

Unclassified

GOV/PGC/ETH/RD(2007)1



Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

01-Jun-2007

English - Or. English

**PUBLIC GOVERNANCE AND TERRITORIAL DEVELOPMENT DIRECTORATE
PUBLIC GOVERNANCE COMMITTEE**

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**DEVELOPING A LEGAL FRAMEWORK FOR LOBBYING AND THE
REGISTRATION OF LOBBYISTS: THE QUÉBEC EXPERIENCE**

**Expert Group on Conflict of Interest with a Special Session on Lobbying:
Transparency and Accountability
6-8 June 2007, Château de la Muette, Paris**

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JT03228265

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DEVELOPING A LEGAL FRAMEWORK FOR LOBBYING AND THE REGISTRATION OF LOBBYISTS: THE QUÉBEC EXPERIENCE

This paper¹ outlines the recent Quebec experience in regulating and monitoring lobbying activities and shares some thoughts about the implications of developing and implementing such a legal framework.

As we all know, a law is rooted in a specific legal, historical, sociological, economic and political context, so the aim of this paper is to make some contribution to the current debate on the basis of recent experience in Québec.

From that perspective, this paper addresses four basic questions which in my opinion are inherent to any legislative attempt at regulating lobbying:

1. Why regulate lobbying?
2. What is to be considered lobbying for the purpose of such regulation?
3. Which obligations are to be imposed and on whom in the context of a lobbying relationship? and,
4. What type of control mechanisms are to be set up in order to ensure compliance?

Why regulate lobbying?

The word “why” refers both to the reasons for doing something and to the objectives that are pursued in doing so. Without pretending to be exhaustive, I will attempt to address this complex and delicate question.

Often, lobbying is depicted in a negative way, assuming that it implies some sort of obscure undue influence by private or vested interests in the decision-making processes of public institutions that should be animated by the systematic quest for public interest. If this were so, the logical step should of course be to consider prohibiting lobbying altogether, as are generally banned corruption, influence peddling or the enticement of public office holders to abandon their duties.

Needless to say, that it is a gross misconception of the reality of properly conducted lobbying.

In any modern society, a complex and fruitful interaction does happen constantly between public office holders and various stakeholders. Not only does it happen, but it is fair to say that it is a rapidly growing phenomenon and that it has become not only inevitable, but necessary and useful. It is now generally accepted that lobbyists may contribute to more enlightened decisions by public office holders since they provide on behalf of stakeholders an informed point of view which may merit consideration.

¹ This text is a revised and edited version of a paper presented in March 2007 at a conference on Lobbying: Practice and Legal Framework, held at Sam Son, Vietnam, under the aegis of the National Assembly of the Socialist Republic of Vietnam.

Lobbying is indeed an intricate part of this interaction between public office holders and the multifarious vested interests or interests groups that compose their civil society or, in the context of globalisation, that even attempt to reach and to influence governments from outside their national boundaries.

Any attempt at regulating lobbying thus postulates a very pragmatic recognition of the existence of the phenomenon in a specific society. It entails the explicit assertion of the legitimacy of such an activity and the setting up of rules and conditions for its proper conduct.

To my knowledge, existing laws or regulations concerning lobbying have two things in common: the imposition of some degree of transparency and the expression of standards of behaviour with which lobbyists are expected to comply.

In some instances, like at the European Commission in Brussels, the system works as a certification procedure providing those lobbyists who register with privileged access to the premises in which public office holders carry out their activities. Registered lobbyists are required to carry a badge which readily identifies them as the representatives of vested interests or interests groups. As registered lobbyists, they also undertake to abide by a code of conduct.

Such an approach aims at ensuring the appropriate exercise of lobbying on the premises of the governmental or parliamentary institutions. It seems to me to be designed mainly for the benefit of public office holders, at least insofar as the requirements for transparency go. It provides the public limited knowledge of the particulars of the lobbying activities happening on the institutional premises and does not seem to reach whatever lobbying activities might be happening outside these premises.

