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TRANSLATION

COMMITTEE ON INSTITUTIONS

Study of the report by the Lobbyists Commissioner entitled
“Propositions de modifications à la Loi sur la transparence et l’éthique
en matière de lobbyisme"

OBSERVATIONS, CONCLUSIONS AND RECOMMENDATIONS

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Background

On May 9, 2012, the President of the National Assembly tabled a report by the Lobbyists Commissioner in anticipation of the tenth anniversary of the adoption of the Lobbying Transparency and Ethics Act, which was on June 13, 2012. The report makes 105 recommendations and, in an appendix, contains a completely restated act incorporating the full set of recommendations.

On November 20, 2012, the Committee on Institutions assumed the task of reviewing the report, which is entitled *Propositions de modifications à la Loi sur la transparence et l'éthique en matière de lobbyisme*. In that framework, on April 17th the Committee heard the Lobbyists Commissioner regarding the proposed amendments. Further to that hearing, the Committee held private consultations, and received 12 briefs and numerous letters in support of the briefs. It also held public hearings on September 19 and 24, 2013, in the course of which it heard from the representatives of six organizations affected by the proposals in the Lobbyists Commissioner's report.

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The Lobbying Transparency and Ethics Act[1] was unanimously adopted by the National Assembly in June 2002. Section 1 states the purpose of the Act:

> While recognizing that lobbying is a legitimate means of access to parliamentary, government and municipal institutions and that it is in the interest of the public that it be able to know who is attempting to influence such institutions, this Act is designed to foster transparency in the lobbying of public office holders and to ensure that lobbying activities are properly conducted.

Under the Act, a lobbying activity is any oral or written communication in an attempt to influence or that may reasonably be considered as capable of influencing a decision by a public office holder[2]. In accordance with the Act, lobbyists must register their lobbying activities in the registry of lobbyists – which has been operational since November 2002 – and comply with the

[1] CQLR, c. T-11.011.
[2] CQLR, c. T-11.011, s. 2.

Code of Conduct for Lobbyists, which came into force in March 2004.

The Act defines three types of lobbyists:

- Consultant lobbyists (persons whose mandate is to lobby on behalf of other persons);
- Enterprise lobbyists (persons whose job or function within a profit-seeking enterprise consists in lobbying on behalf of the enterprise); and
- Organization lobbyists (persons whose job or function consists in lobbying on behalf of an association or non-profit group).

The Act has not been amended since its adoption in 2002. In October 2007, the Minister of Justice tabled a report in the National Assembly on the Act's implementation, in accordance with section 68 of the Act. Two months later, in January 2008, the Lobbyists Commissioner published his own report on the five-year review of the Act.

In May 2008, the Committee on Public Finance held private consultations on the implementation of the Act, during which it received 19 briefs and heard 28 interveners. However, the Committee was unable to complete its mandate before the dissolution of 38th legislature on November 5, 2008.

Observations

Each of the recommendations contained in the Lobbyists Commissioner's report merits close attention. However, the Committee will focus its observations on only some of the questions raised by the participants in their briefs or at their hearing.

Application of the Act

Among all of the recommendations made by the Lobbyists Commissioner, the ones that were most commented on during the private consultations relate to the advisability of making all non-profit organizations (NPOs), coalitions and grass-roots lobbying subject to the application of the Act.

Non-Profit Organizations

Although the Act also contemplates NPOs, most NPOs are not subject to the Act pursuant to

the Lobbying Transparency and Ethics Act Exclusions Regulation[3], which was adopted in 2003. Indeed, that Regulation limits the scope of the Act to only those NPOs that have been constituted for management, union or professional purposes or composed of a majority of members that are profit-seeking enterprises.

According to the Lobbyists Commissioner, the exemption of those organizations from the registration obligation, many of which have vast financial and technical means at their disposal, leaves a significant portion of the lobbying reality in Quebec behind the scenes. Not only does this conflict with the transparency promoted by the Act, it creates an unfair situation and instils a feeling of injustice in the organizations that are subject to the Act. In the Commissioner's opinion, this situation "[TRANSLATION] also sets up unequal treatment, thus strengthening the perception that there are good and bad lobbyists, which does not harmonize with the objective of recognizing the legitimacy of lobbying activities[4]." The Commissioner also recommends making all associations and non-profit organizations subject to the Act, while excluding representations made by lobbying organizations for the purpose of obtaining grants, loans or financial guarantees of $5,000 or less (recommendation 39).

