

Bill 1 *Lobbyists Act*

A Preliminary Assessment of its Implications for Not-for-Profit Organizations in Alberta



© 2007 The Muttart Foundation

Prepared by Professor Lois E. Gander
Faculty of Extension, University of Alberta

for the

Legal Resource Centre
201 10350 - 124 Street
Edmonton, AB T5N 3V9

Copies available on the website
www.legalresourcecentre.ca

We gratefully acknowledge the financial support of
The Muttart Foundation.



Table of Contents

Introduction.....	1
Summary of Bill 1 as it applies to not-for-profit organizations.....	2
Summary of Findings.....	3
Suggestions for moderating the impact of Bill 1.....	4
Discussion.....	5
The role of not-for-profit organizations.....	5
The role of lobbying registration legislation.....	6
Public policy implications of Bill 1.....	7
The application of the proposed <i>Lobbyists Act</i> to not-for-profit organizations.....	8
Problems with Bill 1.....	10
Implications for complying with the Act.....	13
Implications for recruiting board members, staff, volunteers and members.....	14
Implications for interactions between public office holders and not-for-profit organizations and between not-for-profit organizations.....	15
Moderating the impact of the proposed legislation.....	17
Conclusion.....	20
Appendix 1: General observations on Bill 1.....	21
Appendix 2: The implications of Bill 1 for not-for-profit organizations.....	28
Appendix 3: Terms of this study.....	32

Introduction

In March 2007, the Government of Alberta introduced Bill 1 *Lobbyists Act* in the Legislative Assembly. Like other lobbyist registration legislation, it provides an interesting glimpse into a government's idea of what is fair play in a democracy. It tells us who in government we can communicate with freely and when our communications are subject to oversight. For its part, the Preamble to Bill 1 imbeds the principles that

- free and open access to government is an important matter of public interest;
- lobbying public office holders is a legitimate activity;
- it is desirable that the public and public office holders be able to know who is engaged in lobbying activities;
- a system for the registration of paid lobbyists should not impede free and open access to government; and
- it is desirable that the public and public office holders be able to know who is contracting with the Government of Alberta and Provincial entities.¹

Many governments have passed legislation to make the extent and nature of lobbying visible.² Alberta's is unique in prohibiting lobbying altogether under specified conditions in an effort to address conflicts of interest.³

This study investigated the implications of Bill 1 for not-for-profit organizations in Alberta.⁴ However, Bill 1 introduces a number of new concepts and contains a number of provisions that are not fully explained in the legislation. It will not be possible to truly assess their impact until regulations, advisory opinions, and interpretation bulletins are developed to elaborate or clarify various aspects of the legislation. As a result some implications can only be speculative.

¹ Except for this last clause, the preamble to the Alberta legislation is the same as the federal *Lobbyists Registration Act*. The wording of the Purpose section of the Newfoundland legislation is slightly different. These are the only two other jurisdictions included in this study which have preambles or their equivalent.

² When it comes in force, the *Federal Accountability Act* will prohibit contingency fees and provide a lengthy cooling off period before certain public office holders can lobby the government.

³ i.e. when engaged in a contract to provide advice on the same subject matter at the same time.

⁴ See Appendix 2 for the terms of the study.

Summary of Bill 1 as it applies to not-for-profit organizations

- Not-for-profit organizations are explicitly covered under Bill 1. [s.1(1)(f)]
- Much of the communication currently taken for granted between not-for-profit organizations and government officials with respect to legislative, program, and policy development and administration is captured by the proposed legislation. [s.1(1)(e)]
- The Act does not apply with respect to submissions in response to a request initiated by a public office holder or regarding the enforcement, interpretation, or application of any Act or the implementation or administration of any program, policy, directive or guideline with respect to the organization itself. Nor does it apply to submissions that are a matter of public record that are made to various committees of the Legislative Assembly or other bodies created under an Act. [s.3(2)]
- Employees and board members who are paid for their work in an organization are considered to be organization lobbyists if they communicate with a public office holder on behalf of the organization with the intent to influence specified decisions. [s.1(1)(a)]
- Unpaid volunteers are not considered to be lobbyists even if they lobby on behalf of the organization.
- Not-for-profit organizations that wish to engage in lobbying will need to put appropriate policies and procedures in place to ensure that they can keep track of all lobbying and prospective lobbying activities at the level of detail required for reports [Sched. 2 s. 2]; identify contributions of \$1000 or more that have been received for lobbying activities [Sched. 2 s.2(d)]; and establish internal systems to ensure they file reports on time [s.5(1)].
- The senior paid person in the organization will have to register and report for everyone in the organization who qualifies as a lobbyist. [s.1(1)(c)]
- Not-for-profit organizations who wish to receive contracts for providing paid advice will have to abstain from lobbying public office holders on the same subject matter at the same time as their contract and *vice versa*. [s.6]
- Not-for-profit organizations that wish to receive contracts for paid advice will have to put procedures in place to ensure that no one in their organization who is paid or who is associated with the organization jeopardizes their ability to do so by lobbying any public office holders with respect to the same subject-matter at the same time and *vice versa*. [s.6]
- Individuals who lobby on behalf of their organizations will be liable to various penalties and fines up to \$200,000 if they do not comply with the legislation.

Summary of Findings

The current draft of Bill 1 *Lobbyists Act* has significant implications for not-for-profit organizations:

1. The Act will apply to not-for-profit organizations regardless of their size, resource base, or the nature of their objects if they engage in any lobbying activity whatsoever.
2. Not-for-profit organizations may find that complying with the proposed legislation will increase their workloads significantly. That may put demands on financial and human resources that exceed the organization's capacity or that require the redirection of resources away from mission-related activity.
3. The legislation may have the effect of significantly reducing the pool of talent available to not-for-profit organizations as board members, staff, volunteers, and members.
4. Many not-for-profit organizations will likely have difficulty understanding their obligations because legislation is complex, its scope is broad and encompassing, and many terms are vague and subject to interpretation. They may also have inadequate access to professional assistance in meeting their obligations. As a result, organizations may either under-comply or over-comply. This in turn may adversely affect their reputations and the reputation of the sector as a whole.
5. The legislation may have a "chilling" effect on the nature and extent of the interactions between public office holders and not-for-profit organizations and among not-for-profit organizations themselves. This may be mitigated somewhat by the provision exempting communications initiated by public office holders. However, that provision allows public office holders to favour some organizations over others.
6. The exemption for lobbying a Member of the Legislative Assembly by a constituent favours organizations with staff, board members, volunteers, or members in ridings of key Members. Organizations with province-wide membership will be able to lobby all MLAs without having to report those communications.
7. The prohibition on simultaneously lobbying and contracting for paid advice on the same subject-matter by associated persons and entities raises serious public policy issues. It may not only impair the ability of not-for-profit organizations to achieve their missions but may also be disruptive to family life and the workplace generally.

Suggestions for moderating the impact of Bill 1

1. Reduce or eliminate the need for registration of in-house lobbyists of not-for-profit organizations:
 - Introduce a threshold test for requiring registration and reporting.
 - Create a separate class of organization lobbyists for all (or certain types of) not-for-profit organizations and establish requirements that are appropriate to their roles and realities.
 - Exempt registered charitable organizations and foundations from the ambit of the *Lobbyists Act*.
2. Reduce or eliminate the financial impact of the *Lobbyists Act* on not-for-profit organizations.
 - Eliminate the application of registration fees.
 - Eliminate or reduce administrative penalties for not-for-profit organizations.
3. Limit the scope of public office holders to officials above a prescribed level and limit the number of prescribed provincial entities.
4. Clarify the meaning of key terms, such as “on behalf of”, “in an attempt to influence”, “knowledge and belief”, “the exercise of reasonable diligence” “advice”; and “subject-matter”. Clarify the distinction being drawn between making a submission and otherwise communicating. Exempt tokens of appreciation given to directors and volunteers of not-for-profit organizations from the definition of “payment”.
5. Eliminate the prohibition on simultaneously lobbying and contracting for paid advice on the same subject matter
 - Alternatively*, eliminate the application of the prohibition with respect to not-for-profit organizations.
 - Alternatively*, remove the provisions regarding affiliated persons and entities.
 - Alternatively*, create a threshold for the value of contracts captured by the prohibition.
6. Consult the not-for-profit sector as regulations, information bulletins, and advisory opinions are being developed.
7. Provide funding to educate the not-for-profit sector with respect to the application of this legislation and to train designated filers in effective tracking and reporting mechanisms.
8. Phase in the application of the legislation beginning with consultant lobbyists so that necessary regulations, information bulletins, and advisory opinions can be put in place to address the implications of the legislation for not-for-profit organizations.

