·TACTIX·
GOVERNMENT CONSULTING INC.

"From Registration to Regulation: The Evolving Government Relations Legislative Environment"

Remarks by Alan Young
Vice President, Tactix Government Consulting Inc.
4th Annual Public Affairs Summit
February 6, 2007

CHECK AGAINST DELIVERY

For those of you who may have spent the past year on a deserted island in the middle of the Pacific, without a Blackberry, the Government of Canada's crowning legislative achievement last year was the introduction and passage of the *Federal Accountability Act*. Those of you who were not on the island and spent even a nanosecond observing Ottawa will know that I am referring to Bill C-2. This legislation makes substantive changes to some 45 statutes, and amends over 100 hundred other laws.

The *Federal Accountability Act* represents a significant step in the evolution of the government relations legislative environment. The new *Lobbying Act* emerging from Bill C-2 will drive notable changes to the way lobbying is done in Ottawa. Gordon Douglas and I have divided up this evolution into digestible bites. I will speak to you about what has not changed as a result of Bill C-2, what has changed, and what I believe some of the implications of these changes will be.

WHAT HAS NOT CHANGED?

To help put the new legislative regime in perspective I want to outline briefly four key things that have not changed as a result of Bill C-2.

First, "lobbying public office holders is a legitimate activity." This affirmation of legitimacy appeared in the preamble to the original *Lobbyists Registration Act* in 1989 and has survived every amendment to the legislation ever since. Being able to make one's views known to government is a fundamental right in a parliamentary democracy. But it must be done in a certain way. I will return to the legitimacy of lobbying at the end of my remarks.

Second, "lobbying" continues to be undefined. "Lobbyists" are not defined either, although the law refers to different categories of lobbyists.

Exchange Plaza
45 O'Connor Street, Suite 880, Ottawa, Ontario K1P 1A4
Tel: (613) 566-7053 Fax: (613) 566-2026
E-Mail: young@tactix.ca
www.tactix.ca

Third, the tests for triggering the application of the law continue to be the same. It is still the case that whenever an individual, for payment, on behalf of any person or organization, undertakes to either (a) communicate with a public office holder in respect of a set of enumerated items, or (b) arrange a meeting between a public office holder and any other person, that individual will be subject to the *Act* as a consultant lobbyist. And, the triggers for employees of a corporation or an organization also remain unchanged.

Fourth, the exemptions from registration did not change. For example, submissions to parliamentary committees in public proceedings, communications with respect to the enforcement, interpretation or application of an Act or regulation, and communications restricted to a request for information, continue to be activities for which registration is not required.

As you can see, much of the basic structure of the regime governing the activity of lobbyists was not changed by the *Federal Accountability Act*. Now, let's examine some of the important changes that were made.

WHAT HAS CHANGED?

Let me say at the outset that I do not propose to discuss every single change that was made by Bill C-2 to the legislative regime affecting lobbyists. That would be tedious, both for me and for you. Instead, I have identified a handful of changes that I believe will have the greatest impact on the lobby industry.

1. **From Registration to Regulation**

One of the most important changes is to the underlying premise of the law governing lobbying. This is signalled by the change in name from the *Lobbyists Registration Act* to the *Lobbying Act*. We have moved from a regime focusing primarily on registering the lobbying industry to a regime that more closely regulates the industry.

Let's examine some of the indicators of regulation.

The new Commissioner of Lobbying will have the authority under the new law to investigate possible breaches of the *Act* and the *Code of Conduct*. Remarkably, the Registrar under the previous *Act* had no authority to investigate possible violations of the *Act*. He could only investigate potential breaches of the *Code of Conduct*. That yawning gap has been closed.

The threshold for launching an investigation has been lowered. Whereas the Registrar had to have reasonable grounds to believe someone had breached the *Code*, the new Commissioner can conduct an investigation if he or she has reason to believe that an investigation is necessary.

