

**“Accountability and the GR Community - The Road Ahead”  
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**INTRODUCTION**

*“Rules were broken or ignored at every stage of the process for more than four years and there was little evidence of value received for the money spent.”*

With these now infamous words spoken two years ago last week, Auditor General Sheila Fraser set in motion an intense and turbulent two-year round of debate, inquiry, rule-making and law-making on government accountability, transparency, and ethics. Of course, issues of accountability, transparency and government ethics are as old as government itself, but the Auditor General’s report on the sponsorship program shot them into the stratosphere of Canadians’ public consciousness. Inevitably, the AG’s report also shone a bright light on the interaction between the public and private sectors – that very special place in which the lobbying industry resides.<sup>1</sup>

Two years later, we have had two general elections resulting in minority governments, one Commission of Inquiry that captured the avid attention of Canadians from coast-to-coast, two high-profile reports by that Commission, and the swearing-in of the first Conservative federal government in 13 years. It has been quite an eventful two years for those of us interested in government, politics, and the complex interaction of the public and private sectors. And today, the spotlight shines as bright as ever on the lobbying industry.

I will focus my remarks this afternoon on what I see as the road ahead for the industry, in light of all that has transpired over the past two years. In short, it looks like it will be a bit of a bumpy road; a road with a few twists and turns; and, given the vicissitudes of a minority Parliament, a somewhat unmapped road. My advice? Buckle up.

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<sup>1</sup> It is perhaps not well known that the Auditor General made a recommendation about lobbying in the audit report tabled in Parliament on February, 10, 2004 (Chapter 2, Accountability and Ethics in Government). The AG raised a concern that lobbyists may give their clients an advantage of access to information that is not readily available to the public. This, she said, may compromise the public interest. The AG recommended, therefore, that “the government should protect the public interest by affirming the principle that any significant information given to one party by public office holders at any stage of the process for procurement, grants and contributions, regulation, or policy development must be available to all known interested parties.” (page 17)

## FEDERAL ACCOUNTABILITY ACT

The logical place to begin is with the Federal Accountability Act, or what will almost certainly become known as Bill C-2 in the next Parliament.<sup>2</sup> On November 4, 2005, Stephen Harper made a “commitment to Canadians to clean up government”. He would do so with a package consisting of 54 legislative measures, policies and rules which he pulled together under the heading of the Federal Accountability Act. Now that Mr. Harper has become Prime Minister, we will be hearing a great deal about them in the weeks and months ahead.

One important message to take away from the Conservative’s Accountability Act platform is that, from the perspective of the lobbying community, there is much more to pay attention to than simply the *Lobbyists Registration Act*. It reminds us that there is a web of interconnected laws, regulations and policies that help to shape and govern the world in which we work. These include the *Financial Administration Act*<sup>3</sup>, the *Criminal Code*, the *Canada Elections Act*, the *Auditor General Act*, the *Public Servants Disclosure Protection Act* (i.e., whistle blower protection), the *Parliament of Canada Act*, the *Conflict of Interest and Post-Employment Code for Public Office Holders*, and the *Values and Ethics Code for the Public Service*. Prime Minister Harper’s proposed accountability measures touch upon virtually all of these laws and codes.

A second important message to take away is that this government means business. Almost immediately upon being sworn-in as Prime Minister, Mr. Harper began implementing his package to “clean up government”:

1. The Office of the Registrar of Lobbyists was transferred from Industry Canada, where it has resided since the *Lobbyists Registration Act* came into force in 1989, to the Treasury Board Secretariat as a stand-alone office. The purpose of this temporary move from a line department to a central agency was to give that Office a measure of independence while permanent changes are pursued in amendments to the *LRA*.
2. *Accountable Government, A Guide for Ministers* was distributed to Cabinet Ministers, setting out the fundamental principles of ministerial conduct in the Harper government. Its goal is nothing less than the transformation of the culture of government – promoting a culture of accountability.
3. A new *Conflict of Interest and Post-Employment Code for Public Office Holders* was issued. In addition to the high profile five-year ban on former ministers, ministerial staff and senior public servants from acting as lobbyists to the federal government, this new *Code* requires the Ethics Commissioner to publish cases in

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<sup>2</sup> In previous Parliaments, Bill C-1 has been a pro forma Act respecting the administration of oaths of office.