Discussion

The role of not-for-profit organizations

Not-for-profit organizations play an essential role in maintaining a healthy democratic society. Often referred to as “voluntary organizations” and “non-governmental organizations”, they are a major component of “civil society”. Civil society or the “third sector” provides individuals with ways of engaging in their communities that are neither government-sanctioned nor undertaken with the motive of profit. These activities have many benefits. They enhance individual, social, and environmental well-being, cultivate positive citizenship attributes in youth, and integrate newcomers into Canadian society. Many people believe that they can make the greatest contribution to their communities and to society by participating in civil society organizations.

The not-for-profit sector is composed of organizations which have a wide range of purposes – from the promotion of the arts to regulating particular professions or industries. They provide benefits that range from essential life-saving services to child care and training for elite athletes. They restore families, build houses, and help protect neighbourhoods. They carry out research, education, and advocacy activities. Their work may be supported by staff, volunteers, members, donors, and the community-at-large. Some are large and have substantial human and financial resources. Others have little of either. They differ in almost every way imaginable but one: none exists to make a profit.

Not-for-profit organizations meet needs the market cannot. In some cases, the market is too small or too scattered to support the cost of providing goods or services. Other public or social goods and services, like vibrant communities, are not easily bought and sold in the market place. Not-for-profit organizations also meet needs that we believe, as a matter of public policy, should not be subject to the market forces of supply and demand – for example, the need for blood plasma and human organs.

The day-to-day realities of not-for-profit organizations differ considerably from for-profit entities. Whereas for-profit entities have various ways of capitalizing their operations and adjusting their fees or prices in response to market conditions, not-for-profit organizations rely heavily on grants, donations, membership fees, and, to a lesser extent, sales of related goods and services. For-profit entities seek to end the year with more revenue than they need to pay their expenses. Not-for-profit organizations, on the other hand, often have fewer resources than they need to address their mandates and have little discretionary income. They usually have to stretch a dollar as far as possible to make ends meet. Managing not-for-profit agencies is challenging!

Many not-for-profit organizations work collaboratively with each other and with relevant government departments and agencies. Close working relationships are generally seen as beneficial, if not essential, to achieving common goals.

Like for-profit organizations, not-for-profit organizations engage in lobbying public office holders regarding a range of matters including proposed or existing legislation, policies, programs, directives, and guidelines. However, unlike their for-profit counterparts, not-for-profit organizations do not undertake these communications for the purpose of enhancing their own profit but rather to enhance other types of benefits for their members or some segment of society. Those who are registered charitable organizations or foundations do so entirely for the public good.

The role of lobbying registration legislation

Governments in many jurisdictions in Canada are attempting to ensure that their activities are open and transparent to those they serve. One way that has been adopted by the federal government and five provinces⁵ has been to pass legislation requiring lobbying to be reported. The Government of Alberta has recently joined this trend by introducing Bill 1 *Lobbyists Act*⁶ in the Alberta Legislature in March 2007. In speaking to what is being referred to as the flagship bill⁷ for the government, Premier Ed Stelmach reiterated his government's commitment to governing with integrity and transparency in highlighting three aspects of the proposed legislation:

- by establishing a lobbyist registry;
- by requiring lobbyists to declare existing contracts to give advice to government; and
- by regularly publishing an online, searchable index of who has contracts with the government.

“One of the key features of the legislation is the prohibition from lobbying and providing advice to government on the same issue at the same time”.⁸

Bill 1 *Lobbyists Act* seeks to address significant public policy issues with respect to lobbying activities of both for-profit and not-for-profit entities. The legislation has been proposed out of concern that certain individuals or entities may have undue, inappropriate, or, at a minimum, unknown influence on public office holders. There is an added concern that those lobbyists may then derive unfair advantage or benefit from their access to public office holders. In addressing those concerns, the government has proposed legislation to improve the integrity and transparency of the interactions between public office holders and lobbyists. Under the proposed legislation not only will lobbyists be required to register, they will be prohibited from simultaneously lobbying and holding contracts for paid advice on the same subject matter.

⁵ British Columbia, Newfoundland, Nova Scotia, Ontario and Quebec.

⁶ 2007 Bill 1.

⁷ Mr Elsalhy, March 21, 2007 *Alberta Hansard* 284.

⁸ March 7, 2007 *Alberta Hansard* 5

Public policy implications of Bill 1

Bill 1 appears to be directed at achieving two public policy goals. The first is to increase the transparency of lobbying – to make it possible for both the public and public office holders to find out who is lobbying the government and about what. Its second goal is to eliminate the conflict of interest that arises if someone is lobbying on a subject-matter at the same time as contracting to provide advice on the same matter.

The critique of the legislation arising from this study suggests that as currently drafted, Bill 1 fails to achieve either of these goals. It contains several loopholes that will allow lobbyists to have a great deal of influence on public holders without having to report their communications. For example, the proposed exemption for submissions in response to a request initiated by public office holders means that public office holders can continue to communicate privately with lobbyists they favour. Since those communications will not be considered to constitute lobbying under the Act, those lobbyists (and anyone “associated” with them) will still be able to conduct their communications while under contract to provide paid advice on the same subject matter and *vice versa*.

Moreover, closing the latter loophole may not solve the conflict of interest problem. If the lobbyist/contractor has a financial interest in the outcome of the contract for paid advice, the conflict remains even if the lobbying ceases. The conflict of interest is contained within the contract itself and should be dealt with under conflict of interest and contract rules not lobbying legislation.

At the same time that Bill 1 fails to deal with the public policy issues it is meant to address, it creates several new ones. The findings of this study suggest that the proposed legislation may impair the ability of not-for-profit organizations to play their role in promoting and maintaining our democratic society. It may affect their ability to promote civic engagement, to carry out their work, to engage effectively with governments, and, in the end, to achieve their missions. As a result, it may also impair the government’s ability to achieve a variety of its legislative and policy objectives. While the exemption dealing with communications initiated by public office holders may mitigate this situation somewhat, it creates a lop-sided capacity to engage. The study also suggests that the provisions that prohibit simultaneously lobbying and contracting for paid advice on the same subject matter will have unintended consequences that will not only affect not-for-profit organizations but will disrupt family life and the workplace generally.

The application of the proposed *Lobbyists Act* to not-for-profit organizations

As currently drafted, the proposed *Lobbyists Act* will apply to not-for-profit organizations regardless of their size, resource base, or the nature of their objects if they engage in any lobbying activity whatsoever.

