

Are public decision-makers at the mercy of lobbyists?

Essay

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Quebec's Lobbyist Commissioner

by

Maximilien Roy

ENAP Gatineau

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The relationship between the government and its civil society has, in many instances, been unclear and imprecise, often leading to confusion and scandals. As Stritch (2007) describes it, there is a major issue in western societies in regard to capitalism, as democracies are “based on the formal equality of political representation, [while capitalism is] based on the right to unequal ownership of property” (p.443). Lobbying stands in between capitalism and democracy, and the links have not yet been either harmonious or formalized. Due to a lack of communications and oversight of civil society by the government, there have been many issues in the past regarding the relationships among certain individuals and/or groups and the government.

In June 2002 the National Assembly voted unanimously in favour of a law defining what a “lobbyist” is and what rights and duties lobbyists have in Quebec. This new piece of legislation was tabled in order to reduce the gap between government and civil society; nevertheless, one concern about this law is left unanswered and this essay will concentrate on this specific issue: what are the consequences of such a law? Does it provide public decision-makers with enough information, or does it leave them at the mercy of the lobbyists? This essay will argue that, although the Act was beneficial in increasing the level of transparency in lobbying activities, there is still a lack of specific obligations on public decision-makers (consequently reducing the potential value of the Act). These individuals have a positive duty to help enforce the law in order to safeguard the democratic institutions they work in, yet there are no direct consequences if they do not. This will be demonstrated through a brief look at the law, both in its outcomes and in its aims, which reveals that public decision-makers are not targeted as actors under the law, although they do have an ethical duty to work hand in hand with both lobbyists and the Lobbyists Commissioner in order to preserve the institutions of which they are part. We will go on to focus on possible issues resulting from the absence of any legally binding duties on these public decision-makers. At a more macro level, the question will be addressed whether public decision-makers are at the mercy of lobbyists, which is the stated aim of this analysis. Lastly, this essay will point to the most desirable direction in terms of the relationship between lobbyists and public decision-makers and the best application of the Act in order to make it a pragmatic and useful tool.

A brief overview of the *Lobbying Transparency and Ethics Act*

In our modern democracy, Quebec has a duty to ensure that decisions made by public officials, at all levels of government, are the true product of a democratic process. The *Lobbying Transparency and Ethics Act* produced multiple benefits for the preservation of our democracy by creating a framework to identify the main actors in the process (public-decision-makers, lobbyists and the action of lobbying) as well as a tool to promote transparency: the Lobbyists Registry. Pierre Reid, former Education Minister, declared that many public decision-makers recognize the benefits of the Act as it provides them (and the public in general) with a way of legitimizing the political system in which they live (2009). All these results of the Act will be more fully explained later, as they describe the effects of the law.

Mr. Côté, the previous Lobbyists Commissioner, stated in a 2002 speech (2002a) that this law is not a reaction to recent events¹ but rather a natural step taken by the state to preserve itself, since there is an increased demand for more transparency from the public. Mr. Côté pointed out that he had been involved in increasing both transparency and ethics in this domain since 1994.

The law defines important terms, creates a position within Quebec's public administration and provides a tool to facilitate the application of the law. The tool is the Lobbyists Registry and the position is that of the Lobbyists Commissioner.

Definition of lobbying, lobbyists and public decision-makers

The three focal points of the *Lobbying Transparency and Ethics Act* are the definitions of "public decision-makers," "lobbyists" and "lobbying." The impact of these definitions will help determine what is considered lobbying, and who is a possible lobbyist or a person to be lobbied, thereby enabling lobbyists to better grasp the limits of their activities, while at the same time allowing public decision-makers to find out who is trying to lobby them and how, through the Lobbyists Registry. The different actors and the links among them are clarified to

¹ By "recent events" we refer to the Oxygène 9 scandal involving Gilles Baril, a member of the PQ cabinet who went on vacation in Mexico with the owner of the Oxygène 9 firm in 2002. See Hanes, 2002.

ensure the relationships are healthy. Public decision-makers have a tool to determine what lobbying is and who is a lobbyist; that makes this law, as well as the Registry and the Commissioner, modern and pragmatic.