In North America, where lobbying legislations are the rule rather than the exception, transparency requirements for lobbyists stem from the very fact of lobbying a public office holder. These transparency requirements are crafted primarily with a view to informing the public of various particulars of lobbying activities. Statutory provisions and codes of conduct also apply. Such regulations aim not only at informing public office holders on whom they are dealing with, but also, if not primarily, at levelling the playing field with respect to the practice of influence and at increasing public trust in public institutions.

In Québec, whilst the possibility had been discussed and contemplated for a few years, the decision to regulate lobbying was made in 2002, in the aftermath of a situation involving lobbyists who had deeply embarrassed the government. The Québec National Assembly then unanimously adopted the Lobbying Transparency and Ethics Act. This piece of legislation took inspiration from a federal statute that had been in force since the late 1980s, but it was in many ways more comprehensive and more ambitious in its scope and coverage.

The law is aimed at reinforcing public trust in public institutions by fostering transparency in the lobbying of public office holders and by ensuring that lobbying activities are properly conducted. Central to this body of rules is a requirement for transparency grounded in the belief that it is in the public interest to know who is attempting to influence the decision-making process of public institutions through lobbying. Statutory provisions governing the practice of lobbying and a code of conduct complete the picture.

The assumptions behind such a statute are that sufficient knowledge of current lobbying activities thus made available to the public will create conditions for the democratisation of influence and that it will affect positively the accountability of public office holders.

Transparency of the substance of their contacts with lobbyists serves as a subliminal reminder of the fact that in their decision making, public office holders have to strike a proper balance among the interests of various stakeholders, having in mind the quest for public interest. It is also expected that, together with

these transparency requirements, the setting up of a new ethical framework for the practice of influence will enhance the quality and credibility of the public decision-making processes.

What is to be considered lobbying?

Since there does not seem to be any universally accepted or workable definition of what constitutes lobbying, for any attempt at regulating lobbying it is fundamental to provide clear legal definitions of what is at stake in a particular setting. The ambit of those definitions is a matter of political choice. However, it seems to me that three main notions must be so defined in order to adequately specify the intended scope of any regulatory process:

1. In what political or administrative environment is the regulation to be applied.
2. Who is to be considered a lobbyist; and
3. What is to be considered a lobbying activity?

On the first point, the Québec law has been quite broad in its coverage of the decision-making apparatus in its public institutions. It encompasses not only the lobbying of ministers, parliamentarians, as well as their staff, but it also covers the lobbying of government employees, the lobbying of persons holding office or employment in government agencies or enterprises, and even the lobbying of elected officials and employees at the level of local authorities.

As to the question of who is to be considered a lobbyist, the Québec law defines two broad categories: consultant lobbyists and enterprise or organisation lobbyists. In so doing, it should be noted that the law subjects not only the action of professional or specialised intermediaries but it also aims at lobbying done directly by and on behalf of enterprises and of organisations.

In this context, a consultant lobbyist is any person “whose occupation or mandate consists, in whole or in part, in lobbying on behalf of another person in return for compensation”. This broad category includes individuals acting for third parties in a variety of capacities. In fact, very few individuals will give you a business card on which they identify themselves as lobbyists. They might be public relations or government relations specialists, project managers, business consultants, former public office holders, lawyers, engineers, architects, accountants and so on. In fact, whatever his or her formal title, as long as a person is lobbying on behalf of another person in return for compensation, that person will be deemed a consultant lobbyist for the intents and purposes of the law.

The second category targets the so-called “in-house lobbyists” whose job or function, within a profit-seeking enterprise or within an association or a non-profit group, consists, for a significant part, in lobbying on behalf of such enterprise or organisation. These might be influential members of the board, executives or other salaried employees of such entities.

Having determined that a potential lobbyist is somewhat involved in a political or administrative environment contemplated by the act, for it to apply there finally needs to be what the law defines as a lobbying activity. A lobbying activity implies a direct communication, either oral or written, between a lobbyist and a public office holder. This communication must be made in an attempt to influence a decision-making process in which this public office holder is implicated. It must also relate to any of the subject matters that are enumerated as being susceptible to regulated lobbying.