- Bill 1 applies to “a charitable or non-profit organization, association, society, coalition or interest group” whether incorporated or unincorporated. This vague and open-ended definition of “organization” may make it difficult for informal clusters of concerned individuals or organizations to know whether their activities must be reported and, if so, on whose behalf they are lobbying.
- The definition of lobbying is broad and captures any communication with a public office holder that attempts to influence prescribed types of decisions. Much of the communication currently taken for granted between not-for-profit organizations and government officials with respect to legislative, program, and policy development and administration is captured by the proposed legislation. However, the legislation **does not** apply with respect to “submissions made in any manner” in response to a request initiated by a public office holder or with respect to the enforcement, interpretation, or application of any Act or regulation or the implementation or administration of any program, policy, directive or guideline with respect to the organization itself. Nor does it include submissions that are a matter of public record that are made to a committee of the Legislative Assembly or other body created under an Act. Still, in practice, it will likely capture much of the interaction that currently takes place between not-for-profit organizations and public office holders.
- The definition of public office holder includes an employee, officer, director or member of a **prescribed** Provincial entity. The categories and names of Provincial entities are contained in two government documents.⁹ Neither document contains the complete list. Both can be found on the internet with some difficulty. A wide variety of agencies fall under that category of Provincial entities including schools and educational institutions, Alberta Treasury Branches, and key agencies such as the Alberta Alcohol and Drug Abuse Commission. Not-for-profit organizations may be surprised to find that some agencies they deal with are Provincial entities. They may also be surprised to find that they have public office holders on their boards and staff and among their volunteers. Regulations have yet to be developed to identify which provincial entities will be prescribed. It is possible that regulations will also be developed limiting the designation of public office holder to only employees above a certain level in those entities. Once that list is determined, organizations will have to report on their interactions with public office

⁹ The List of Government Entities set out in the most recent Government Estimates and any body or entity set out in the most recent Government of Alberta Annual Report;

holders of prescribed entities if their communications fall within the definition of lobbying.

- Employees and any board members and officers who engage in specified forms of communication will be considered to be organization lobbyists if they receive anything of value as payment for the performance of their functions. As currently drafted, the definition of “payment” appears to capture honoraria, stipends, and tokens of appreciation of the sort often given by organizations to board members. Board members so paid would be considered organizational lobbyists if they engage in communications with public office holders on specified matters. If organizations find it burdensome to track the communications of their board members or difficult to enforce policies prohibiting board members from lobbying, they may have to review their practices in recognizing the contributions of their board members.

Some organizations also “pay” volunteers or members – again usually a small honorarium, stipend, or other sorts of benefits. There is a possibility that a paid volunteer may be captured within the definition of “employee” or even “consultant lobbyist”. This may cause organizations the same sorts of problems of tracking communications and enforcing organizational policies as may be experienced with “paid” board members. If so, not-for-profit organizations will have to review their practices in providing volunteers with tokens of appreciation.

Unpaid volunteers will not be considered to be lobbyists even if they lobby on behalf of the organization.

- Not-for-profit organizations will be captured by the prohibition on lobbying and contracting for paid advice on the same subject-matter at the same time. They may find that they have to identify and monitor a substantial web of relationships with associated persons and entities.
- The Executive Director of most not-for-profit organizations will bear the responsibility for filing on behalf of all its “organization lobbyists”. The Executive Director will be required to certify that “to the best of the designated filer’s knowledge and belief, the information in the return or document is true”. Returns will need to be filed every six months and will cover all lobbying activity since the last return was filed and any lobbying anticipated in the next six month period. Electronic filing will be possible. Executive Directors will be liable to penalties and fines if they do not comply with the Act.

Problems with Bill 1

1. **Its breadth:** As currently drafted, Bill 1 is extremely broad in its coverage.
 - It captures all not-for-profit organizations regardless of their size and the amount of lobbying they do. If the intent of the legislation is to expose individuals and organizations that have significant influence on the government, it is overly broad in capturing so many individuals and organizations who do so little lobbying.
 - It applies to communications by paid board members, staff, and perhaps even paid volunteers.
 - It captures all public office holders regardless of their level of responsibility in government or a prescribed Provincial entity.
 - It captures decisions being made down to the level of directives and guidelines.

Many not-for-profit organizations would have little capacity for tracking and reporting communications on all these matters by all those who might be considered organization lobbyists.

2. **The provisions regarding public office holders:** As currently drafted the definition of public office holders captures thousands of people, many of whom are active in the not-for-profit sector as volunteers and board members. Since a public office holder appears to always be on duty, communication on specified matters among board members or between staff and volunteers may fall within the definition of lobbying and would be captured by the legislation.

The definition of public office holder also captures individuals appointed to committees by a Minister. These individuals may be drawn from the staff or board of not-for-profit organizations by virtue of their organization's expertise. As long as they serve on that committee, they remain public office holders and their communications with others on specified matters would be captured by the legislation. This would appear to include communications within their own organizations as well as with others outside the organization. An Executive Director who is such a public office holder may then, as the designated filer, have to report communication that goes on within the organization itself and between the organization and others.

3. **The prohibition on lobbying and providing paid advice on the same matter at the same time:** The provisions defining an associated person or entity¹⁰ are particularly difficult to understand. Moreover, not-for-profit organizations can be expected to have difficulty tracing all the relationships their board members, staff, volunteers, and members have. Identifying associated persons and entities will require them to delve into the personal lives of people involved with their organizations. Individuals involved in not-for-profit organizations may have difficulty understanding why the

¹⁰ s. 1(5) of the Act

organization is making those inquiries and may resent and resist the intrusion into their personal lives.

Once conflicts or potential conflicts between lobbying and contracting activities are identified they will need to be addressed. If the conflict exists within the organization, it will have to decide which activity it values more. However, if the conflict exists between two or more related persons or entities, it is unlikely that one will be prepared to defer to the other. The likely resolution to the conflict will be the termination of the employment or board activity of one of the associated persons.

The prohibition against simultaneously lobbying and contracting for paid advice on the same subject matter has a ripple effect that will have far-reaching consequences. It will likely be difficult if not impossible for spouses,¹¹ their employers, and organizations they serve to keep track of each others' activities with sufficient accuracy to abide by this provision. Conflicts between the activities of spouses, their employers, and any not-for-profit organizations affected may only be resolvable by terminating relationships, including employment relationships. Other family members may be affected as well if one or more of them is a public office holder. It may be difficult for family members to be engaged in the same sector of the economy or pursue similar interests in the community.

4. **The imposition of penalties and fines:** Bill 1 is unique in the Canadian lobbying legislation studied in creating administrative penalties. These can be imposed by the Registrar on forming the “opinion” that someone is in contravention of the Act. The provision does not appear to require any investigation or reasonable and probable grounds for arriving at that opinion. It appears that a penalty can be imposed without the lobbyist even knowing that there has been a question raised with respect to compliance. It appears that personal service of the notice of the penalty is not required and that it can be served by ordinary mail. If the lobbyist does not contest the penalty within 30 days, it can be enforced by use of civil remedies. This can cause problems for lobbyists for small not-for-profit organizations. Many do not operate out of proper office facilities, but rather out of the homes of individuals. If the individual is on holidays, has moved, or otherwise doesn't receive mail on a timely basis, the penalty could be levied and the appeal period could pass without the person's knowledge. The person may no longer even be involved with the organization. Penalties also attach to individuals rather than to the organization. This means that Executive Directors will be personally liable for complying with the legislation – a liability they may be unwilling to assume. Organizations may not be able to reimburse staff for penalties and fines.

¹¹ The Act actually refers to “spouse or adult interdependent partner”. For the purposes of this report, the term “spouse” includes adult interdependent partner.

5. **Other issues:**

- Many not-for-profit organizations will likely have difficulty understanding their obligations because the proposed legislation is complex, its scope is broad and encompassing, and many of its terms are vague and subject to interpretation. Many will also have inadequate access to professional advisors to assist them in meeting their obligations. As a result, organizations may either under-comply or over-comply with it. This in turn may adversely affect their reputations and the reputation of the sector as a whole.
- Key terms such as “on behalf of”, “in an attempt to influence”; “knowledge and belief”; “the exercise of reasonable diligence”; “advice”; and “subject-matter” may be difficult for not-for-profit organizations to interpret in their particular contexts.

An organization may authorize certain individuals to lobbying on its behalf. However, it is not clear whether this will be sufficient to relieve the organization from having to track and report rogue lobbying activities of others.

It is also not clear whether the test for attempting to influence a public office holder will be subjective or objective. Will the intent be inferred from the context or will it need to be established explicitly? Will the public office holder actually have to have the ability to influence the decision? How much influence? How much does the putative lobbyist need to know about the public office holder’s sphere of influence?