Raymond Hudon (2002) expressed his belief that the term “lobbyist” should no longer be used to describe solely corporations and business groups. The new definition is broader and covers more individuals, as it also includes many professionals who work to protect -- and even enhance – the interests of their clients. The definition of “lobbyist” is found in Chapter 1, section 3 of the Act. It refers to three distinct groups: consultant lobbyists, enterprise lobbyists and organization lobbyists (Government of Quebec, 2002). The main difference between these three categories is the nature of the client they represent: individuals, enterprises or organizations. Hence, the Act establishes a broader definition of who is a lobbyist, including more than enterprises and organizations, for greater oversight of lobbying activities. Like any tool, it can be harmful if used in an improper way. Nevertheless, when well applied it can be very beneficial; public officials now have a more complete terminology to help them understand the principle of lobbying.

As for public officials, section 4 of chapter 1 of the law (ibid) provides a broad definition of who these individuals are, and encompasses all levels of involvement in the public sector, from ministers to ordinary employees. Such a broad definition is perhaps effective to control most, if not all, lobbying activities by providing a wider circle of people who are considered as potential lobbying targets.

Lastly, the term “lobbying” is defined in chapter 1, section 2. It is fairly broad, with the aim of covering most activities by an individual that could be considered lobbying. Some clarification may be needed in the light of such broadness; that would be considered part of the responsibilities of the Lobbyists Commissioner and the Lobbyists Registrar.

An indispensable tool: the Lobbyists Registry

Although framing the actors and the links among them is a crucial aspect of the Act, there is a need to increase the transparency of the process in the form of a public record stating who the actors are and what their relationships are. The Lobbyists Registry ensures that the Act promotes transparency. Managed by the Lobbyists Registrar, it is a record in which lobbyist groups have to register, divulge the subject matter of their lobbying, their names and their client's names, the person contacted during lobbying and his or her title, and lastly "the term of the lobbyist's mandate" (Lobbyists Commissioner 2009b). It is a tool to be used by both citizens and public decision-makers to identify lobbyists and their activities within an institution. Consequently, it is an essential feature of the *Lobbying Transparency and Ethics Act*, and the core of its transparency aspect. It makes it hard for public decision-makers to deny they were lobbied, and allows the public to investigate the decision-making processes of their institutions and have a better grasp of whose interests are being lobbied for.

Here again, the Registry does not impose any obligations on public decision-makers *per se*, yet it is an interesting tool for them to better understand who is trying to influence them and for what purpose. However, this Registry may not be very attractive for lobbyists; for instance, Yates (2004) decries the heavy bureaucratic burden the Registry imposes on lobbyists, which is even greater for smaller organizations that do not have the resources to follow all the procedures. It therefore undermines the democratic aspect of the law, since it works to the detriment of smaller organizations, while having a lesser impact on bigger organizations. According to Cauchy (2003, p.A3), the Lobbyists Commissioner himself has declared the need to simplify the Registry so as to help lobbyists register and make it easier for the public to consult it.

The creation of a third party: the Lobbyists Commissioner

The Act created the new position of Lobbyists Commissioner to oversee the creation of the Lobbyists Registry and its administration. As stated on the Lobbyists Commissioner's website (2009), "Appointed for five years, he reports his activities every year to the Québec

National Assembly. The Lobbyists Commissioner is impartial. He is not answerable to a governmental or paragovernmental body.”

The mandate of the Lobbyists Commissioner has never been to oversee the activities of public decision-makers. Rather, he is responsible for clarifying the scope of lobbying in Quebec, making sure that lobbyists are identified, and preserving public confidence in institutions.

The fact that public decision-makers do not have a legal responsibility to promote the Lobbyists Registry may undermine the usefulness of this tool. There are no major constraints for public decision-makers who do not urge lobbyists to register, only moral incentives. These may well be overlooked, as demonstrated by Jacob (2007, p.26). That is why this paper argues that the Registry is a useful tool, but only if public decision-makers make full use of it.

