CASE COMMENTS AND NOTES

THE LAWYER AS LOBBYIST

I. INTRODUCTION

Traditionally, the lawyer's role has been viewed in the narrow context of service to the interest of his clients. This perspective has allowed the lawyer to tender advice to and order the affairs of his clients; and whenever necessary, to articulate his client's interests in the appropriate forum.

For the most part, this traditional view of the lawyer's role represents the prevailing and dominant role of most lawyers today.

But law and lawyering are rapidly changing. The legal profession and society at large have come to recognize other legitimate roles for lawyers including social activism and service to previously underserviced segments of our community.

The legal profession has always been regarded in terms of its many facets. However, some activities have been viewed as being below professional dignity and not in keeping with a perceived status. The present day lawyer is not confronted with the same problems, although some members of the profession still react with disdain to the new lawyering. But clearly, more roles than ever are legitimately reserved for the modern lawyer. Law is becoming truly a multi-dimensional profession.

Lawyers have always lobbied. However, with the proliferation of law and the view of some that no segment of our society nor any facet of modern life is free of at least some form of legal regulation, the opportunity for lawyers to exercise a lobbying function as part of their professional lives is greater than ever. And this is compounded by the enormous complexities of recent and proposed legislative enactments.

In short, the lawyer as lobbyist, although not a new phenomenon, is an integral part, if not the entirety, of the professional lives of many lawyers. It is conducted in a somewhat clandestine manner and is very lucrative for those who engage in it. More important, however, it has far-reaching implications for society in general, and the business community in particular. And moreover, it raises some interesting questions about the legal profession and ethical standards. Indeed, many lawyers have become truly adept at this lobbying function, a political art which they have mastered with both great finesse and expertise.

II. LOBBYING AS PART OF THE CANADIAN POLITICAL SYSTEM

Lobbying, to be sure, is an integral part of the Canadian political system. It may be defined simply as the exerting of influence on decision-makers. This may be conducted in a variety of fashions, but most usually, it is done through the vehicles of pressure and interest groups. It occurs at all levels of government and affects decision-makers in ministerial, legislative and bureaucratic capacities.[1]

[1] On at least the federal level, a fundamental distinction can be made between Canadian and American lobbying practises. Lobbying in Canada is geared primarily to decision-makers at the Cabinet level, with the exception of some efforts aimed at the bureaucracy and some efforts expended in connection with our

Generally speaking, lobbying serves a useful informational input function; albeit one-sided and sometimes conducted in an objectionable manner. Decision-makers often look to lobbyists in order to amass data, statistics, and other forms of information. In addition, some political scientists have regarded lobbying in terms of providing a purified form of interest articulation. This, it is argued, can be contrasted with political parties which aggregate various interests along given ideological lines; and by this aggregating process, tend to dilute any forceful articulation.

It has also been suggested that some decision-makers look to lobbyists for assistance in connection with the drafting of proposed legislation.

Interestingly, there has been very little empirical research conducted by Canadian political scientists as to the extent that lobbying is practiced in our political system. One notable exception is that of Professor Robert Presthus of York University.[2]

Many people simply do not believe that lobbying is a widespread phenomenon in Canada. As Professor Presthus wrote in connection with his research, "[a]nother reaction encountered occasionally during our research was that 'lobbying' just did not exist in Canada."[3] Moreover, along similar lines, Professor Presthus concluded:[4]

> In sum, the evidence suggests that interest groups and their agents play a functionally essential and widely legitimated role within the Canadian political system, an appreciation that calls into question the conventional tendency to characterize them as a normatively and operationally marginal element in that system.

Moreover, consider the following recent commentary appearing in The Financial Post, February 19, 1977, at p. 3:

> . . . the role of the lobbyist—or as most of the Canadian variety prefer to call themselves, consultants—continues to intrigue Members of Parliament. The issue, like a hole in a tooth, is one MP's just can't resist worrying with their collective tongue.
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> Recently the House debated two private member's bills . . . to try to bring lobbyists under some form of control. The bills themselves will go nowhere.
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> The bills are almost identical . . . and both would require lobbyists to register their names, clients and the duration of any contracts. [One] bill includes penalties for noncompliance of up to $5,000 a month.
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> [Conservative House leader Walter]Baker regards lobbying as 'an important and absolutely necessary part of democratic government.' But what worries him, and other MP's, is the potential for undue pressure on behalf of special interests. To avoid that, he wants as much lobbying as possible to be carried out in the open 'so people can see who is trying to influence what.'
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> But turning a noble sentiment into a practical reality isn't that easy. The three or four members who debated the issue seemed agreed on one thing: that any legislative move to control lobbying raises more questions that it resolves.
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> What, for one, is a lobbyist? Is a Toronto corporate executive who bends the ear of a visiting cabinet minister, or MP, lobbying? Should he register? Is he a lobbyist if

Parliamentary committee system. The latter exception often affords the interest group a unique opportunity to air its views in a national forum. However, that notwithstanding, the lobbying of members of the House of Commons is not generally regarded as a productive exercise. In the United States, however, the contrary is true, in that the influencing of members of both houses of Congress is considered vital to an effective lobbying effort. The reason for this likely goes to the very distinction between our respective systems of government. In the United States, despite recent controversy over growing executive power, great authority is vested in Congress, arising out of the U.S. constitutional division of powers. This may also explain why U.S. federal regulation of lobbying only pertains to the registration of Congressional lobbyists.

[2] *See* Presthus, *Elite Accommodation in Canadian Politics* (1973); and Presthus, *Elites in the Policy Process* (1974). *See also* Pross (ed.), *Pressure Group Behaviour in Canadian Politics* (1975).

[3] Presthus, *Interest Groups and the Canadian Parliament: Activities, Interactions, Legitimacy and Influence*, (December 1971) Canadian Journal of Political Science 444 at 445.

[4] *Id.* at 460. *See also*, by way of general background, Corry and Hodgetts, *Democratic Government and Politics* (1959) at 299.

he flies to Ottawa to do the same thing? Is a consultant in Ottawa lobbying if he phones a civil servant, or just seeks information? If the civil servant phones the consultant for reaction to a proposed policy change, is that lobbying? From the MP's point of view: when does assistance to constituents become activity on behalf of a lobbyist?

III. WHY LAWYERS ARE SUITABLE FOR LOBBYING

It is not at all surprising that some lawyers are engaged in a lobbying capacity. For lawyers, generally, are uniquely suited for this type of role.

Members of the legal profession possess an understanding of law, legal remedies, and the legislative process. In addition, they have an appreciation of the intricacies of our political and decision-making machinery. As a result of formal legal education as well as the practice of law, lawyers generally have the ability to define precisely the material issues in a given concern and to provide the organizational machinery to articulate that concern. Moreover, lawyers are able to use the judicial system to provide legal remedies in support of a given cause.

Moreover, consider the following observation made by Johnstone and Hopson in their treatise, *Lawyers and Their Work* (1967):

> Lawyers are peculiarly well qualified as lobbyists. Lobbying is a form of advocacy which in many respects resembles litigation. An understanding of legal doctrine is often important in lobbying as are familiarity with the formal and informal procedures of government decision making and facility at oral and written expression. Also, many lawyers are active in politics, generally an asset in lobbying.

Perhaps the lawyer's greatest asset in this lobbying function is accessibility. Clearly, to promote a successful lobbying effort, one must have accessibility to decision-makers. And, since many decision-makers are themselves lawyers, this cannot help but assist the lawyer as lobbyist. It has been said that "no one talks to a lawyer as well as another lawyer."[5] Some might even agree that no one understands a lawyer as well as another lawyer. At any rate, no one listens to a lawyer as well as another lawyer.[6]

In the United States, it is not unusual for major corporations to send persons to Washington as full-time lobbyists. For example, one may recall the 1972 scandal involving Mrs. Dita Beard who was a registered lobbyist employed by I.T.T.[7] In a recent treatise by Robert Miller and J. D. Johnson, there is a discussion of the advantages and disadvantages

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[5] Johnson and Miller, *Corporate Ambassadors to Washington* (1970).