Executive Directors will need some assistance in determining when they have met the various tests for determining who is lobbying in their organization and with whom the organization might be associated.

Clarification will also be needed with respect to the nature of a contract for paid advice. Will it include grant agreements and other kinds of funding agreements? Will “advice” include recommendations, suggested next steps, or other kinds of feedback often required as part of project and research reports?

The breadth or narrowness of the “same subject-matter” will have a significant impact on the scope of the prohibition on lobbying and contracting at the same time.

Clarification is needed as to the distinction being drawn in the legislation between making submissions and otherwise communicating. This will significantly affect the scope of the communications that will be exempt from the application of the Act.

- Not-for-profit organizations will not be the only ones that have difficulty in understanding this legislation. In particular, their funders and donors may misunderstand the meaning being given to the term “lobbying” under the proposed legislation. As a result, they may unnecessarily restrict the application of their funds in ways that impede the organization from operating efficiently and effectively. Organizations may find fund-raising more difficult and therefore more expensive. Organizations may also have to institute policies and practices to ensure that funds are not used for lobbying if the contributors so specify.
- While it can be expected that regulations, interpretation bulletins, advisory opinions and the like will address some of these issues, it is important that the sector be consulted in advance of the legislation coming into effect to ensure that these matters are addressed appropriately. It is also important to ensure that the sector and their advisors are well-informed of these related materials.

Implications for complying with the Act

Not-for-profit organizations may find that complying with the proposed legislation will increase their workloads significantly. That will vary depending on the amount and nature of the detail required in semi-annual reports¹² and the number of organization lobbyists and the extent of their lobbying. They may require professional advice and assistance in understanding and meeting their obligations. That advice may be costly and beyond the means of some organizations. It might not be readily available to others. Tracking and reporting communications may put demands on financial and human resources that exceed the organization’s capacity or that require the redirection of resources away from mission-related activity.

- In addition to those policies and procedures already mentioned, not-for-profit organizations will have to implement policies and procedures that establish who is authorized to lobby on behalf of the organization and that will enable them to keep track of all communications that staff (and any board members that are paid by the organization) engage in that might be considered lobbying. They will also need to develop policies for dealing with board members and employees who contravene the organization’s lobbying policies. Organizations will also have to develop ways of identifying and tracking contributions of over \$1000 to their lobbying activities.
- Organizations that also lobby the federal government will have to ensure that they understand the differences between the provincial and federal legislation dealing with lobbying. Registered charitable organizations will have to track and report on both their lobbying and advocacy activities to ensure that they

¹² The requirements of the LRA are not currently onerous.

meet the requirements of the *Income Tax Act* as well as relevant lobbying legislation.

- Organizations will need to put policies and procedures in place to enable them to identify associated persons and entities and track any potential contraventions of the prohibition on lobbying and contracting for paid advice on the same subject-matter at the same time`. They will need policies and procedures for dealing with individuals and entities that expose them to a contravention of the Act.
- Organizations that wish to both lobby and receive contracts for providing paid advice will have to put in place procedures for ensuring that they cease to carry out activities that put them in violation of the prohibition against doing both on the same subject-matter at the same time.
- Not-for-profit organizations may not have the resources to pay fees necessary to comply with the legislation nor penalties or fines that might accrue for failing to comply. Funders and donors may not want their funds used for these sorts of expenses.

Implications for recruiting board members, staff, volunteers and members

The proposed legislation may significantly reduce the pool of talent available to not-for-profit organizations. Many not-for-profit organizations are currently experiencing considerable difficulty in attracting board members, staff, and volunteers. Anything that reduces the pool of talent from which to draw could be devastating.

- Executive directors of organizations may have difficulty taking on the added responsibilities that they will assume under the proposed legislation. They may be particularly concerned with acquiring the personal financial liability that they will have as designated filers and lobbyists for their organizations.
- Organizations will need to determine whether any current board or advisory committee members, volunteers, or members are public office holders. If so, when paid staff members are in attendance at board and committee meetings or deal with volunteers and members, their communications may fall within the definition of lobbying. Since boards need their Executive Directors and other staff to attend these sorts of meetings, organizations may have to purge their boards and committees of public office holders. Similarly, staff members deal with volunteers and members. If a volunteer or member is a public office holder, interactions with staff could give rise to communications captured within the definition of lobbying. This could have a serious impact on the composition of boards, advisory committees, and the like, and on the recruitment of volunteers.

- In pursuing their social goals, some not-for-profit organizations make a point of hiring people who have difficulty obtaining or maintaining employment. In some cases, these people have reduced intellectual capacity or suffer from emotional or psychological disorders. In other cases, they may lack social skills or acumen. Organizations may be reluctant to hire employees or take on volunteers that will have difficulty understanding and complying with the organization's policies and procedures with respect to lobbying and to the prohibition on lobbying and contracting for paid advice.
- Some present or potential board members, staff, volunteers, and members may be reluctant to expose themselves to the kind of government surveillance made possible by the proposed legislation. They may be concerned that the information gathered will be used for other purposes.
- Organizations will also have to scrutinize the external activities of board members, staff, volunteers, and members, and the activities of their spouses and of any associated entities to determine if any might put the organization in conflict with the prohibition against simultaneously lobbying and holding contracts for paid advice on the same subject matter. Organizations may have to terminate some of these relationships.
- For their part, individuals will need to be careful in choosing their employers and in volunteering for boards of any not-for-profit organizations so as to avoid potential conflicts between lobbying and paid advice activities. Spouses will have to be vigilant to ensure that they do not put each others' employers or any organizations in jeopardy. There may be instances of conflict that can only be resolved by one spouse terminating his or her employment or board activities.

Implications for interactions between public office holders and not-for-profit organizations and between not-for-profit organizations

The proposed legislation may have a “chilling” effect on the nature and extent of the interactions between public office holders and not-for-profit organizations and reduce interactions between not-for-profit organizations.

- Some organizations will likely find the existence of the legislation intimidating. This phenomenon may be particularly acute among certain marginalized sectors of the public who because of geographical isolation, language, literacy, age, limited financial resources, or particular disabilities may be unable to access appropriate professional or other assistance or to comprehend the requirements and prohibitions of the proposed legislation. As a result, they may avoid engaging in any kind of communication with government departments or prescribed Provincial entities lest they trigger the application of the Act.

- Some organizations may not be able to cope with the requirements of the legislation and will have little or no option but to cease to engage with public office holders.
- Some organizations may find the effect of the legislation intimidating. Organizations whose board members, staff, volunteers, or members have suffered under repressive regimes in other countries may be very cautious about engaging in activities that expose them to the kind of government scrutiny that will flow from the proposed legislation. They may fear that the information will be used against them or for other purposes.
- Other not-for-profit organizations may view this legislation as an inappropriate form of government surveillance. It may pose particular problems for organizations with government watch-dog mandates and those who oppose government policies. Organizations may be afraid that their interactions with certain public office holders will be used against them by others, for example, in making important decisions with respect to grants. Provisions with respect to grass roots lobbying may be particularly suspect in the eyes of not-for-profit organizations. They may view these as a means of discouraging public engagement in policy-making. In situations such as these, certain kinds of interactions between not-for-profit organizations and public office holders may be significantly reduced or discontinued entirely. Relations between some not-for-profit organizations and the government may even become hostile or give rise to forms of civil disobedience.
- Not-for-profit organizations will need to weigh the costs and benefits of participating in consultations and collaborations with government where those activities might trigger either the requirement to register as a lobbyist or the prohibition against simultaneous lobbying and providing paid advice on the same subject matter.
- The provisions regarding affiliated person or entity may have significant implications for collaborations and other resource-sharing arrangements among not-for-profit organizations.
- Some not-for-profit organizations may be reluctant to engage with public office holders even when those communications do not constitute lobbying. Organizations may simply misunderstand the application of the Act. Or, they may understand the Act but be afraid they will inadvertently cross a line that brings them within the ambit of the legislation. In their efforts to avoid lobbying, they may not seek information that they need. This in turn may reduce the efficient and effective administration of legislation, policies, and programs.
- Bill 1 exempts submissions in response to requests that are initiated by public office holders. This enables officials to pick and choose with whom to communicate and to favour some not-for-profit organizations over others.