<sup>3</sup> For example, the Treasury Board, established by the *Financial Administration Act* to exercise Governor in Council powers in many key matters including general administrative policy, financial management, and personnel management, is responsible for, among other things, contracting policies, terms and conditions on grants and contributions, procurement policy and process, values and ethics for public servants, and guidelines for Ministers’ offices.

which former public office holders have been granted a waiver or reduction of post-employment restrictions,<sup>4</sup> makes reports and findings by the Ethics Commissioner final, without recourse to the Prime Minister, and confirms the Ethics Commissioner may review complaints from the public that are brought to his attention by Members of Parliament. Moreover, it is intended that this *Conflict of Interest Code* will be enshrined into law.

These measures serve as an important signal that accountability, transparency, and ethics are to be taken seriously. And not just by Ministers, ministerial staff, and public servants. They are to be taken seriously by everyone in this room. Any misstep involving a lobbyist casts a shadow on the entire industry, as well as on the government.

Some Federal Accountability Act measures will require legislative changes and therefore will be scrutinized by Parliamentarians. In the interests of time I will focus on only two, namely, proposals to amend the *Auditor General Act* and the *Lobbyists Registration Act*.

## **AUDITOR GENERAL ACT**

The Auditor General of Canada plays a major role in the Conservative's accountability plan. Among other things, the AG will be asked to conduct, on an expedited basis, an audit of all federal grant, contribution and contracting policies, and the government will commit to following her recommendations. Her office will be given increased funding to ensure she can do the 'Gs and Cs' audit and to ensure that all granting programs will be reviewed every five years.

One of the most interesting measures, and one that should attract the special attention of the government relations community, is a proposal to amend the *Auditor General Act* to give the AG the authority to 'follow the money'. A clear response to revelations from the sponsorship program scandal, the AG would have the statutory authority to conduct audits of the records, documents and accounts of any individual, institution or company that receives grants, contributions or transfers under an agreement with the government. Those of you who are advocating that your client or your own organization receive a grant, contribution or transfer will need to be aware that the glare of the AG's spotlight may be visited upon you some time down the road. Govern yourselves accordingly.

## **LOBBYISTS REGISTRATION ACT**

As many of you know, the *LRA* has been in force since September 1989 and has been amended in 1995, 1996, 2003 and 2004. Although it was originally known as the "business card bill" because it required very little information to be disclosed, learning and experience over the years have led to a series of incremental changes that, among other things, have expanded the disclosure requirements to be met by lobbyists. Some time in April 2006 we should expect to see further changes.

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<sup>4</sup> Post-employment restrictions on activities such as accepting services contracts or being employed by an entity with which the public office holder had significant official dealings can be waived or reduced by the Ethics Commissioner. The five-year ban on lobbying cannot be waived or reduced. (Section 30)

Prime Minister Harper's proposals to strengthen the *LRA* include:

1. Banning success or contingency fees.
2. Requiring ministers and senior government officials to record their contacts with lobbyists.
3. Making the Registrar of Lobbyists an independent Officer of Parliament.
4. Giving the Registrar of Lobbyists the mandate and resources to investigate violations.
5. Extending to ten years the period for which violations can be investigated and prosecuted.<sup>5</sup>

An interesting blend of administrative and substantive measures, at their root is a belief that past abuses have not been addressed satisfactorily because the system lacked real teeth.

Of these, I believe the most challenging to get right will be the requirement to record contacts with lobbyists. There is very little guidance from other jurisdictions as to what this could mean in practice. Although my research has not been exhaustive, I was able to find only one jurisdiction in which such a requirement exists.

The U.S. *Lobbying Disclosure Act of 1995* provides that any person or entity making an oral lobbying contact with an official covered by the *Act* shall, on the request of the official, state whether he or she is registered under the *Act* and identify the client. Further, the lobbyist must advise whether the client is a foreign entity. When it comes to written lobbying contacts, the lobbyist is under a positive obligation to tell the official if the client is a foreign entity. There is no obligation to disclose, however, should the client not be a foreign entity. An obligation is imposed on officials to inform a lobbyist, should the lobbyist request, if the official is covered by the legislation.<sup>6</sup>

It is interesting to note that the issue of what officials should do when contacted by lobbyists was canvassed and a recommendation made in one of the research papers prepared for the Gomery Commission of Inquiry. It did not, however, make its way into Mr. Justice Gomery's recommendations. The research paper written by Paul Pross, Professor Emeritus, School of Public Administration, Dalhousie University, recommended that a Treasury Board policy be implemented to place a positive obligation on public office holders to, as a matter of routine, establish the registration status of lobbyists communicating with them.<sup>7</sup> This was seen as a way to help ensure compliance with the *LRA*.

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<sup>5</sup> Subsection 14(3) of the *LRA* provides that proceedings by way of summary conviction in respect of an offence may be instituted at any time within but not later than two years after the time when the subject-matter of the proceedings arose.