[6] In this connection, the reader might refer to an article written by Professor Thorburn of Queen's University where a study was made of pressure groups in Canadian politics. Professor Thorburn uses as his model revisions of the Combines Investigations Act in the early sixties. In particular, in discussing evidence tendered before the Commons Banking and Commerce Committee, Professor Thorburn states that "[g]enerally the lawyers and business executives were heard with great respect." (Thorburn, *Pressure Groups in Canadian Politics: Recent Revisions to the Anti-Combines Legislation* (May 1964) 30 Canadian Journal of Economics and Political Science 157 at 171.) This is not surprising in that one-third of all members of the legislative branch and almost two-thirds of the Cabinet are members of the legal profession.

[7] Very recently, there has been considerable controversy in the United States arising out of the use by foreign nations of Washington lobbyists to promote and advance the interests of those foreign nations. In discussing this phenomenon, journalist John W. Finney wrote the following in the New York Times, dated October 3, 1976:

> If a foreign country wants to be sophisticated, and thus above reproach in its lobbying, it goes out and hires a prestigious lawyer who once used to be a politician or a diplomat. Before his death Dean Acheson, Secretary of State in the Truman Administration, represented South African interests as a Washington lawyer. William F. Rogers, who held the same post for former President Nixon, now represents France. J. W. Fulbright, who as Chairman of the Senate Foreign Relations Committee, conducted hearings 15 years ago exposing foreign agents, particularly in the sugar lobby, is now registered as a foreign agent representing the United Arab Emirates. There is nothing illegal about this arrangement, so long as the lawyers [are] registered as foreign agents, and it is mutually beneficial. The lawyers draw down large retainers, and the foreign countries obtain a respected conduit for their views.

of lawyers exercising the role of Washington representatives. Although this is somewhat unrelated to the type of lobbying practiced in Canada, it does shed some light on the lawyer's suitability for this type of work. In particular, the authors suggest the following factors as relevant:[8]

> There were many and varied reasons for preferring a training in law. Basic among them were:
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> The Washington Representative, if he deals mainly with the legislative branch, is communicating with persons trained in the law and, 'no one talks to a lawyer as well as another lawyer.'
>
> Legal training provides the Washington Representative with a thoroughness and a broad outlook that is necessary to conceptualize the types of problems with which he deals.
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> Training in the law gives the Washington Representative the basis for understanding the legislative process. As one Washington Representative explained: 'If he wears a legislative liaison hat, he should have a broad knowledge of the rules, procedures, operations, and activities of the legislative branch of government.'
>
> By virtue of his training and experience an attorney is more sensitive and knowledgeable politically than those trained in other professions. This is important so that he may give his company the benefit of his interpretation: He should have a fairly well-grounded knowledge of his company's policies in the legislative and political fields so that he can interpret to his contacts the company's feelings on matters coming before or proposed by the legislators.
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> [The reasons given for not preferring a training in law were]:
>
> The Washington Representative should have an education more in line with the firm's objectives and a lawyer, like any other specialist, can be hired as needed. . . .
>
> Attorneys do not have the technical expertise required to handle the problems of many firms that have a technical orientation. . . .
>
> Those trained in the law tend to approach all problems with a legal methodology. Because of this they may miss the opportunity to use other approaches that would be more practical in the long run.

In addition to the foregoing, many lawyers are particularly suited for this lobbying function arising out of the opportunity to use the legal office, position and title to achieve gain. For example, the senior partner of a firm might be serving a public relations function, or alternatively, he might be exerting influence in a non-practicing capacity; for example, as a Senator.[9] Moreover, senior members of the profession often have many contacts with the business community and the economic elite—some, in fact, hold multiple corporate directorships—all of which provides the lawyer/lobbyist with both resources and clients.[10]

[8] Johnson, J. D. and Miller, R. W., *supra*, n. 5 at 24-25.

[9] In this connection, *see* Thomas, *The Senate is Safe So Long As It's Silent* (December 1972) Saturday Night at 12, where there is a discussion of the Senator's role as lobbyist. In particular, it is pointed out that 37 Senators enjoy extra incomes arising out of multiple corporate directorships. Moreover, the members of the Senate share 180 corporate directorships and 53 senior executive positions including eight bank directorships. It is further pointed out that some years back, Senator John J. Connolly's name was displayed in an Ottawa office building occupied by British-American Oil as the latter's "Government Representative." *See also* Newman, The Canadian Establishment (1975).