- Bill 1 also exempts submissions by a constituent to the Member of the Legislative Assembly for the constituent's riding. This may advantage organizations with members in the ridings of key Ministers. It also gives organizations with province-wide membership the ability to lobby all MLAs without having to report those activities.

Moderating the impact of the proposed legislation

Serious consideration needs to be given to moderating the impact of Bill 1 on the not-for-profit sector. There are a number of possible strategies that can be adopted, including exempting all not-for-profit organizations from the legislation, exempting only some portion of the sector, exempting the sector from the application of some provisions of the legislation, or modifying some provisions as they apply to the sector.

- At a bare minimum, a “threshold test” needs to be established for determining when an organization is engaged in a significant enough amount of lobbying to warrant application of the legislation. Otherwise, the briefest telephone conversation or casual exchange can bring the legislation into play. A threshold test would eliminate the application of the legislation for many small not-for-profit organizations and those that rarely undertake any sort of lobbying. It would also protect organizations from having to report random and casual encounters between staff (or paid board members) and public office holders. It would reduce the level of apprehension among many organizations that might be reluctant to engage with public office holders in any way for fear of acquiring obligations they cannot meet.

The widely accepted threshold is the equivalent of 20% of a person's job (based on the time spent on lobbying by an individual or the combined time of all those in the organization who engage in lobbying). Canadian jurisdictions vary as to how that time is to be calculated – whether it includes preparation time or only the time actually involved in carrying out the lobbying. The latter is the more manageable calculation.

- Both the federal and Nova Scotia lobbying legislation create a separate class of lobbyists for not-for-profit organizations and use that distinction to make the reporting requirements clearer for the sector. Legislation in Nova Scotia is the friendliest toward the not-for-profit sector. It creates a distinct class of lobbyists for the sector and captures as lobbyists only those who are employed by an organization and whose duties include lobbying. This relieves organizations from having to track casual communication between staff whose jobs do not include lobbying and any public office holders they may encounter in social or other settings. It also protects organizations against well-meaning board members who may engage in unauthorized communication with public office holders. The use of a separate class could be further extended to make other adjustments to the application of the Act that take into account the role the not-for-profit sector plays in sustaining civil society and that reflect the

day-to-day realities of the sector. These adjustments could include exempting not-for-profit organizations from the application of certain fees and eliminate or reduce penalties and fines for certain kinds of contraventions of the legislation.

- Consideration should be given to exempting not-for-profit organizations from the ambit of the *Lobbyists Act* entirely. As already discussed, they play a critical role in engaging the public in pursuing matters of the public good. Interfering with that role may be contrary to public policy. More particularly, consideration should be given to exempting registered charitable organizations and foundations from the ambit of the *Lobbyists Act*. Their objects and activities are already subject to scrutiny. To be considered charities, their activities must be undertaken solely for the public good. They are also constrained by specific limitations on the amount of advocacy they can undertake. Regulating these organizations even further may be unnecessary and undesirable.
- Some not-for-profit organizations may have few, if any, resources that they can allocate to paying registration fees. In some jurisdictions there is no fee for filing electronic returns online. While this will be of benefit to many organizations, not all of them will have access to the technology needed to take advantage of these savings. It may be appropriate to reduce or eliminate the application of fees for all not-for-profit organizations or at least to those with revenues below a particular amount.
- Consideration should be given to reducing the administrative penalties applicable to organization lobbyists for not-for-profit organizations or exempting them from the application of administrative penalties entirely.
- Certain terms used in the legislation make it difficult to interpret. It would be particularly useful to have regulations, information bulletins, or advisory opinions that deal with these terms in place before the legislation comes into force. Troublesome terms include “on behalf of”, “in an attempt to influence”; “knowledge and belief”, “advice”, and “subject-matter”. The distinction between “submissions” and “communications” needs to be clarified. It would also be helpful to make it clear that tokens of appreciation given to directors and volunteers of not-for-profit organizations are not “payments” within the meaning of the Act.
- The prohibition against simultaneously lobbying and contracting for paid advice has a ripple effect that is potentially disastrous for individuals and not-for-profit organizations. It will likely be difficult if not impossible for spouses, their employers, and organizations they serve to keep track of each others’ activities with sufficient accuracy to abide by this provision. Conflicts between the activities of spouses, their employers, and any not-for-profit organizations affected may only be resolvable by terminating relationships, including employment relations. Other family members may be affected as well if one or more of them are public office holders. It may be difficult for family members

to engage in the same sector of the economy or pursue similar interests in the community.

Since the impact of this prohibition is potentially widespread, serious consideration should be given to removing it from the legislation. If that is not possible, consideration should be given to exempting not-for-profit organizations from its application. At a minimum the provisions with respect to affiliated persons and entities need to be modified if not eliminated entirely.

- Regulations will play a critical role in elaborating the application of the legislation. The not-for-profit sector should be consulted in the preparation of these regulations and in the development of information bulletins, advisory opinions and educational materials.
- Not-for-profit organizations will vary widely in their ability to understand and respond appropriately to the proposed legislation. Consideration should be given to providing funding to organizations active in the sector to facilitate education with respect to the application of this legislation and to train designated filers in effectively tracking and reporting communications, identifying associated persons and entities (if necessary), and tracking donations to lobbying efforts.
- Since it will take time to prepare not-for-profit organizations to meet their obligations under the proposed *Lobbyists Act*, consideration should be given to phasing in its application. This would also spread the burden on those who must deal with the first filings of lobbyists. Application of the Act could begin with consultant lobbyists rather than organization lobbyists so that necessary regulations, information bulletins, and advisory opinions can be put in place to address the needs of not-for-profit organizations.

Conclusion

Bill 1 *Lobbyists Act* as currently drafted has serious implications for not-for-profit organizations. There are four features of the proposed legislation of particular significance:

1. It does not contain a threshold test. All not-for-profit organizations will have to register and report if they undertake any lobbying whatsoever. Many may not have the capacity to do so.
2. The definition of public office holder captures many current and potential board members, staff, and volunteers. This may adversely affect their ability to participate in the work of not-for-profit organizations.
3. It contains a unique prohibition against simultaneously lobbying and contracting for paid advice on the same subject matter. That provision is difficult to understand and will likely be difficult to apply. It will require organizations to track a web of relationships between their staff, spouses, other not-for-profit organizations, and businesses. It may have serious implications for recruiting board members and staff and for cooperation and collaboration between not-for-profit organizations. It will likely be disruptive to the work force and to family life.
4. Staff of not-for-profit organizations will be personally liable for penalties and fees. They may not be willing to assume that liability.

The impact of these features of Bill 1 may be devastating for particular not-for-profit organizations and impair the ability of others to achieve their missions. They may also have a “chilling effect on interactions between public office holders and the not-for-profit sector and inhibit cooperation and collaborations within the sector and between the sector and the government.

Much can and should be done to moderate these impacts.

Appendix 1: General observations on Bill 1

In introducing Bill 1 *Lobbyists Act*, the Alberta Government has made an unequivocal statement that it intends not only to register lobbyists operating in the province, but regulate them. This legislation is one of the boldest in the country.

- It casts a very broad net in terms of who and what is captured;
- It contains prohibitions against lobbying under certain conditions;
- It authorizes the Registrar to impose administrative penalties; and
- It gives the Registrar investigative powers to ensure compliance with the Act.