Another of the peculiarities of the Québec law is that it goes far beyond regulating solely the lobbying of public office holders on their policy making, on their action plans or on the various facets of their legislative and regulatory activity. Attempts by lobbyists to influence decision-making processes on more

administrative matters such as the issue of administrative authorisations, procurement, the awarding of grants, subsidies or other forms of benefits, even attempts to influence the appointment of senior civil servants may also be deemed to be lobbying activities.

Having somehow defined those three basic concepts which circumscribe its coverage, any attempt at regulating lobbying must obviously state which obligations are to be imposed on whom.

Which obligations are to be imposed on whom?

As mentioned in the preliminary remarks, the regulation of lobbying involves the imposition of some degree of transparency and the expression of standards of behaviour with which lobbyists are expected to comply.

Lobbying being a relationship between two actors, a lobbyist and a public office holder, the first question which arises concerns which of these actors should bear the formal responsibility for achieving transparency. Since lobbyists initiate the relationship, it is generally assumed that they should primarily be responsible for the publicity of their endeavour to influence public office holders on behalf of the particular or vested interests they represent. In fact, I do not know any law that imposes on public office holders the obligation to file reports on their contacts with lobbyists.

Typically, as under the Québec law, the filing of a return in the registry of lobbyists is required from the lobbyist in a prescribed delay as soon as the lobbying relationship has started. It is important to note that the filing of that return is not a prerequisite; it is a legal consequence of the beginning of the relationship. Accordingly, public office holders may not be expected to impose the production of proof of registration prior to engaging a relationship with a lobbyist. It shows that registration is not designed as a certification process tantamount to the granting of a licence to lobby. It is essentially conceived as a means to ensure the transparency of the ongoing lobbying relationships for the benefit of citizens and other stakeholders.

To say so does not mean that public office holders have no role to play in making sure that lobbyists who are at work to influence them abide by the law. Even if the lobbying law does not impose a formal duty on them, public office holders cannot ignore that these requirements are part and parcel of the law of the land. They must show due and reasonable diligence in making sure that these requirements are complied with in their dealings with lobbyists. They should bear in mind that transparency requirements imposed on lobbyists in their dealings with them are aimed at enhancing the legitimacy and credibility of their own authority and that they are imposed to ensure an equitable access to the institutional decision-making processes of which they are the trustees and which are designed to determine what is in the public interest.

The next question to be considered relates to the extent of transparency requirements imposed on lobbyists. Here again it is a matter of political choice.

In a nutshell, the core of required disclosures under the Québec law could be summarised as “who is lobbying where on what subject matter?”

The first element, who is lobbying, refers both to the identification of vested or particular interests attempting to influence public authorities and to the identification of the person or persons acting as lobbyists on their behalf.

Consultant lobbyists have to formally identify themselves and give their professional particulars. They must also identify in some detail the client on behalf of whom they are lobbying. If consultant lobbyists represent various clients, they must file a distinct section of their declaration for each such client.

As to lobbying by an enterprise or an organisation, the onus is put on the senior officer of such an entity to properly identify it and to provide its particulars. The senior officer must also duly identify and register the person or persons mandated to act as lobbyists on behalf of the enterprise or organisation.

Regarding the second element, where and in which public institution contemplated by the law are the lobbying activities taking place, the requirements are not nominal but of a general nature. In Québec, lobbyists are not required to identify the person or persons whom they met or intend to meet. It is sufficient to name the particular institution and identify the nature of the function of the public office holders they lobby or intend to lobby in that institution. For instance, it is sufficient to mention that one is lobbying at the ministerial or managerial level in a specified ministry or that one intends to lobby members of the board of a specified government agency or enterprise.

The third and most essential element of the declaration is a description of the subject matter of the lobbying activities including, as the law says, “particulars to identify such subject matter”. We take it to mean a sufficiently detailed description of the nature of the decision that the lobbyist is attempting to influence. It is noteworthy that our law does not require the disclosure of lobbying activities as such. It merely requires the disclosure of the subject matter of these lobbying activities.