On the other hand, it is false to assume or argue that it is the role of the Lobbyists Commissioner to oversee the morals and ethics of public decision-makers. Côté (2002b) raises the point that there are other groups who have this task, and goes further by stating that it is not included in the mandate of the Lobbyists Commissioner. That may mean that the law does not involve public decision-makers legally, as there are already existing mechanisms to check and balance the decision-makers. Nevertheless, in Quebec it is the public -- and by extension its politicians, media, etc. -- that has the duty to oversee the actions and morality of politicians. Recently, the idea of having an Ethics Commissioner at the provincial level has been raised as well.

What should public decision-makers do?

This section of the essay will look at what public decision-makers ought to do to ensure the Registry is useful. Although they are outside the framework of the *Lobbying Transparency and Ethics Act*, public decision-makers have a positive duty to make sure they act in a legal and moral way. For instance, Sherbrooke Mayor Jean Perrault showed concern when a citizen intervened on February 2 2009 (Bombardier, 2009) at the town hall meeting regarding a matter that could have repercussions for the company he was working for. This story went further, and Mayor Perrault scheduled a meeting with Mr. André Côté before the municipal elections in

November 2009 in order to better understand the law. Sherbrooke's mayor was uneasy at the low number of lobbyists registered in Sherbrooke and in other cities, and asked Mr. Côté to develop a strategy to help cities enforce this law. This event is perhaps a sign that there is a need for public decision-makers to make sure they understand the law and find a better way of applying it. Public decision-makers do have a role to play with regard to lobbying. They must do so in order to preserve the legitimacy of the democratic system they live in and ensure public confidence in it. This point was strongly reaffirmed by Mr. Andre Côté in a speech in 2002 (2002b).

This part of the essay lists what public decision-makers ought to do. However, this list does not limit actions that can be taken by public decision-makers, nor should it be viewed as establishing the legal principles by which they must abide. It is important to reiterate that this section is normative and is intended solely for enumerating a few positive duties that can be undertaken in order to preserve our maturing democracy. These positive duties include: having a strong knowledge of the *Lobbying Transparency and Ethics Act*, being familiar with the annual report of the Lobbyists Commissioner to the National Assembly, consulting the Lobbyists Registry and committing to promote registration in it, and, lastly, following the rules after public decision-makers give up their positions and functions.

To begin with, public decision-makers should all be aware of the *Lobbying Transparency and Ethics Act* and its application. This will not only permit them to ensure they are not being lobbied illegally, it will also increase citizens' confidence in their institutions as it will minimize the number of scandals such as the Oxygène 9 affair (Hanes, 2002). As stated earlier, reinforcing public confidence in the democratic system is one of the principal goals of the law. Although it may be a truism that all public decision-makers should know the law and use the Registry, Jacob (2007, p. 32) points out that almost 50% of them are not even aware of it. There is a growing need for them to consult it; in order for a tool to be useful, it must be used. It is only by consulting the Registry that public decision-makers will be able to accurately understand the motives in lobbyists' minds and make the registry practical. It is thus important

for public decision-makers to support the Registry by directing lobbyists to the Lobbyists Registrar.

Another important point is that every public decision-maker ought to be familiar with the annual report of the Lobbyists Commissioner to the National Assembly, as intended by Section 45 of the Act (Government of Quebec, 2002). In this document they will find the achievements of the Lobbyists Commissioner, such as narrow interpretations of the law and procedures taken against lobbyists who are not in compliance (Lobbyists Commissioner 2006). In addition, the report outlines the orientations the Lobbyists Commissioner will follow in future years (ibid). Public decision-makers need to be familiar with the report so as to better understand the scope of the application of the law.

Promoting the Registry will not only permit decision-makers to better understand the intentions of lobbyists, it will also increase the level of transparency and consequently increase public confidence in institutions. This claim is formulated in Mr. Andre Côté's reply to Sherbrooke mayor Jean Perrault (Bombardier 2009), after Mr. Perrault articulated worries about the low number of lobbyists on the Registry. In addition, as their name suggests, public decision-makers make decisions for the benefit of their constituents; it is their responsibility to make value judgements on the quality of the information provided through lobbying, as well as to weigh the benefits for the population (Côté 2005). In addition, with these new institutionalized practices of lobbying in place, public decision-makers have the right to demand that lobbyists follow the rules and, when lobbyists do not, they have the duty to contact the Lobbyists Commissioner (ibid).