This proposed amendment provoked strong reactions from many NPOs. They insisted on expressing their objections, either by filing briefs or submitting letters in support of such briefs. To them, there is a clear distinction to be made between organizations that lobby for their own interests or for financial purposes and those whose ultimate objective is the common good[5].

Accordingly, many of them, such as the *Réseau québécois de l'action communautaire autonome*, recognize that the exclusion of all NPOs from the application of the Act led to unfairness, in particular in view of the significant financial and technical means some of them have, and their influence. However, they find that making all NPOs, including independent

[3] CQLR, c. T-11.011, r. 1.

[4] *Propositions de modifications à la Loi sur la transparence et l'éthique en matière de lobbyisme du Commissaire au lobbyisme*, p. 7.

[5] Without making a direct pronouncement on the advisability of making all NPOs subject to the Act, commercial development corporations maintain that their activities should be excluded from the Act's application. In their view, although they are coalitions of business people, they should not be deemed to be lobbyists for a number of reasons. For instance, their incorporation, organization and activities are provided for in the Cities and Towns Act. Also, they must render an accounting to the municipal council and obtain its approval of their operating budgets and fee structures. Their status and activities are similar to those of local development centres and professional orders, which are exempt from the Act's application. See the brief filed by the *Association des sociétés de développement commercial de Montréal* and the *Société de développement commercial centre-ville de Trois-Rivières*.

community action groups, subject to the Act could jeopardize their ability to take action and might even compromise their survival.

Many are of the opinion that the ensuing obligation for the employees, officers and board members of an NPO to register in the registry would create a great deal of administrative nuisance which could paralyze the organization, in addition to clogging up the registry. It could even cause many volunteers to drop out, and without them NPOs could not function.

Taking the opposite view, the *Fédération des chambres de commerce du Québec* finds that no distinction should be made between organizations that defend interests in the areas of environment, health, social and community development or the economy. They should all be treated equally under the Act. On this issue, the *Réseau québécois d'action pour la santé des femmes* responds that NPOs are not the same as organizations that defend economic and private interests, because their ultimate objectives, financial means and ability cannot be compared. Thus, to treat them the same way would be contrary to the principle of equality[6].

Meanwhile, the Canadian Bar Association argues that the objective of the Act is the transparency of public action and that to exclude lobbying activities goes against the Act's principles. However, for many NPOs, this goal has been achieved since, as the beneficiaries of public funds, they must comply with the requirements of every funder, federal or provincial, and must render an accounting in their annual activity reports.

Furthermore, some see the Lobbyists Commissioner's idea of excluding representations made to obtain financial aid of $5,000 or less as unrealistic[7] and arbitrary[8].

Coalitions

Unlike the federal statute on lobbying and those of many provinces, Québec's law does not specifically mention coalitions as being subject organizations. However, the Lobbyists Commissioner believes that persons conducting lobbying activities on behalf of a coalition should be registered as enterprise lobbyists where that coalition comprises at least one member that is a profit-seeking enterprise (recommendation 36). Similarly, it proposes that lobbyists conducting lobbying activities on behalf of a coalition comprised strictly of NPOs should be deemed to be organization lobbyists (recommendation 37).

[6] Brief filed by the *Réseau québécois d'action pour la santé des femmes*, p. 5.
[7] Brief of the *Chantier de l'économie sociale*, p. 2.
[8] Brief of the *Coalition priorité cancer au Québec*, p. 2.

This latter proposal was strongly opposed by many of the groups consulted. It was pointed out that a good number of those coalitions do not have letters patent. They often spring from the public will and are very short-lived. To make them subject to the Act would restrict freedom of expression and would impose too great a responsibility on their spokespersons[9].