It might seem at first glance to put a lighter burden on lobbyists. Our experience is that this requirement of particulars as to the subject matter of lobbying activities implies a rather drastic change in the mentalities of those who endeavour to lobby public office holders. At least at first, we have encountered some reluctance by lobbyists in giving too many details about the purpose of their lobbying activities. Together with the registrar of lobbyists, in order to ensure that declarations are sufficiently detailed, we are gradually developing standards of conformity in that respect.

The above-mentioned are not the only elements of the declaration required from lobbyists but they represent in my opinion the core of the legal requirements under the Québec law.

It might have been noticed that the paper has not included on that short list of core transparency requirements, details about how lobbying activities are to be conducted.

The Québec law asks for very few details about how lobbying is to be conducted and also about the financial resources invested to support lobbying activities.

Lobbying techniques are referred to only in the broadest terms such as a general reference to organising or holding meetings, or communicating verbally or in writing. Incidentally, it might be interesting to mention that Québec law deals strictly with what the literature calls “direct” lobbying as opposed to “indirect” or “grassroots” lobbying which is covered under other jurisdictions. For instance, in Canada, the federal statute requires that such indirect lobbying, involving notably advertisements in the media or public opinion campaigns to influence or to put pressure on decision making by public office holders, be declared.

As to the financial resources invested to support a lobbying drive, the Québec law barely requests the disclosure by range of the order of the honoraria paid to a consultant lobbyist. This is quite different from some lobby legislations in the United States which go quite far in requesting details of the amounts of money invested in a lobbying campaign as well as the disclosure of political contributions, gifts and other advantages granted by lobbyists to public office holders.

If the Québec lobbying law might appear timid in that respect, it is no doubt because the same objectives are pursued by different means in our legal system. Québec has a quite stringent law on the financing of political parties. As for gifts and other advantages granted by lobbyists to public office holders, this question is addressed through norms and codes of conduct made applicable to public office holders.

Having considered the question of the substance of the disclosure requirements, one must say a few words about the procedure for filing returns and about the question of the accessibility of those returns.

Returns are generally filed electronically without charge on the prescribed form. Those which are not so filed are integrated for a fee in the electronic data base of the registry of lobbyists. Declaration is an iterative process. For instance the initiation of any new mandate by a lobbyist must be reported by an adjunction to his initial declaration, as well as any substantial modification in the parameters of a mandate that has previously been declared in the registry.

Since the purpose of the law is transparency, the content of the registry of lobbyist is accessible freely to any interested individual. In fact, the whole data bank is accessible freely at any time via internet at www.lobby.gouv.qc.ca.

The second category of obligations imposed on lobbyists concerns the setting of norms destined to ensure that lobbying is properly conducted. This is the “ethical”, or to be more precise, the “deontological” aspect of the law.

In Québec, these norms are set either in the law itself, or in the Code of Conduct for Lobbyists which had to be adopted by the lobbyist commissioner after consulting the interested parties.

In the law itself are provisions which prohibit for instance lobbying for a contingency fee or lobbying in return for compensation from a grant or loan from the government. The law also contains provisions that restrict for a time the ability of former public office holders of high rank to act as lobbyists in the environment in which they held office. It also contains prescriptions of a more general nature for former public office holders concerning the deriving of undue advantage in lobbying from having previously held public office or the disclosure or usage of confidential information in the course of lobbying activities.

The Code of Conduct for Lobbyists adopted by the Commissioner is in fact a regulation adopted under the law and as such it is compulsory. It establishes standards of behaviour in order to ensure that lobbying activities are properly conducted. These duties and obligations are grouped under the headings of “respect for institutions”, “honesty and integrity” and “professionalism”.

Having so dealt with the question of which obligations are to be imposed on whom, the final section will describe briefly the control mechanisms that have been set up under the Québec law in order to ensure compliance with the transparency and deontological requirements.

What control mechanisms are to be set up in order to ensure compliance?

In Québec, it was decided, for very operational reasons, to create both a function of Lobbyist Commissioner and a function of Lobbyists Registrar. There was no compelling reason to do so other than the fact that a specialised team at the ministry of Justice was already operating very successfully some complex computerised registries. It appeared a sound administrative decision to ask this team to create and operate the registry of lobbyists since it had already proven that its members had the know-how and equipment to do the job.