Bill 1 is similar to that of other jurisdictions in

- establishing classes of lobbyists (consulting lobbyists and organization or in-house lobbyists),¹³
- requiring those lobbyists to file returns detailing their lobbying activities;
- requiring the returns to be filed with a Registrar who is located in an office with some other monitoring functions such as ethics or privacy;
- exempting communication among various levels of governments and government-like bodies,¹⁴ and government agencies from supervision;
- exempting communications in response to a request initiated by the public office holder;¹⁵
- exempting disclosure of information where that disclosure could reasonably be expected to threaten an individual's safety;¹⁶
- requiring the reporting of contributions to the organization's lobbying efforts;¹⁷ and
- making the violation of key provisions offences with significant monetary fines.

¹³ Nova Scotia is notable in creating three classes of lobbyists, one of which is lobbyists for not-for-profit organizations.

¹⁴ chiefly aboriginal self-government councils.

¹⁵ "If the Government comes courting, there's no reporting". Chase March 21, 2007 *Alberta Hansard* 285. In British Columbia to be exempt the request must be made in writing. Neither the federal LRA nor the Ontario legislation includes this exemption.

¹⁶ The LRA and legislation in British Columbia, Newfoundland, and Ontario also include such a provision.

¹⁷ Legislation in Newfoundland, Nova Scotia, and Ontario have this requirement.

Bill 1 differs from other jurisdictions with respect to

- **Who is being communicated with: the definition of public office holder**
Bill 1 captures all government employees regardless of their function as well as employees of “prescribed Provincial agencies”,¹⁸ possibly the most inclusive coverage of any statute.¹⁹
- **The extent of the content that falls within the definition of lobbying**
Lobbying consists of any communication with a public holder in an attempt to influence certain specified decisions. Alberta is unique in including “guidelines and directives” in the list of matters which trigger the application of the Act.
- **How substantial or on-going the communication must be before it triggers the application of the Act: the threshold test**
As it currently stands, a single phone call or even casual conversation with a public office holder can trigger the application of the proposed Alberta legislation. All other jurisdictions include a test for determining the extent to which an in-house or organization lobbyist must be engaged in lobbying for the Act to apply.²⁰ Most set the threshold as being “a significant part” of a person’s duties or an amount which in combination with that of others in the organization collectively amounts to the equivalent of a significant part of a person’s duties.²¹ In its legislation, Newfoundland provides that 20% of a person’s duties (or the duties of several people in combination) must consist of lobbying for the Act to apply.²² It is possible that a threshold test will be introduced in Alberta through regulations.
- **When former public office holders can begin to engage in lobbying: the cooling off period**

¹⁸ Other Acts sometimes refer to these sorts of agencies in other ways making it difficult to compare this aspect of the scope of the Alberta legislation. For example, the LRA refers to “a federal board, commission or other tribunal as defined in the *Federal Courts Act*. British Columbia’s refers to “any government corporation as defined in the *Financial Administration Act*. Nova Scotia’s refers to “an agency of government within the meaning of the *Auditor General Act*. Ontario’s refers to “any agency, board, or commission of the Crown”. Newfoundland’s legislation lists a number of such bodies specifically. Identifying agencies covered by legislation in most jurisdictions would likely pose problems for lobbyists.

¹⁹ When it is in force, the Fed AA will require more detailed reporting when the communication is with a senior “designated” public office holder.

²⁰ Not all have a threshold for consultant lobbyists.

²¹ The LRA, British Columbia, Nova Scotia, and Ontario provide that lobbying must form “a significant part” a persons duties or when combined with that part of the duties of other people collectively amounts to the equivalent of a “significant part of those duties”.

²² Ontario specifies a 20% threshold in its regulations. The federal government has adopted the 20% rule through its interpretation bulletins.

Like most other legislation, Bill 1 requires the designated filer to indicate whether any lobbying has been undertaken on the organization's behalf by a former public office holder. However, it does not prohibit such people from lobbying.²³ The Newfoundland legislation forbids anyone from lobbying for a period of 12 months after ceasing to be a public office holder. The proposed changes to the *Lobbyists Registration Act* (LRA) under the *Federal Accountability Act* (Fed AA) provide for a five years cooling off period for "designated" public office holders. Proposed amendments to conflict of interest legislation in Alberta will prohibit former ministers, deputy ministers and other designated people from lobbying for up to a year. However, it does not cover the full range of public office holders.

- **What is prohibited: "a contract for providing paid advice" to the government**

Bill 1 is unique in creating the concept of a "contract for providing paid advice" to the government and then prohibiting lobbyists from lobbying if that lobbyist or a person associated with that lobbyist is holding a contract for providing paid advice on the same subject-matter.

Conversely, no person shall enter into a contract for providing paid advice to the government if that person or a person associated with that person is a lobbyist who lobbies on the same subject-matter as that of the contract. Lobbyists have 90 days of the coming into force of this section to comply.

- **Who is captured in the prohibition: the definition of an associated person**

Aspects of Bill 1 apply not only to lobbyists but to anyone who falls within the definition of an associated person or entity. This definition is necessitated by the prohibition against lobbying when the lobbyist or person associated with the lobbyist has a contract for providing paid advice to the government on the same subject-matter. The definition is as unique as the need for it. It captures spouses and particular relationships between the lobbyist and other corporations and partnerships. It captures, as an associated person, any organization on which a lobbyist serves as a director. If two "associated" people or entities are in conflict with this prohibition, they will have two choices. One person would have to cease to lobby or provide paid advice on the subject-matter or the two associated people would have to sever their relationship with each other. One individual might be willing to defer to another's interest but it seems unlikely that one organization will readily agree to give up its lobbying

²³ The *Conflicts of Interest Act* prohibits former Ministers and former political staff members from undertaking a limited range of lobbying activities. Under the proposed Bill 2 *Conflicts of Interest Amendment Act, 2007*, the time limit of the prohibition will be increased from 6 months to 1 year. Other senior government staff will be captured as well.

or contracting activities in favour of another organization's or individual's interest. A business entity is unlikely to be willing to give up a contract for paid advice or a lucrative lobbying client in favour of a not-for-profit organization's interests. This will put staff, board members, and their spouses in difficult positions and may result in resignations or forced terminations of employment or voluntary activities. This could create serious financial and other problems for families.

- **The consequences of contravention: the imposition of administrative penalties**

Bill 1 is unique in creating a category of administrative penalties. The maximum penalty is \$25,000. These can be imposed by the Registrar if it is his opinion that there has been a contravention of the Act or regulations. The Registrar is not required to have "reasonable grounds" for the opinion or to have conducted any investigation. Administrative penalties are reviewable before an administrative panel only on appeal by the affected lobbyist. A lobbyist who pays the penalty can not subsequently be charged with an offence for the same contravention.

Although this power is subject to regulations, it seems possible for it to be abused. A lobbyist may prefer to pay the administrative penalty rather than deal with the hassle of appealing or taking the risk of being charged with an offence instead.²⁴

If a person neither pays the administrative penalty within 30 days nor appeals, the penalty is enforceable in the same way as other civil judgments – garnishee, seizures, etc. There does not appear to be a subsequent right of appeal or review if, for example, an individual only learns of the penalty after the 30 day period for appealing has lapsed. This problem may be cured by regulations dealing with personal service of notices.

- **The consequences of contravention: fines and prohibitions**

Legislation in all jurisdictions provides for fines. The fine under Bill 1 is \$50,000 for a first offence and \$200,000 thereafter. These are currently the highest fines in the country.

The maximum fine for contravening the federal legislation is \$25,000. However, the LRA further provides that where a person knowingly makes a false or misleading statement in any return or other document submitted to the Registrar, the person is liable on summary conviction to a fine of \$25,000 and imprisonment for up to six months. If proceedings

²⁴ Since Bill 1 does not provide for imprisonment for conviction of an offence, the incentive to pay an administrative penalty without protest is less than it otherwise would be.

are by way of indictment,²⁵ the fine can be up to \$100,000 and imprisonment for up to two years. The Fed AA will raise those fines to \$50,000 and \$200,000 respectively and expand the range of offences that can be proceeded with by indictment.