It will now be a strict liability offence to fail to file a return, or to file an inaccurate or incomplete return. In other words, you don't have to deliberately intend to not file, or to

be inaccurate or incomplete in your filings. It doesn't matter. You will face the same consequences you would for knowingly making a false or misleading statement. And those consequences – the penalties – have doubled. Moreover, the Commissioner may prohibit someone who is convicted of an offence under the *Act* from lobbying for up to two years.

In addition to these tougher enforcement provisions, probably the most significant indicator of regulation is the new requirement to file monthly returns. All lobbyists, be they consultant or in-house lobbyists from organizations and corporations, are affected by this critical change.

Monthly reports will have to be filed to cover certain communications involving a designated public office holder. A "designated public office holder" is a new category of public official and is a sub-set of the long-standing category of "public office holder". It includes Ministers and Ministers of State and their staff, Deputy Ministers and equivalents, Associate and Assistant DMs, and any individual occupying a position designated by regulation.

At present we do not know two vitally important things about the new monthly reporting regime:

- The *Act* only requires the reporting of communications of a prescribed type – we do not know what types of communication the regulations will prescribe; and

- We do not know what other positions Cabinet will designate as constituting a designated public office holder.

What we do know is that meetings arranged by consultant lobbyists do not have to be reported. We also know that reports are to be filed by the 15th day of each month to report on the prescribed communications during the preceding month. Monthly reports are not required when no prescribed communications take place, except that once a report is filed no more than six months can pass without filing a monthly return even if no prescribed communication occurred since the original return.

In addition to the fact that the legislative environment is now one of regulation as opposed to registration, a few other changes are notable.

2. Prohibition on Contingency Fees

The new *Lobbying Act* makes it illegal for a consultant lobbyist to receive, and for their client to pay, contingency or success fees. Previously, consultant lobbyists simply had to register the fact they were to receive a success fee as part or all of their compensation.

There are a few important exceptions to the ban on contingency fees. The prohibition will not apply to success fees that are reported in a return filed before the amendment comes into force. Further, the prohibition will not apply if a contingency payment has

already been agreed to in an undertaking before the section comes into force, even if it has not yet been filed. Interestingly, because this prohibition applies only to consultant lobbyists, it is at least theoretically possible for in-house lobbyists to receive a special bonus or some other compensation that is related to their success on a GR matter. Those of you who fall into this category might want to make a special note of that.

3. Five-Year Prohibition on Lobbying

Probably one of the best-known changes to the legal environment is the introduction of a five-year ban on lobbying imposed on former designated public office holders and on members of a Prime Minister's transition team. The *Act* gives legal effect to the prohibition imposed on Ministers, their exempt staff, and senior public servants put in place last year by Prime Minister Harper's *Conflict of Interest and Post-Employment Code for Public Office Holders*. Because Assistant Deputy Ministers were not caught by the five-year rule in the *Conflict of Interest Code* but are caught by the rule in the new legislation, they have been given an extra six-months beyond the coming into force date of the five-year ban to leave the public service and become lobbyists, if they so choose.

4. Commissioner as an Officer of Parliament

Finally, the Registrar of Lobbyists under the old regime was a member of the public service. This gave rise to some questions about the Registrar's independence from the government of the day. Even though the Harper government moved the Registrar from Industry Canada to the Treasury Board Secretariat to give the position greater distance from the private sector, this was not considered to be sufficient. Therefore, the new *Act* makes the Commissioner of Lobbying an Officer of Parliament, placing the Commissioner on par with the Auditor General, the Chief Electoral Officer, and the Commissioner of Official Languages, to name a few. This is an important symbol of independence.

PUBLIC POLICY AND BUSINESS IMPLICATIONS

Now that we have considered what has and what has not changed in the new legislation, I would like to examine some of the public policy and business implications of these changes.

I must say at the outset that we do not know what all of the implications will be. Most of the *Lobbying Act* has not yet been proclaimed in force. Some important matters are to be covered by regulations which have not yet been made. If history is any guide, it could take many, many months before the *Act* will be fully in force. It was exactly 12 months after passage of the first *Lobbyists Registration Act* that it came into force. And the last major round of amendments was assented to in June 2003 and came into force two years later in June of 2005.