In operating the registry, the Lobbyists Registrar is responsible for ensuring that returns filed contain all the required information in the manner prescribed. He must also safely safeguard that information and make it conveniently accessible to any interested party.

Simultaneously, the law created the function of Lobbyist Commissioner stipulating that the person holding the office would be “responsible for monitoring and controlling the lobbying of public office holders”.

Since that institution was to be responsible for monitoring and controlling the relationship between lobbyists and persons holding office in parliamentary, government and municipal institutions, it was decided that the Commissioner would be appointed on a consensual basis by the National Assembly, that he would be independent from government and accountable directly to the National Assembly to which he would report directly and from which he would receive the budget.

The Commissioner is granted the powers to make inspections and inquiries, both upon request or on his own initiative if he has reasonable grounds to believe that there has been a breach of any provision of the Act or of the Code of Conduct. Investigative powers may be exercised with any parties involved, either lobbyists or public office holders.

If a Commissioner’s inquiry report ascertains a breach of a provision of the Act or of the Code of Conduct, various penalties may be requested against the contravening lobbyist. Fairly substantial fines may be imposed upon conviction by a tribunal. The law also empowers the Attorney General to claim from the contravening lobbyist “the amount or value of any financial or other compensation received or payable to him/her on account of the activities having occasioned the breach”. Finally, in cases of grave and repeated breaches of the Law or of the Code of Conduct, the Lobbyist Commissioner might even discipline the lobbyist and bar that individual from lobbying any public office holder for a period of up to a year.

Having so described the control mechanism, the last part of the paper will highlight the way we have deployed our operations and the kind of approach we are trying to privilege in implementing this law.

By imposing transparency in lobbying, this law requires from lobbyists and public office holders alike a very profound change in their way of doing things. It aims at circumventing and at regulating a very diverse and complex reality. It presupposes a cultural transformation of the relationship between public office holders and lobbyists.

It is no surprise if that change did not happen by the stroke of the pen of the legislator. For almost five years now, we have approached that task by attempting to strike the right balance between the use of supporting, of incentive and, gradually, of coercive measures to ensure compliance.

Our strategic planning was devised with a view to convincing lobbyists, public office holders, and citizens alike to partake in the implementation of the new value system that underlies this bold and recent legislation.

Fortunately, the National Assembly included in the law a provision to the effect that five years after its adoption, the Minister of Justice would report on the implementation of the Act and the Code of Conduct and on the advisability of amending them. In the near future, the question will be revisited in the light of experience and in a different context from that of the difficult one which prevailed at the moment of its adoption.

So far, even though much remains to be done, we have reasons to be quite satisfied with the results attained, particularly with respect to lobbying at the parliamentary and government levels. We are currently preparing our description and assessment of these first five years and we are looking forward to taking part in the forthcoming evaluation process at the National Assembly.

Conclusions

In 2000, the OECD published a report entitled *Building Public Trust: Ethics Measures in OECD Countries*. Simply put, this report stated that public administrations are not only evaluated on the basis of their ability to reach sound decisions, but also on the quality and credibility of their decision-making processes. It advocated the establishment of the components and functions of what it called an “Ethics Infrastructure” that encourages high standards of behaviour and that promotes the integration of values specific to the context of public administration such as impartiality, accessibility, equality, equity and transparency.

In this perspective, the setting up of rules and standards to monitor and control the practice of lobbying might increasingly appear as a natural complement to the ethical framework that is put in place to inspire and guide public office holders in the exercise of their functions.

While a few European countries like Germany and Poland have adopted some form of legislation to control the practice of lobbying whilst beforehand this was almost exclusively a North American phenomenon, there are growing signs that some more are considering the possibility to do so. It is of great interest also to point out that it seems that the OECD, through its Public Governance and Territorial Development Directorate is becoming actively involved in a reflection on the issue. One might expect that in the coming years, this issue will be increasingly considered and that international principles or standards might emerge.

This might be a mere speculative assertion or a form of wishful thinking on my part, but I do not think so. The very fact of this gathering here at the OECD Symposium to reflect on the issue strongly convinces me to the contrary.