current text of Rules 4 and 5 is as follows: "4. Confidential Information Lobbyists shall not divulge confidential information unless they have obtained the informed consent of their client, employer or organization, or disclosure is required by law. 5. Insider information Lobbyists shall not use any confidential or other insider information obtained in the course of their lobbying activities to the disadvantage of their client, employer or organization."

[11] Canada, Office of the Commissioner of Lobbying, "Opening Remarks by Karen E. Shepherd, Commissioner of Lobbying of Canada, at the Standing Committee on Access to Information, Privacy and Ethics" (May 25, 2015).

[12] Standing Committee on Access to Information, Privacy and Ethics.

[13] Subs. 10.2(3) of the Act provides that "The Code shall be referred to a committee of the House of Commons before being published under subsection (4)." Subs. 10.2(4) provides, "The Code is not a statutory instrument for the purposes of the Statutory Instruments Act, but the Code shall be published in the *Canada Gazette*."

[14] Canada, Office of the Commissioner of Lobbying, "Opening Remarks by Karen E. Shepherd, Commissioner of Lobbying of Canada, at the Standing Committee on Access to Information, Privacy and Ethics" (May 25, 2015).

