PAAC
PUBLIC AFFAIRS ASSOCIATION OF CANADA

February 23, 2012

Stacey Ursulescu,
Committees Branch
Standing Committee on Intergovernmental Affairs and Justice
Room 7,
2405 Legislative Drive
Regina, SK S4S 0B3

Dear Ms. Ursulescu,

Re: Legislative Model for Lobbying in Saskatchewan

On behalf of the Public Affairs Association of Canada, we are writing to you in respect of the request the Standing Committee on Intergovernmental Affairs and Justice recently made for written submissions on lobbying legislation in Saskatchewan.

Overview of the Public Affairs Association of Canada

The Public Affairs Association of Canada ("PAAC") is a national, not for profit organization founded in 1984. Its principal objective is to help public affairs professionals succeed in their work by providing forums for professional development, the exchange of new ideas and networking. PAAC also advocates on issues that directly impact its members.

PAAC's membership represents a cross section of many disciplines involved in public affairs including: Government relations, lobbying, public relations, policy analysis, and public opinion research. The association's members come from both the private and public sectors in areas such as energy, finance, small business, charities, government departments, municipalities, law and accounting firms, colleges and universities and trade associations. At the present time PAAC has roughly 150 members many of whom are active in-house, organization and consultant lobbyists.

PAAC and Lobbying Legislation in Canada

PAAC fully supports the policy objective of ensuring lobbying activity is transparent and in the public interest. PAAC is also on the record for supporting federal and existing provincial lobbying statutes and the need to ensure the highest level of transparency, predictability and accountability for lobbying activity. PAAC has a voluntary ethics code that complements and supplements various federal and provincial lobbyist codes of conduct. This ethics code directs

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compliance with the provisions of both the federal *Lobbying Act* as well as corresponding provincial statutes.

PAAC also assists its members and lobbying regulators by holding frequent educational workshops with the Federal Commissioner and provincial lobbying Registrars. This helps to ensure that PAAC's members understand the legal and ethical requirements involved in lobbying public office holders, while providing lobbying regulators insights into the nature of the lobbying profession.

In addition, a number of PAAC's lobbyist members have been instrumental in advocating for lobbyist registration systems, codes of conduct and other regulatory provisions for many years at all levels of government in Canada. Its members have given testimony into the development of lobbyist registration systems at the City of Toronto as they developed the first mandatory lobbyist registration system for municipalities in Canada. Moreover, PAAC recently made a submission to the federal Standing Committee on Access to Information, Privacy and Ethics on the five year review of the Lobbying Act in an effort to improve the disclosure and compliance requirements for all lobbyists. PAAC also has a solid working relationship with the Ontario Ethics Commissioner and Lobbyist Registrar and have commented on recent changes to the Ontario *Lobbyist Registration Act, 1998*.

Lobbying and its role in the Policy Development Process

Lobbying and Lobbyists serves a critically important function in the development of sound public policy. At a general level, lobbying helps to build the policy and political case for the government to act to address an issue or opportunity that impacts a particular group, say, a region of the country, a citizen's group, a business or an economic sector. More specifically, lobbyists provide government policy makers and decision maker's information key to the development of balanced and fair policy. For example, lobbyists routinely provide impact studies on how a proposed course of action may impact a business group, charitable or industrial sector.

Best Practices for Lobbying Legislation in Canada

Overview

Lobbying statutes currently exist in several jurisdictions across Canada: at the federal level, and in six provinces—British Columbia, Alberta, Ontario, Quebec, Nova Scotia, Newfoundland and Labrador. Lobbying legislation has passed in Manitoba but has not been proclaimed into force. New Brunswick's *Lobbyist Registration Act* is currently before the New Brunswick legislature. In addition, a number of municipalities have lobbying regulations including the City of Toronto, Montreal, St. John's and the City of Ottawa (pending). Each of these statues or regulations has a

number of similarities as well as strengths and weaknesses. This submission will identify best practices in lobbying law in Canada that are of particular interest to lobbyists.