I understand that a public consultation process – most likely an on-line process – will be announced in the near future to seek input on the content of these regulations. Of these,

arguably the most important to the industry will be the details surrounding the monthly filings in respect of designated communications. What type of communications will trigger the filing requirement? What protection will there be for sensitive commercial information? What is the entire universe of designated public officer holder? The answers to these questions and more will give us a more fulsome understanding of the implications of the new legislative framework.

But, based on what we know today, what are some of the important consequences flowing from the new law?

- If it is true that nature abhors a vacuum, I think it is also true that regulators abhor inactivity. This is why the shift from a regime of registration to a regime of regulation is so important. Regardless of who is chosen to be the first Commissioner of Lobbying, he or she will have no desire to be the lonely Maytag repair man. And, of course, one rarely hears of regulatory regimes shrinking over time. This has certainly not been the case with lobbying – we are a fry cry from where we were with the first *Act* 18 years ago.

- There is some risk that the "no surprises approach" to government relations, which many of us practice and which I believe benefits both government and the private sector, may fall by the wayside. This could be one of the unintended consequences of the new rule requiring the monthly reporting of communications. There can be little doubt that the monthly reports will be "must read" material not only for lobbyists and those for whom they work, but also for business competitors, both domestic and international. Depending upon what the regulations say, and what impact business leaders believe reporting communications with designated public office holders will have on their competitiveness in the market, frank "heads up" meetings between senior executives and Ministers and Deputy Ministers could be a casualty. If this indeed turns out to be the case, I would regard it as one of the most significant public policy implications.

- It is increasingly challenging to find people in government who are comfortable speaking with lobbyists. This may become even more difficult. The monthly filings of communications will require lobbyists to state the name of the designated public office holder with whom they have been communicating. Moreover, while designated public office holders do not have to file reports, the Commissioner has the authority to ask that they confirm the accuracy and completeness of reports filed by lobbyists. This places a *de facto* responsibility on designated public office holders to keep close track of their "communications". Accordingly, even though lobbying is a legitimate activity and the demand for it grows as government becomes ever larger and more complex, some designated public office holders might prefer to walk a mile in tight shoes than see their names listed in a public lobby registry.

- I predict that Director Generals will become extremely popular. With the cut-off point for designated public office holders stopping just short of the DG position,

lobbyists can legitimately avoid monthly filings by using DGs as the entry point for their communications.

- The five-year ban on lobbying will affect recruitment by consultant lobby firms, organizations, and corporations. Ministerial staffers and their bosses have historically been a rich source of new talent for the lobbying industry. That is precisely why the five-year prohibition was put in place. But do not despair. The talent pool needed to continually replenish the industry has not gone completely dry. Members of Parliament are not covered by the ban – who on the Hill have more impressive networks than some MPs? Talented people work in backbench MPs' offices and in party research bureaus. Further, there is a tradition of people moving back and forth between provincial and federal politics. And, don't forget the extra 6-month grace period given to Assistant Deputy Ministers. With a large number of senior public servants approaching their "magic" retirement numbers, this too could be a rich source of talent, at least for the next 12 months or so. Failing all of this, of course, it may well become far more prevalent to "poach" talent from other organizations. It will drive up labour costs for employers, but all is fair in love and the war for talent.

- The lower threshold for launching investigations of possible violations of the *Act* and *Code of Conduct* could lead to some mischief. Keep an eye out for your competitors who may be tempted to offer the new Commissioner some reason to believe that an investigation of you is necessary.

I spoke of the legitimacy of lobbying at the outset of my remarks. I want to return to this theme in closing. Those of us who are in the business of lobbying should never forget that what we do is legitimate. We should not be deterred by those who make it difficult for us to practice our craft. From time-to-time, we may need to remind people in government that the law recognizes what we do is legitimate. And, let's hope that the Commissioner uses his or her legislative mandate to educate to inform people about the lobbying business.

But, most important of all, it is incumbent upon each of us to always act in a manner that reinforces the fact that lobbying is legitimate.

Thank you.