[10] Professor John Porter, in his respected treatise, *The Vertical Mosaic* (1965), points out the high inter-relationship among the various elite groups in Canada. For example, many persons occupying positions within the economic elite also occupy similar high strata positions among the political elite, and so on. With particular reference to lawyers, Professor Porter states at 277-8:

> The second large functional group with professional training consisted of lawyers who have the task of guiding corporations through the confusion of statute, judicial decision, and legal fiction. This legal framework through which corporations work is as important to their operations as are the technical conditions of production. The lawyers provide legitimacy, both juridical and psychological, to the firm's activities in a complex technological epoch. There were 108 lawyers (14.2 per cent of the elite) who were all trained in universities or law schools in Canada. It is the law firm rather than the legal department of the corporation which is the route to the board room. . . . Some of the larger firms in the big cities employ as many as thirty to thirty-five lawyers, and so provide a range of specialized talent. Some of Canada's high ranking corporation lawyers are credited with important roles in such corporate activity as mergers, reorganization schemes, and the defining of rights of different groups of bond and shareholders.
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> A few law firms in Toronto and Montreal were particularly prominent in the corporate world, several partners of each having directorships in more than one of the dominant corporations. One firm in

IV. MODES OF INVOLVEMENT

The term "lobbying" actually embodies a whole range of diverse activities. The most significant and far-reaching activity concerns specific lobbying efforts on behalf of particular clients; or the co-ordination of a comprehensive lobbying plan for a particular group of clients. However, the following is a list of the various other capacities in which lawyers exercise this lobbying function:

(1) A reputable firm or prestigious senior partner is often utilized to represent and articulate a specific interest on behalf of particular clients. As indicated earlier, the senior partner may really be exercising a public relations function, or perhaps, exerting influence through his contacts with the business and/or political elite. This type of lobbying is usually restricted to the resolution of particular problems on behalf of the firm's long-standing corporate clients.

(2) A large Ottawa firm is often used by corporations and law firms elsewhere to assist them in particular matters. The Ottawa firm may specialize in those areas of the law that require close proximity to the federal bureaucracy (for example, patents, trade marks, and copyrights). Or, the Ottawa firm may assist those clients who require the initiation of private legislation (for example, the incorporation of insurance companies). In addition, some Ottawa firms engage in representing their clients' views to decision-makers on matters of policy.[11]

(3) A lawyer may act as counsel to an interest group. This is sometimes done on a full-time basis, especially if the interest group is one of approximately two hundred such groups in Canada having substantial membership.[12] A particularly striking example of a large and powerful interest group is the Canadian Manufacturers Association.[13]

> Montreal had four partners in the economic elite and together they held ten directorships in the dominant corporations. . . . The lawyers might be called the intellectuals of the corporate world from the point of view of their academic training and, in some cases, high achievement, but their intellect is rather narrowly directed. The law firm is an additional social nucleus within the structure of the economic elite, and like the law school constitutes another area of interaction which makes for social homogeneity of the elite.
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> Lawyers also provide a link between the corporate and the political world. Sixty-one of them had political affiliations, about equally divided between Liberal and Conservative parties. Twenty-two had held political offices in federal or provincial cabinets, the courts, or the Senate, and a further six had been M.P.'s or members of provincial assemblies. Fifteen dominant corporations, two banks, and an insurance company were "represented" in the Upper House by Liberal lawyer senators. Lawyers interlocked considerably within the dominant corporations. The 108 held 176 (16 per cent) of the directorships in the dominant corporations, 36 (19 per cent) of those in the banks, and 17 (19 per cent) of those in the life insurance companies.

Moreover, Professor Porter points out on page 391:

> Lawyers predominate even more at the higher levels of the political system. Two-thirds (64 per cent) of the political elite were lawyers. When the judges are removed from the group the proportion remains high. Sixty per cent of the federal cabinet ministers were lawyers. . . .

[11] This type of lobbying is widespread and common in the United States among Washington law firms. These firms often engage the services of former Senators, Cabinet members, and other influential persons. However, this type of lobbying ought to be distinguished from the professional registered lobbyist, often employed or retained by large corporations. In Canada, there are few persons engaged in the latter type of lobbying. The few, however, are well-known in Ottawa circles, and remain unregistered and unregulated. In this connection, Corry, J. A., and Hodgets, J.E., *supra*, n. 4 at 324-5, state as follows:

> Some of the highly organized [interest] groups have their headquarters in Ottawa, but many have not, and rely instead on the sending of occasional deputations or on the securing of the services of a parliamentary agent. There are few permanent lobbies in Ottawa of the kind found at every turn in Washington . . . and although they have a considerable clientele they are not highly successful in negotiating favours.
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> It may be noted that the term "parliamentary agent" is often used in various contexts, and has been used on occasion to refer to each of the foregoing types of lobbyists.