In addition to Canadian jurisdictions, the OECD has recently adopted a "good governance" model of lobbying legislation that outlines broad frameworks to ensure transparency and accountability in lobbying law. The purpose of the OECD framework is to ensure that lobbying activity does not undermine the integrity of government decision making and lobbying legislation be viewed as part of a broader set of regulations governing access to information, conflicts of interest, conduct of public office holders, election financing and government procurement.[1]

Recognize the Legitimacy of Lobbying

It is critical for the design of any statue that establishes a lobbyist registration system or a broader form of lobbying regulation that the legitimacy and importance of lobbying is acknowledged in the preamble to the legislation. The federal *Lobbying Act* states, for example:

> WHEREAS free and open access to government is an important matter of public interest;
>
> AND WHEREAS lobbying public office holders is a legitimate activity;
>
> AND WHEREAS it is desirable that public office holders and the public be able to know who is engaged in lobbying;
>
> AND WHEREAS a system for the registration of paid lobbyists should impede free and open access to government.

It is important to recognize that the ability of citizens to petition their government is a right and not a mere privilege. This right extends back to the right of nobles to seek redress from the Crown in the *Magna Carta*, and the right of subjects to petition the Monarch in the *Bill of Rights 1689*. This type of acknowledgement places lobbying in its proper context—that is fundamental to the policy and decision making processes of government. Ensuring that lobbying activity is publicized allows citizens to see how policy is shaped and by whom. This contributes to a greater understanding of the workings of democratic government.

Objective Definitions of Lobbying

A number of provincial statutes define lobbying as communicating with a public office holder in an "attempt to influence" a range of policy development processes (statutes, programs,

[1] Organization for Economic Co-operation and Development "Framework for Enhancing Transparency and Accountability in Lobbying" 2007. Attached in Appendix A.

regulations) the enactment of an order in council and the awarding of grants. The problem with defining lobbying in this manner is that it depends on the communicator's state of mind. Is he or she trying to change the opinions and views of the public office holder or not? Or is the communication merely seeking an understanding or clarification of the policy issue in question?[2] Definitions of this kind can create confusion about what is (and is not) covered by the disclosure law and thus make compliance and enforcement difficult.

A more adequate definition is reflected in the federal *Lobbying Act.* It is based on an objective definition that focuses on the actual content of communication. It relates to communication with a public office holder *in respect of* the development of any legislative proposal, Bill, regulation, program, policy, awarding of a grant and so on. The communication that qualifies as lobbying need not, in other words, attempt to influence a government decision but simply be about a government decision.

In addition, any plausible definition of lobbying should be restricted to only those individuals who are *paid* to lobby and exclude volunteers from civic organizations. As Guy Giorno, a leading legal expert on Canadian lobbying law states:

> Everywhere in Canada, the policy determination has been that paid relationships are the ones requiring increased transparency. Whether the individual making the representations to government receives a salary, a consulting fee, a director's fee, income as a sole proprietor or partner, or some other form of compensation, other jurisdictions have viewed the financial connection as the impetus for disclosure.[3]

It is not clear what public interest objective would be served by having all civic minded or engaged citizens who volunteer their time to specific causes or projects be subject to lobbying disclosure. In fact, it is more likely that a disclosure requirement would deter civic engagement and thus create further distance between citizens and their government and therefore be contrary to the public interest. Thus, the definition of lobbying should be restricted to paid lobbyists, that is, professional government intermediaries.

Broad and comprehensive role for the education of all stakeholders by Commissioner or Registrar of lobbyists

PAAC believes that it is critical to have a broad and comprehensive educational role for the lobbying regulator. This is especially relevant in the early stages of the implementation of any legal regime where stakeholders must learn the rules of compliance. Having that role

[2] Some provincial statutes, for instance Ontario's *Lobbying Registration Act*, specifically exclude communications with public office holders that is merely attempting to understand or gain clarity on a policy matter from the definition of lobbying. See sections 3 (2) on the application of the statute.

[3] "Supporting Ottawa's new lobbyist registry: Making a strong proposal even stronger". Presentation to the Governance and Renewal Sub-Committee City of Ottawa December 1, 2011.

specifically stated in the governing statute will also ensure the lobbyist Registrar or Commissioner will make it a key priority. The educational duties for the Registrar or Commissioner should also include public officer holders to ensure they have a consistent working knowledge of the requirements of the disclosure law and understand that lobbying activity is a right and not a privilege. This will help to avoid any confusion over the role of lobbyists in, for example, government procurement processes. So long as lobbying activity is fully disclosed, lobbyists should be able to make representations to public office holders on any government decision.