There is a two year time limit for commencing prosecution by summary conviction in Bill 1 and most other legislation. It runs from the date on which the contravention is alleged to have occurred. Under the Fed AA, the time limit will be raised to five years from the date on which the Commissioner becomes aware of the subject-matter of the proceedings but in no case more than ten years after the date on which the subject-matter of the proceedings arose. There is no deadline for commencing proceedings by way of indictment.

Bill 1, like other statutes, gives the Registrar the authority to prohibit a person who has been convicted of an offence from lobbying for a period of not more than two years where the Registrar believes that would be in the public interest.

The meaning given to several key terms will have a major impact on the implications of Bill 1.

- “in an attempt to influence” – It will be difficult to determine whether a communication was undertaken “in an attempt to influence”. Will the test of intention be subjective – the actual intention of the putative lobbyist – or objective – the apparent intention? Will the intention be inferred from the context or will it need to be established explicitly? Does it matter whether the person knows who the public office holder is and what they do? Will the public office holder actually have to have the ability to influence the decision? How much influence? Does it matter if the communication is too late to have any influence? How much does the putative lobbyist need to know about the public office holder’s sphere of influence? The meaning of this phrase will be critical to determining whether casual communications and communications with any public office holder regardless of function will constitute lobbying.
- “on behalf of” – the meaning of this phrase is critical to determining whether a communication between an individual and a public office holder is considered lobbying on behalf of an organization. Do organization lobbyists have to be given specific authority to lobby or do they automatically become lobbyists simply by communicating with a public office holder? Exercising the necessary discipline over board members may be difficult for some not-for-profit organizations. Tracking casual or unauthorized communications may be almost impossible.

²⁵ Provincial governments do not have the power to create indictable offences.

- “value” – The meaning given to this term will be critical in determining whether board members receive “payment” and therefore fall within the definition of lobbyist. The meaning of the term may also affect whether volunteers or members might be considered employees or consultant lobbyists.
- “advice” – The meaning to be given to “advice” will determine the scope of the prohibition on lobbying while providing paid advice to the government on the same subject matter. Will “advice” include recommendations, suggested next steps, or other kinds of feedback often required as part of project and research reports?
- “subject-matter” – The meaning given to this term will affect the scope and impact of the prohibition of lobbying while providing paid advice on the same subject matter.
- “best of the designated filer’s knowledge and belief” – The standard set will have a significant impact on not-for-profit organizations.
- “the exercise of reasonable diligence” – Is this a different standard than “best of designated filer’s knowledge and belief”?
- “in the public interest” – In several sections of the Bill, the Registrar is given discretion to do or not do certain things on the basis of what would be in the public interest. It is unclear whether this is a matter to be decided by the Registrar or if some objective test is to apply.
- “submissions” – The Act generally makes use of the term “communications” in referring to lobbying activity but exempts certain kinds of “submissions”. Clarification with respect to the differences intended by the use of those two terms is needed.

Some of these terms are unique to the Alberta legislation and require further definition and interpretation. Others may have been subject to interpretation by the courts, advisory opinions, interpretation bulletins, or practice in other jurisdictions. However, it was beyond the scope of this project to conduct the research necessary to provide opinions in that regard. Accordingly, this analysis is based on a plain reading of the Bill and the other legislation included in the study.

Issues of particular concern:

- The **scope of the legislation** in terms of the definition of public office holders and the range of matters captured under the definition of lobbying. They are probably the most extensive in the country.
- The absence of a **threshold test** means that even the briefest communication made on behalf of an organization between a person who is paid by the organization and any public office holder in an attempt to influence a decision of the sort prescribed will instantly trigger the application of the Act. It is to be hoped that this will be addressed in the regulations.
- **The meaning of “on behalf of”, “intent to influence”, and “value”** will have a significant impact on whose and what communications will be captured.
- **Tracking contributions to the organization’s lobbying activities.** Organizations will have to develop ways of identifying and tracking contributions which are often not made with specific reference to particular activities of the organization. Organizations may also have difficulty assuring those who contribute to the organization that their contributions are not used for lobbying if the contributors so specify.
- The provisions with respect to **contracts for paid advice** seem unworkable. As currently drafted they will create a nightmare for both consultant and organization lobbyists. It is quite within the realm of possibility for organizations and businesses to terminate the employment of a staff member whose spouse might compromise the organization’s ability to lobby or attract contracts for paid advice.
- **Payment of administrative penalties** may become a cost of doing business that organizations may need to provide for.
- Bill 1 provides for regulations dealing with **the cost of filing**. The regulations allow for differential fees. In other jurisdictions this has resulted in lower fees for organization lobbyists for not-for-profit organizations. In British Columbia fees for organization lobbyists are \$75 for each filing. The fees for consultant lobbyists are \$150.²⁶

²⁶ In some jurisdictions, there is no fee for online filing.

Appendix 2: The implications of Bill 1 for not-for-profit organizations

Bill 1 will have significant implications for not-for-profit organizations that have any dealings with the provincial government or any prescribed Provincial entities. However, Bill 1 introduces a number of new concepts and contains a number of provisions that are not fully explained in the legislation. It will not be possible to truly assess their impact until regulations, advisory opinions, and interpretation bulletins are developed to elaborate or clarify various aspects of the legislation. As a result some implications can only be speculative.

The proposed legislation characterizes as lobbying much of the interaction between not-for-profit organizations and the provincial government that those organizations currently take for granted as part of their work.

However, it does not cover submissions in response to a request from a public office holder, nor submissions with respect to the application or administration of various legislation, programs, policies, etc. to the organization.

To continue that communication, not-for-profit organizations will need to register, track and report on lobbying by any staff and board members who receive any sort of payment, and will need to put policies and practices into place that

- ensure that board members and staff understand the implications of the *Lobbyists Act* for the organization and understand the organization's policies and procedures in that regard;
- ensure that board, staff and volunteer recruitment, selection, retention, and recognition practices do not expose the organization to liability under the legislation;
- identify which, if any, prescribed Provincial agencies they deal with;²⁷
- establish who can and cannot communicate with provincial government officials, staff and prescribed Provincial agencies on behalf of the organization;
- ensure that appropriate records of all affected communications are maintained;
- ensure that prospective communication can be adequately forecast;
- ensure that contributions to the organization in amounts over \$1000 to support lobbying activities are tracked;²⁸
- determine if the organization will be entering into contracts for paid advice and, if so, identify who, if anyone, might fall under the category

²⁷ Organizations are assumed to be able to recognize when they are dealing with an employee of a provincial government department. If that is not clear to their lobbyists, a list of those departments and their staff would need to be prepared as well.

²⁸ It is unclear how an organization is to determine the purpose for which contributions are made.

- of associated persons and set up processes for monitoring their activities, and preventing or dealing with conflicts; and
- ensure that reports on lobbying activities are properly filed every six months and updated as required.

Not-for-profit organizations that are also registered charitable organizations will have to ensure that their activities and records conform not only to the restrictions on advocacy as defined pursuant to the *Income Tax Act* but also those on lobbying under the proposed provincial legislation and the LRA, if appropriate.

The definitions of lobbying and advocacy, the thresholds required for reporting, and what needs to be reported vary from legislation to legislation. This will be very challenging for not-for-profits to understand and deal with effectively.

These new requirements will represent a considerable burden for not-for-profit organizations.²⁹

Organizations may need assistance from legal and other experts to ensure that they understand and address legislative requirements appropriately. Organizations may find that advice is expensive or not available in their communities. Putting appropriate measures into place will require organizations to acquire new resources or reallocate resources currently used for some other purpose. Considering the importance for many not-for-profit organizations of communicating with the provincial government, it will be imperative for many to have those policies and procedures in place as soon as the proposed legislation comes into force.

The meaning given to the words “on behalf of”, “value”, and “intent to influence” could make this legislation a nightmare for not-for-profit organizations who may have difficulty maintaining records or exerting any control over their board members or even staff in some instances.