<sup>6</sup> Section 14, *Lobbying Disclosure Act of 1995*, Public Law 104-65, 104<sup>th</sup> Congress.

<sup>7</sup> *The Lobbyists Registration Act: Its Application and Effectiveness*, A. Paul Pross; Commission of Inquiry into the Sponsorship Program & Advertising Activities, Restoring Accountability, Research Studies Volume 2, 2006; pages 210 and 222-223.

## THE ROAD AHEAD

The question on some people's minds is whether the Federal Accountability Act is likely to find safe passage through a highly fractured minority Parliament. My short answer is, "yes". And my advice to the government relations community is, "get involved".

Treasury Board President Baird will be responsible for preparing the accountability legislation and steering its passage through Parliament. He and his officials will obviously be guided by the Federal Accountability Act measures outlined by Prime Minister Harper last November. He will also have the benefit of the Gomery Commission's recommendations on lobbyists to support his actions. Mr. Justice Gomery recommended that:

1. The Registrar of Lobbyists should report directly to Parliament on matters concerning the application and enforcement of the *LRA*.
2. The Office of the Registrar should be provided with sufficient resources to enable it to publicize and enforce the *Act*.
3. The limitation period for investigation and prosecution should be increased from two to five years from the time the Registrar becomes aware of an infringement.<sup>8</sup>

Prime Minister Harper has said that Mr. Gomery's recommendations are all consistent with, and in some cases identical to, his own accountability proposals.

What can we expect from the Opposition parties? I suspect very little opposition, for two reasons. First, who in their right mind would want to stand in the way of an endeavour to "clean up Ottawa"? Second, each Party has its own proposals to amend the *Lobbyists Registration Act*, so it is already on everyone's radar screen.

Just prior to the election writ, the Honourable David Emerson announced the Liberal government's intentions to amend the *LRA* to, among other things, make failure to register an offence, increase the fines, have the limitation period commence from the time the Registrar becomes aware of an infringement, and establish an Administrative Monetary Penalty scheme.

The Bloc's election platform called for expanding the activities that must be disclosed, increasing penalties, and lengthening the cooling off period applicable to public office holders.

And the NDP has Ed Broadbent's 7-point Plan on Ethics and Accountability. The NDP would ban contingency fees, and provide stiff fines and jail time for violators. They would require the disclosure of fees and expenditures by lobbyists. Moreover, the NDP favour prohibiting lobby firms from providing lobbying services to the private sector while at the same time conducting communications work on behalf of government clients.

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<sup>8</sup> Recommendation 15, Commission of Inquiry into the Sponsorship Program & Advertising Activities, Restoring Accountability, Recommendations, 2006; page 174.

So, the government is committed to making changes to the *LRA* and Parliamentarians of all political stripes are lined up to strengthen the laws affecting lobbyists. But, that is not the end of it. And this is where the road gets bumpy and more turbulence can be expected. We should also expect that advocates with strong views about the lobbying industry will be urging MPs and Senators to impose even tougher measures than those contemplated by the government and Mr. Gomery.

Requiring the disclosure of lobbying costs, as proposed by the NDP, will certainly come forward again and be supported by some third party advocacy groups. It is also reasonable to expect proposals will be made to bar lobbyists from political activity, such as working voluntarily on election campaigns, to require that lobbyists' connections to public office holders be disclosed, to close off the exemption for volunteer lobbyists, and to add an anti-avoidance clause to the *LRA*. Proposals may be made that I have not even thought of yet.

Furthermore, advocates who will be appearing before parliamentary committees once the Federal Accountability Act gets there have ammunition provided to them by Professor Pross' paper for the Gomery Commission. Here are a few illustrative quotes from that paper:

*“A culture of entitlement, for example, was seen as a precondition for the rampant expansion of lobbying and a trend toward illicit lobbying techniques.”<sup>9</sup>*

*“... a lobbyist('s) ... most important asset, the ability to obtain access to decision makers.”<sup>10</sup>*

*“Nevertheless, the lobbying that engulfs any important public decision is now so extensive that its cost is in itself a matter of public concern.”<sup>11</sup>*

*“None of this is illegal, but it does give the person or firm that can afford to buy the lobbyist's time preferential access to public office holders. It is, therefore, inimical to principles of democratic equality.”<sup>12</sup>*

There you have it. Change is coming. Ottawa's government relations community had best be prepared.

You know what to do. It is what you do.

Practice your craft.

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<sup>9</sup> The Lobbyists Registration Act: Its Application and Effectiveness, A. Paul Pross; page 203.

<sup>10</sup> Ibid, page 190.

<sup>11</sup> Ibid, page 197.

<sup>12</sup> Ibid, page 195.