Moreover, in view of the great diversity of coalition models, some believe that those that have no profit-seeking members, but receive private monies and whose lobbying mandates are financially profitable to a member or donor, should be subject to the same rules as enterprise lobbyists. However, this should exclude coalitions formed for a social purpose, which raise private funds and whose attempts to influence do not directly benefit the members or donors[10].

Grass-Roots Lobbying

Unlike most Canadian and American lobbying legislation, grass-roots lobbying as a means of trying to influence public officials is not deemed to be a lobbying activity under Québec's legislation.

Grass-roots lobbying is generally viewed as an invitation to the population to communicate with the holder of a public office in order to influence him or her. According to the Lobbyists Commissioner, grass-roots lobbying can be a very efficient way of influencing decision-making by public institutions by putting public pressure on elected officials and others holding public office. Even if there is not necessarily any direct communication between the official and the enterprise or organization that is behind the activity, it is intended to influence a public policy-maker. The Commissioner therefore finds that grass-roots lobbying should be considered a lobbying activity and should be clearly defined in the Act (recommendations 15 and 16).

The Canadian Bar Association concurs with those recommendations, but adds that the provision should be drafted so as to maintain the freedom of expression guaranteed by the charters of rights. However, the great majority of the participants in the private consultations held by the Committee object to that request by the Commissioner which, according to the *Association québécoise des lobbyistes*, stems from a potentially exaggerated interpretation of

[9] *Loc. cit.*
[10] Brief filed by the *Association québécoise de lutte contre la pollution atmosphérique*, the *Coalition pour le contrôle des armes*, the *Coalition québécoise pour le contrôle du tabac* and the *Coalition québécoise sur la problématique du poids*, p. 14.

the Act's purpose[11].

The *Table des regroupements provinciaux d'organismes communautaires et bénévoles* points out that grass-roots lobbying is a common practice in the field of independent community action. Accordingly, citizens are invited to sign petitions, meet their MNA, appear before a commission, write to the government, contact the media, etc. Anyone in an organization who plays a role in such mobilization should publish their activity in the registry. To the *Réseau québécois de l'action communautaire autonome*, such an obligation would make no sense, since raising public awareness is part of the mission of these organizations. According to the *Chantier de l'économie sociale*, it is the very ability of civil society to express itself and influence government that would be diminished. Also, in its opinion, grass-roots lobbying should in no way be impeded, unless profit is a motive.

Revision of the Act

Aside from the reservations expressed above, the participants in the private consultations generally acknowledge that a thorough revision of the Act is required.

In his report, the Lobbyists Commissioner emphasizes that the wording of certain sections of the Act generates confusion among lobbyists and leads them to misconstrue the provisions. This can complicate the Commissioner's task, as he must apply and enforce the Act. There are also other problems with the conditions for registration in the lobbyists register and the information required. This will be covered in the next point.

Some of the Lobbyists Commissioner's recommendations relate to his responsibilities. The Commissioner has the authority to conduct an inquiry where he has reason to believe that an offence has been committed under the Act. However, he does not have authority to institute proceedings, unlike the Director General of Elections and bodies such as the *Autorité des marchés financiers*, the *Commission de la santé et de la sécurité du travail* and the *Commission des droits de la personne et des droits de la jeunesse*. Therefore he asks to be able to institute his own proceedings (recommendation 88). The Canadian Bar Association has expressed some reservations in this regard, finding instead that the Commissioner's roles of raising awareness and educating the public are essential elements that enable him to see to the Act's application. In its opinion, the authority of regulatory bodies to institute criminal proceedings should be the exception, not the norm. However, the Commissioner should have

[11] Brief of the *Association québécoise des lobbyistes*, p. 14.

authority to impose administrative monetary penalties for any contravention of the Act[12].

Moreover, the Lobbyists Commissioner recommends that the keeping of the register of lobbyists should be entrusted to him (recommendation 105). Currently, it is the Registrar of Personal and Movable Real Rights who is the conservator of the register. According to the Commissioner, this situation confuses lobbyists, who must deal with two agencies at the same time, and leads to inconsistencies between those two agencies. The same observation was made in the report on the implementation of the Act tabled by the Minister of Justice in 2007. The participants in the consultation did not make many comments on this issue. However, the *Association québécoise des lobbyistes* and the Canadian Bar Association are both in favour of this recommendation.