[12] Notwithstanding this, interest groups often retain outside counsel for special purposes. And, naturally, this is always the case if the interest group is an ad hoc organization established for a special purpose.

[13] *See* Francois Lemieux, *Lobbying Plus—The C.M.A.*, in Fox (ed.), Politics: Canada, Problems in Canadian Government (2d) (1966) at 33. In the article, the writer points out the large size of the C.M.A. and the extent of its activities. In particular, Lemieux states at 33:

(4) Lawyers themselves collectively represent their own views of law, society, and their profession through the vehicle of the Canadian Bar Association. This is done often at the level of the various provincial branches, or perhaps, through one of the various specialty sections. In this capacity, lawyers have made their views known on such matters as tax reform, competition policy, and other areas of recent concern. Clearly, the Canadian Bar Association is one of the most effective and influential interest groups in Canada.

(5) Another type of lobbying in which lawyers engage involves representations before boards, commissions, and inquiries, This may take the form of representing a client's interest, or on occasion, it may involve a lawyer's personal submission, particularly in matters of law reform and other professional concerns. For example, a judge, or a prosecutor, or a practitioner may draw on his own experience in making a representation before the Canada Law Reform Commission in the area, for example, of criminal law and evidence.

(6) There is another type of lobbying which, by its very nature, is objectionable. This lobbyist is often referred to as the political "bagman". Essentially, the "bagman" solicits substantial contributions to political campaign funds of a given political party. The contributor then asks for and expects leaders of that party, once in power, to return the favour.

The "bagman" need not limit his activities to the individual contributors.[14] Frequently, political contributions are made by large interest groups. This is particularly important since a larger group can often donate far more funds than individual contributors. As a result, the interest group might easily come to expect a far greater reward for its assistance. It is a political reality that government often perceives its primary function in terms of retaining power. In this connection, Professor Presthus concludes that ". . . interest groups would seem to be vital here in providing campaign support, defined to include mainly the contribution of funds."[15]

The "buying" of influence, through political contributions is probably

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> The Association is well-equipped to carry out its many activities. It had a total income in 1962 of $752,957, stemming for the most part from the dues of 6,271 member firms which represent more than 75 per cent of Canada's manufacturing capacity. . . . It is organized into six divisions, 64 city branches including all 10 provincial capitals and Ottawa and 10 affilitated trade sections. . . . Including its divisional people the CMA has a permanent personnel of 104 of whom 70 are experts engaged in activities geared to promote manufacturing interests.

Moreover, referring to its activities, Lemieux further states at 34-35:

> Though traditional analysis of pressure group functions emphasizes those activities which tend to influence the legislature, the increased use of delegated legislation and ministerial discretion indicates the importance of influencing the executive. Some orders-in-council may be as important as the Act under which they are decreed. It is in this area that the CMA is perhaps most effective in promoting its causes. . . .
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> The CMA also seeks administrative interpretations of acts which are favourable to its members. Association officials visit the Directors of Investigation and Research of the Restrictive Trade Practices Commission to discuss the interpretation and administration of acts relating to mergers, monopolies and combines . . .
>
> Another facet to this technique is CMA's participation on regulatory boards and advisory commissions to ensure that the effects of regulations on manufacturing will not be overlooked. At the national and international level CMA nominates or holds membership in 35 organizations. . . .
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> However, the standard technique of lobbying is not overlooked. The CMA sends numerous briefs to ministers concerning budget resolutions, prospective legislation and bills passing through the House. Annually a delegation visits Ottawa to interview all the cabinet ministers and most of the deputy ministers.

[14] Nor should he limit his activities to individual corporate contributors. The 1972 Washington controversy respecting I.T.T. and its donation to the Republican party indicates clearly the major extent of corporate involvement in this type of lobbying.