Power to issue Advisory and Interpretation bulletins and advance rulings

PAAC also believes it's critical for the Registrar or Commissioner of lobbying to have the legal authority to develop and issue advisory and interpretation bulletins to clarify aspects of the law. The authority is contained in the federal *Lobbying Act,* [10. (1)] and a number of provincial statues. For example, Ontario's *Lobbyist Registration Act,* [15.-1] allows the Registrar to issue "advisory opinions and interpretation bulletins". However, in both the federal and Ontario statutes, these advisory and interpretation bulletins are not legally binding. In order to truly be effective, PAAC thinks these instruments should have the force of law. This would assist in avoiding unnecessary, costly and burdensome administration of the any lobbyist disclosure law.

Ban Success or Contingency fees

Another important development in the regulation of lobbying in Canada is the prohibition on lobbyist's receiving success or contingency fees for their work. Typically, these fees are offered by clients to consultant lobbyists for achieving specific objectives such as changing legislation or otherwise significantly influencing policy development or securing meetings with senior public office holders. We believe these sorts of fees create incentives that undermine transparency and accountability in the regulation of lobbying.[4]

Eliminate Time Threshold Tests for Lobbying Disclosure

In most Canadian jurisdictions, lobbying conducted by employees of a corporation or association (interest group, trade associations) is subject to a time test before disclosure of the lobbying activity is required. In law this is usually described as the "significant part test" that measures the amount of time an organization or corporation spends lobbying. The Ontario *Lobbyist Registration Act,* for example, requires that the senior officer of a company file a return outlining the firms lobbying activities only if the combined volume of employees' communications to public office holders exceeds 20% or more of the time of one employee.

[4] The federal government, Nova Scotia and the City of Toronto lobbying regimes have prohibitions on success or contingency fee's.

This time threshold test is calculated over a three month period of direct lobbying activity which does not include preparation time. The federal *Lobbying Act* differs only in that it includes preparation time, research, planning, travel and follow up activities. In Alberta and British Columbia, if the amount of time of lobbying on behalf of the organization meets or exceeds 100 years per year, then all employees who lobby would be required to be listed in the return.[5]

For consultant lobbyists at both the federal and provincial levels of government, there is no time threshold. Once a consultant lobbyist agrees to an undertaking, he or she is obligated to file a return within a specific period of time (in Ontario its 10 days).

In the interests of full transparency and accountability, various stakeholders are now suggesting the 20% time thresholds for lobbying disclosure be eliminated. Both PAAC and The Government Relations Institute of Canada, a professional association of lobbyists, stated in their submissions on the statutory review of the federal Lobbying Act that the so-called "20% rule" be eliminated to ensure fairness and transparency in lobbying disclosure.[6] Indeed, the federal Commissioner of Lobbying has also endorsed eliminating the 20% rule for in-house, corporate lobbyists.

Post service restrictions should be limited to one year for public office holders

Every jurisdiction in Canada has a "cooling off" period where lobbying activity is restricted for former public office holders. Various conflict of interest and post-employment rules prohibit former public office holders from conducting business with their former departments or Ministries for one to two years. However, only two provinces contain such restrictions within their lobbying statutes. In Newfoundland and Labrador, all former public office holders are restricted for one year from becoming consultant lobbyists or in-house lobbyists. In Quebec, their lobbying statue imposes a series of restrictions: former cabinet Minsters are restricted from becoming consultant lobbyists for two years, other former officials are restricted for one year and former Ministers cannot lobby their former departments or institutions they had significant business with.[7]

PAAC believes this makes sense to ensure former public office holders have sufficient distance from sensitive information they received as senior officers of government. We recommend a time period of one year for all former public office holders.[8] We also think that post service