Streamlining of Conditions for Registration and Administration

Another point came up often during the consultations, namely the administrative burden caused by, in particular, the procedure for registering and updating information in the registry. In this regard, it was mentioned that the complex nature of the registration process and the technology platform were already criticized at length during the 2008 private consultations.

It was also stressed that many of the particulars required for registration are pointless and add nothing to the desired transparency. One example is the obligation to report the means that will be used, although such means are not known ahead of time. In the Commissioner's own opinion, it may be that some lobbyists, despite their goodwill, do not register their mandates because it takes too long and because of the costs and the complicated procedure.

A number of the Commissioner's recommendations for streamlining the procedure were well received by the participants. They were in favour of eliminating the obligation imposed on lobbyists to obtain electronic signature key pairs after having their identity verified by a notary (recommendation 72). Meanwhile, opinion was divided on recommendation 62, which would require each lobbyist to register personally. Some saw such a measure as placing too great a burden on the persons concerned, especially if NPO representatives were to be subjected to that rule, while others found that this would simplify the administrative process. That is the case for the *Association québécoise des lobbyistes*, which also supports the idea that each lobbyist should be required to file only one declaration for all of his or her

[12] Brief of the Canadian Bar Association, p. 15.

activities (recommendation 63). On the other hand, that association believes that other recommendations, such as the obligation for lobbyists to file a quarterly report on their activities (recommendation 81) and to correct it when required by the Commissioner (recommendation 80), would also increase their administrative burden. This fear is shared by Alain Lemieux of the firm *Affaires gouvernementales et publiques*. He adds that this would complicate the procedure for updating information.

Finally, a number of participants reported that they were dissatisfied with the technology platform used to compile registry data, stating that although the information in the registry is public, save for some exceptions, the search engine is so complex that the information is hard to find.

Conclusions and Recommendations

Like the Lobbyists Commissioner and several organizations that took part in the private consultations on this mandate, the members of the Committee on Institutions have been able to note the progress made since the Lobbying Transparency and Ethics Act came into force, specifically in terms of the recognition of the legitimacy of the lobbyist profession and the oversight of lobbying activities.

That said, not only this report by the Commissioner but also the previous reports by the Minister of Justice and the Commissioner on the Act's implementation show the need to now proceed with a thorough revision of the Act. The private consultations conducted by the Committee have also brought this need to light.

The private consultations also brought out the problems that could result from some of the Commissioner's recommendations, notably as regards the advisability of making all NPOs subject to the Act. On this issue, the members of the Committee share the concerns of several groups. In their capacity as MNAs, they regularly meet with representatives of NPOs operating in their ridings. Many such organizations depend on subsidies to carry out their missions. Making all such organizations subject to the Lobbying Transparency and Ethics Act could have adverse effects on not only their work, but also that of the MNA. Accordingly, should all NPOs – other than those formed for management, union and professional purposes – be excluded from the application of the Act, as is presently the case? How far should the line be drawn between these organizations and those that have significant

financial and technical means and whose activities can be compared to lobbying? Indeed, the range of NPOs is broad. It runs from community organizations with very limited financial means to social economy organizations, foundations and pressure groups, some of which are very well endowed. Should they all be lumped together? The Commission believes that this question still requires some thought.

It is now up to the minister responsible for the application of the Act, namely the Minister responsible for Democratic Institutions and Active Citizenship, to follow up on the work done by the Committee and see that the Act is thoroughly revised.

Along with this revision of the Act, the Committee believes that the register of lobbyists should be a user-friendly tool, that is, that it should be easy to use and consult. For that purpose, it would be appropriate to review and streamline the conditions for registration and the updating of the information it contains.

Accordingly, the Committee on Institutions recommends:

Recommendation 1

That the Minister responsible for Democratic Institutions and Active Citizenship should proceed to revise the Lobbying Transparency and Ethics Act and propose suitable changes so that the Act will more efficiently achieve its purposes.

Recommendation 2

That the conditions for registration and updates to the register of lobbyists should be streamlined to make it more readily accessible and user-friendly.

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