[15] *Elite Accommodation in Canadian Politics, supra*, n. 2 at 452.

the most clandestine and objectionable type of lobbying. At the same time, it is offensive to the spirit, if not the letter, of existing and/or proposed canons of legal ethics. In short, it is clearly an unacceptable manner of influencing decision-makers, and might perhaps, in its more virulent forms, be regarded as repugnant to liberal democracy.

V. TECHNIQUES OF LOBBYING

In a subsequent section of this paper, an examination will be made of the particular techniques utilized by lawyer/lobbyists in respect of the revisions to the Combines Investigation Act enacted in the early sixties. However, the present section will examine, generally, the techniques used by lobbyists in exerting influence, as well as particular illustrations of their application.

One view is that "[t]he principal reliance of the interest groups is on direct contact with the government".[16] However, the more important lobbying techniques are outlined by Professor Presthus:[17]

> These comprise what might be called the groups' tactical weapons, including joint lobbying by several organizations having a common objective; formal submission of briefs to cabinet and committees; personal interactions with ministers and their executive assistants; personal contacts with MPs and higher civil servants; testimony before committees; and a rather more generalized function which we have called 'mobilizing public opinion'. . . .
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> The 'mobilization function' also includes the efforts of groups to build public support for such positions once they have been rationalized.

In addition:

> Informal group meetings were ranked second and it is clear from other evidence that ad hoc strategy meetings among MPs and lobbyists who share similar views on an issue provide a common means of group access into the legislative process. . . . [However] using a social occasion to discuss legislation or political issues is generally regarded as gauche, and may even back-fire on the lobbyist who attempts to do so!

Depending upon the type of lobbying effort, the following is a summary of the four major techniques that may be used:

(1) Direct contact (by mail, or through personal or social interaction) with decision-makers.

(2) Indirect contact (through the mobilization of public opinion or the mobilization of opinion of that particular segment of the public that is concerned with the particular issue at hand); this can be done through speeches (to the local Chamber of Commerce or Board of Trade, for example), or through articles written in publications which are geared to a particular type of reader (for example, the various financial and business publications in Canada), through other contacts with members of the economic/political elite, or through various other indirect methods.

(3) Participation in the legislative process (through the tendering of evidence at Parliamentary committee hearings or the submission of briefs to members of the executive).

(4) Participation in the judicial process through actual initiation of the legal process[18] or through the interested third party or *amicus*

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[16] *Supra*, n. 4 at 324.

[17] *Elite Accommodation in Canadian Politics, supra*, n. 2 at 449-451, 459.

[18] This method is presently being used by environmental protection interest groups (such as the Environmental Law Association) through private law suits (including attempts at class actions) as well as privately-initiated quasi-criminal prosecutions.

curiae type of intervention.[19]

It appears that most lawyer/lobbyists prefer indirect methods, exerting influence on federal decision-makers through the use of the media, through co-operative efforts with provincial governments, and ultimately through the mobilization of public opinion. Most tend to view the writing of briefs as having some merit, but generally do not regard it as being the most effective technique. Direct contact with federal decision-makers is not viewed as particularly productive.

One Toronto lawyer, rather than emphasizing specific techniques, takes the view that "a perspective in time and in space is essential for anyone involved in the policy process."[20] The same lawyer views lobbying, or "policy criticism" as involving two aspects:[21]

> Policy criticism itself has two aspects. The first aspect is more inward-looking, and is directed toward the viability of the specific structure of a particular policy system in and of itself. . . .
>
> The second aspect of policy criticism is more outward-looking and is directed toward the several impacts of the existing or proposed new system on the political, economic, social and cultural environment.

Furthermore:

> . . . policy proposals need to be examined from a deeper perspective than we have been used to applying—one which places the rule of law and the balance of society as the major tests of new proposal for more government, and that aims at strengthening ordinary individuals and the institutions, public and private, which are most accessible to ordinary individuals.

Moreover, the role of the lawyer in this process is viewed as follows:[22]

> It is thus clearly a matter of vital professional concern to lawyers. But it is also a matter where the lawyer's skills at achieving some dispassion, of searching out and weighing up arguments and evidence, at finding a basis for common assent and of presenting an effective case as part of a larger process of decision-making, are all badly needed for the benefit of all.