[5] In Quebec, a return must be filed if 1) the total volume of lobbying across the entire firm is 12 days or more during a fiscal year, or 2) the person who lobbies is a manager or director, or 3) the lobbying has a significant impact on the company. See G. Giorno "Themes and Trends in Lobbying Legislation: A Cross-Jurisdictional Analysis" 2010 p. 5.
[6] See the attachments in Appendix B.
[7] Giorno, op.cit. page 13.
[8] For a critical review of the federal government's five year cooling off period for former public office holders see Colin MacDonald "Cooling-Off Periods: Do they help or Hinder Good Governance?" Influencing BC, Vol. 2, 1, January 2012, pp. 5-6. MacDonald argues that post service restrictions are better placed with conflict of interest

restrictions are more appropriate for conflict of interest statutes and not for lobbying disclosure legislation. Blanket prohibitions on former public office holders from becoming in-house or consultant lobbyists for one year (such as Newfoundland and Labrabor) are too restrictive and impedes free and open access to government, which is at the heart of Canada's democracy.

In-House Lobbyist Registration: One Rule for Corporations and Organizations

The federal Lobbying Act has created a significant amount of confusion over the requirement for in-house lobbyists of corporations vs. in-house lobbyists of organizations in the registration process. For organizations such as trade associations, they must list in their returns the names of every staff member any part of whose duties involves lobbying public office holders. For corporations, however, the rules are different. In this case, a corporation must maintain two lists —the first contains the names of each senior officer or employee "a significant part" of whose duties involves lobbying public office holders and the second list contains the names of each other senior officer "any part of whose duties" involves lobbying.[9]

PAAC submits that having two separate filing rules for in-house lobbyists of corporations and organizations is confusing and unnecessary. Compliance with any forthcoming lobbyist disclosure statue would be facilitated by one set of rules for all in-house lobbyists.[10]

Codes of conduct—respect constitutional rights of lobbyists

Codes of Conduct for lobbyists are a feature of lobbying disclosure statues at the federal level and in Newfoundland and Labradour, Quebec and the City of Toronto. In these two provinces, violation of the code is an offence and subject to various penalties. The federal code requires the Lobbying Commissioner provide Parliament with a report on any violations of the code in an annual report.

The purpose of these mandatory codes of conduct is to regulate the behaviour of lobbyists to ensure professional conduct and the avoidance of possible conflicts of interest. PAAC supports the general provisions of the provincial codes of conduct but has reservations about one rule in the federal Lobbyist Code of Conduct. "Rule 8" of the federal code essentially prohibits lobbyists from engaging in "political" activities and has come under significant criticism from PAAC, the Government Relations Institute of Canada, and the Canadian Bar Association. In fact, the Canadian Bar Association issued a legal opinion June 2010 that arguing that rule 8 is

statutes and not lobbying disclosure statutes since they typically have more nuanced and specific restrictions involving their former departments while not preventing subject matter experts (who were government officials) from contributing to policy debates.

[9] See Clause 7 (3) (f) of *the Lobbying Act, 1985*.

[10] The Canadian Bar Association makes this point in the context of its submission to the Standing Committee on Access to Information, Privacy and Ethics' five year review of the Lobbying Act. (February 14, 2012).

"unconstitutional".[11] It is thus important that any lobbyist code of conduct not contain vague rules that attempt to regulate "apparent or perceptions of conflicts of interest" by limiting constitutionally protected rights such as freedom of expression.

In addition, PAAC believes that ethical rules for lobbyists should not be based on myths or stereotypes of lobbyists, nor build around a minority of cases where there is unethical behaviour. On this basis, then, PAAC supports the adoption of mandatory codes of conduct insofar as the respect the constitutional rights of lobbyists to participate in the political process and are based on professional standards that typically apply to other professions.

Conclusion:

PAAC fully supports lobbyist disclosure legislation and the adoption of fair codes of conduct in the regulation of lobbying activity. We fully believe that professional lobbying activity is a key to the development of sound public policy and thus not only legitimate but necessary for a healthy democracy.

We would welcome the opportunity to present our views to the Standing Committee in person at the appropriate time.

Sincerely,

PUBLIC AFFAIRS ASSOCIATION OF CANADA

John Capobianco
Chair

Attachments (Appendix A, B and C)

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[11] See Appendix C for this opinion on rule 8.