Lastly, public decision-makers who give up their functions to go into the private sector after their mandate is over must follow certain rules. They cannot lobby the institutions in which they held positions for two years after their official departure (Côté 2005). This is because post-mandate public decision-makers could in appearance have an incestuous relationship with the money, power, information and influence connected with their previous positions, which could lead to undemocratic processes undermining the institution at stake.

Are public decision-makers at the mercy of lobbyists?

Based on what we have presented above, the answer seems obvious: the current law on ethics and transparency for lobbyists in Quebec, and its application, is a powerful tool for controlling lobbying activities. The new structures regulating the practice provide better safeguards in the province. However, there are still grey areas and a need for improvement in the application of the law, as has been stated on numerous occasions from both sides of the fence; a reduction of the bureaucratic weight, for instance, would lead to a greater variety of actors working within the framework, because at present the measures are costly, thus undermining the ability for smaller groups to be heard.

At a more macro level, the weight of the current law is such a burden that it may actually diminish, rather than control, lobbying activities. This essay is predicated on the notion that lobbying remains a useful way for many groups to be heard by their elected representatives, despite a socially-induced pejorative connotation of this democratic tool. Therefore, we need to question whether such measures are in fact beneficial for democracy, or whether they have negative consequences.

According to Senator Dennis Dawson (2010), who during his lifetime worked on both sides of the fence, the current measures need to be recalibrated because the weight placed upon lobbyists' shoulders makes it harder to influence the government in a democratic way. Senator Dawson also believes the law was tabled a little too quickly, and that it would have been beneficial to study the impact of it further. Nevertheless, a law was needed and Quebec took the right path by proposing such legislation. Unfortunately, the application of the law needs to be revised, as the actual measures actually prevent a just and fair representation of many groups, which could deprive the decision-makers of an excellent tool to better understand the needs of their constituents.

Conclusion

To interpret the law as presenting public decision-makers with a useful and pragmatic tool is a reality; nevertheless, this must be nuanced by demonstrating that a tool misused, or not used at all, is ineffective.

The aim of the law is to define and regulate lobbyists' activities, not to oversee actions taken by public decision-makers. Furthermore, the law focuses on lobbyists and the Lobbyists Commissioner/Lobbyists Registrar, and at no point does it extend to the role of public decision-makers. Nevertheless, as pointed out by the Lobbyists Commissioner himself, public decision-makers ought to be aware of the scope of the law, the definition of lobbying and lobbyists, and also they must refer to and support the Registry. There is therefore a positive duty on public decision-makers, which will benefit both them and the democratic institutions in which they evolve, by increasing public confidence in them. The Registry recording lobbyists and their aims has provided Quebec's maturing democracy with a new tool for preserving its institutions, and public decision-makers have an interest in their preservation. That results in every public decision-maker having a public duty in regard to the *Lobbying Transparency and Ethics Act*. However, there seems to be a need for a better strategy to disseminate the law and its practices, as pointed out by Jacob and Bélanger (2007, tables 16-19), and it seems that the Lobbyists Commissioner is well aware of it (Lobbyists Commissioner 2006). Also, there are issues as to the interpretation of the scope of the law. The main definitions create a universal framework that perhaps cannot be applied to all lobbyists, as they have different resources; this affects smaller lobbyist groups more than larger ones, thus creating disparities and distorting the information that reaches our representatives.

Lastly, this essay has demonstrated that there is room for improvement in the application of the law; it may possibly be depriving public decision-makers of a useful source of information, while encouraging greater lobbying from more powerful firms to the detriment of smaller groups who cannot afford the bureaucratic burden of the latest measures. Nevertheless, the Registry—and the Commissioner—represent a great step toward more ethical and transparent practices in this domain.

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