Many organizations provide honoraria, stipends, or various in-kind benefits, gifts, and tokens of appreciation to their board members. Depending on the meaning to be given to the words “value”, not-for-profit organizations will need to review their practices with respect to recognizing, rewarding, or compensating board members for their contributions to the organizations. This will become critical depending on the meaning of the words “on behalf of”. If the words are meant to capture anything a board member might say in support of the organization’s activities or positions, it may be imperative to keep board members out of the ambit of the legislation by ensuring that they do not receive anything of value as a result of their involvement with the organization. Strict discipline may need to be imposed on staff to ensure no “unauthorized” lobbying takes place. However, if the words are intended to limit the application of the Act to only those people who have been given explicit authority to speak on behalf of the organization, then communication

²⁹ if they have any lobbyists within the meaning of the proposed legislation.

by staff and board members who have not been so designated should not pose problems for the organization.

Creating and implementing effective policies with respect to lobbying will cause particular problems for organizations that have board and staff members who are not proficient in English or who suffer from disabilities that make it difficult for them to comprehend the provisions of the proposed legislation. It may also adversely affect participation of individuals whose experience under repressive regimes makes them very cautious about participating in activities requiring this type of government supervision.

Organizations will need to review the composition of their boards, advisory committees, volunteers, and members to determine if any are public office holders.

If board members or anyone attending meetings is “paid” within the meaning of the Act, then board and other committee meetings and conversations with volunteers or members who are public office holders that could be considered as attempting to influence certain types of government action would have to be reported. Since many paid Executive Directors and other staff are needed at these meetings and staff needs to deal with volunteers and members, organizations may have to reconsider having public office holders as Board and committee members or as volunteers or members. Given the breadth of meaning of public office holders, this could have a major impact on the ability of organizations to constitute effective boards and committees and to recruit volunteers and members.

Depending on the meaning of “with the intent to influence”, anyone who lobbies “on behalf of” an organization will need to be particularly vigilant in their social and personal lives lest they find themselves engaged in a conversation with a public office holder that they are required to report.

The breadth of the proposed legislation makes this a particularly troubling matter. As the legislation is currently drafted, the family of a public office holder will need to be careful what they talk about lest they find themselves lobbying the public office holder or putting an employer or not-for-profit organization in jeopardy of contravening the prohibition of lobbying and contracting for paid advice on the same subject matter at the same time.

Not-for-profit organizations may have difficulty determining when contributions are being made in support of the organization’s lobbying activities.

Most donors and funders do not specify that their contributions are for the lobbying activities of the organization. Indeed many would not consider their activities to constitute lobbying. Funders and donors may need to be educated on this point. Otherwise they may begin imposing restrictions on their funding that severely limit an organization’s ability to do its work.

Not-for-profit organizations that provide paid opinions to the provincial government will have to be careful who represents them on boards or

committees pertaining to the same subject-matter, and who provides opinions on behalf of the organization *gratis*.

To minimize the burden of tracking and reporting lobbying, some organizations may find it feasible to only have individuals who are not paid communicate with public office holders on behalf of the organization. This could have a significant impact on the amount and quality of input public office holders receive from not-for-profit organizations on subjects within their area of expertise. The current loop hole regarding requests initiated by the public office holder may provide some relief.

The implications of the prohibition for spouses and for associated entities are complex and will give rise to a great deal of turmoil. Spouses will have to choose between their respective employers and their respective volunteer activities.

The difficulty in interpreting various provisions in the Act may result in either over-compliance or under-compliance by organizations.

Many not-for-profit organizations may misunderstand the application of the proposed legislation for their organization and may either fail to report activities that they should or be overzealous in reporting. Both extremes can have a negative impact on how the sector is viewed by the public.

The absence of a threshold test, the demands of these requirements, and the prohibitions related to contracts for paid advice will likely have a chilling effect on the extent of community/government engagement.

Organizations will be apt to think twice about becoming involved in activities that will incur reporting obligations that they may find onerous or that expose them or others to being in contravention of the Act.

Appendix 3: Terms of this study

In April 2007, The Muttart Foundation commissioned this study to identify implications of Bill 1 *Lobbyists Act* (as it existed as of April 15, 2007) for not-for-profit organizations. The analysis and findings of this study address only implications for an organization with respect to lobbying from within the organization, not the implications of retaining a consultant lobbyist. The study also only considers the implications for a not-for-profit organization that is not a funding agency (e.g. a private foundation) nor an umbrella agency (e.g. an association of not-for-profit organizations). Nor does it include an examination of the issues for students' unions, research institutes, parent/teacher associations, hospital auxiliaries, and similar organizations that exist to assist or advise Provincial entities in establishing their policies and accomplishing their missions.

Issues arising from the proposed legislation were identified by comparing Bill 1 with statutes from selected jurisdictions in Canada and by reviewing related documents including discussions in the Legislature as reported in *Alberta Hansard*, March 7,³⁰ 20,³¹ 21,³² 22.³³ The provisions of 2007 Bill 2 *Conflict of Interest Amendment Act, 2007* were included where relevant. The issues disclosed from this analysis were then reviewed for their potential impact on not-for-profit organizations on the basis of the research team's experience in dealing with small and medium-sized not-for-profit organizations.

The following provisions of the Alberta legislation were included in the study:³⁴

- s.1 Interpretation
- s.3 Restrictions on the application of the Act
- s.5 Duty to file a return: organization lobbyist
- s.6 Contracting prohibitions
- s.7 Payment information
- s.11 Registrar
- s.15 Investigations
- s.17 Report
- s.18 Administrative penalties
- s.19 Offences and penalties
- s.20 Regulations
- s.21 Review of Act
- Schedule 2 – Organization Lobbyist Return

³⁰ p. 5

³¹ p. 232

³² p. 284.

³³ p. 303

³⁴ Sections excluded: other definitions including s.1(1)(m) definition of undertaking; s. 2 – Crown bound; s. 8 – Submission of documents in electronic or other form; s.9 – Certification of documents and date of receipt; s.10 – Subsequent filings; s.12 – Public access to registry; s.13 – Storage of documents and use of documents as evidence; s.14 – Advisory opinions and interpretation bulletins; s.16 – Limit on liability; s.22 – Coming into force.

The following legislation was compared with Bill 1,³⁵

- Federal: *Lobbyists Registration Act*, 1985, C.44 (4th Supp) and regulations - referred to in this report as the “LRA”;³⁶
- Federal: The proposed *Federal Accountability Act*, Statutes of Canada c. 9 (unproclaimed, as it existed as of April 15, 2007.) - referred to in this report as the “Fed AA”;
- British Columbia: *Lobbyist Registration Act*, [SBC 2001} c. 42;
- Newfoundland and Labrador: *Lobbyist Registration Act* SNL2004 c. L-24.1 and regulations;
- Nova Scotia: *Lobbyist Registration Act. 2001,c.34, s.1* and regulations;
- Ontario: *Lobbyist Registration Act, 1998* (as amended: 2002, c. 17, Sched. F, Table; 2002, c. 18, Sched. K, ss.12, 13; 2006, c.21, Sched. F, s.118; 2006, c. 35, Sched. C, s. 62) and regulations.

This study was carried out under the direction of Professor Lois Gander, Faculty of Extension, University of Alberta with the assistance of Teresa Mitchell, Legal Research Officer, Legal Resource Centre; and Lynn Parish, Law Another Way Inc.³⁷

³⁵ Quebec’s *Lobbying Transparency and Ethics Act* R.S.Q. c. T-11.011 was excluded from this study.

³⁶ When it comes into force, the *Federal Accountability Act* will change the name of the *Lobbyist Registration Act* to the *Lobbyist Act*.

³⁷ Special thanks to Laird Hunter, Q.C., Richards Hunter; and Sean Moore, Gowlings for sharing their insights.



Legal Resource Centre of Alberta Ltd.