VI. COMPETITIVE LEGISLATION: A STUDY OF COMPREHENSIVE LOBBYING EFFORTS

The legislative history surrounding the enactment of competition legislation through Canadian history is illustrative of a large, partially, concerted lobbying effort. More significantly, it is illustrative of a highly successful lobbying effort.[23]

For example, in 1959 and 1960, the Government had proposed several revisions to the existing Combines Investigation Act. These 1960 revisions to some extent followed the earlier report of the MacQuarrie Committee. After the Diefenbaker government assumed power in 1957, it

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[19] An example of this is an intervention a few years ago of the Ontario branch of the Canadian Bar Association in the Ontario Court of Appeal. That case was a reference heard under the Ontario Constitutional Questions Act respecting Section 26 of the Planning Act. The Canadian Bar Association urged the Court of Appeal not to answer the several hypothetical questions posed by the Ontario government respecting the validity of various land titles.

[20] Address given by W. A. Macdonald, *The Isaac Pitblado Lecture*, Winnipeg, Manitoba; May 5, 1972.

[21] *Id.*

[22] *Id.*

[23] For examples of comprehensive lobbying efforts in other fields, the reader may refer to:

(a) Labour Relations—Kwavnick, *Pressure Group Demands and the Struggle for Organizational Status: The Case of Organized Labour in Canada*, (March 1970) Canadian Journal of Political Science at 56.

(b) Land Use Planning—Langois, *Urban Lobbying in Canada*, (1972) 12:1 Plan at 67.

(c) Taxation—The history of recent tax reform from the Carter Commission to the White Paper to Bill C-259 and subsequent amendments represents a further example of a large and comprehensive lobbying effort.

proposed a review of existing competition legislation; following which it further proposed various revisions which were incorporated into the bill of June, 1959. The proposed enactment was not passed. However, a further bill was introduced one year later, debated in Parliament (including hearings before the Banking and Commerce Committee) and eventually enacted into law. At each stage of the legislative process, from 1957 to 1960, there were intense lobbying efforts conducted by various interest groups.

The history of the foregoing is outlined in an article entitled *Pressure Groups in Canadian Politics: Recent Revisions of the Anti-Combines Legislation.*[24] In the article, Professor Thorburn points out the various interest groups which made representations to the government and the methods that they employed.

In particular, the specific methods used by the lobbyists of 1957-60 are set out as follows:

(1) A large number of submissions in the form of written briefs were tendered to the Minister of Justice, who, at the time, was the Minister responsible for the administration of the Combines Investigation Act. Most of these briefs came from trade associations and were drafted by lawyers skilled in competition law. Some, however, were drafted without legal assistance, and some even took the form of personal letters and telegrams to the Minister.

(2) Many persons appeared before the House of Commons Standing Committee on Banking and Commerce, including representatives of numerous trade associations as well as members of the academic community.

(3) Some lawyer/lobbyists supported their positions by writing articles in sympathetic publications; similarly, some lobbyists delivered speeches to sympathetic members of the business community. Professor Thorburn points out that, on occasion, trade associations bolstered their written and/or *viva voce* submissions by making reference to these articles and speeches.

(4) In addition, there was some direct personal contact in the form of delegations representing various trade associations attending at Ottawa.

Professor Thorburn also indicates clearly the significant role played by lawyers in the foregoing process. For example, he points out one distinction between representations made by interest groups on behalf of retail merchants and those made on behalf of big business. In particular, "[big business] worked through the personal influence of prominent business leaders and elaborate briefs prepared by skilled lawyers."[25] For example, he states that the late Senator, (then practitioner) M. Wallace McCutcheon, spoke on behalf of Mr. E. P. Taylor in a submission respecting the laws relating to mergers.[26]

Trade associations, whose membership consisted of big business interests, made the most submissions. They took the form of "lengthy

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[24] Thorburn, *supra*, n. 6.

[25] *Id.* at 163.

[26] Professor Thorburn also indicates that the Canadian Bar Association submitted a brief at that time, as it has recently in respect of the Competition Bill.

briefs or letters that had obviously been prepared by lawyers experienced in combine matters."[27]

Individual lawyers also made representations and in this connection Professor Thorburn cites two examples:[28]

> Two lawyers in private practice (both in the same firm) felt strongly about the severity of the anti-combines legislation. Mr. Andre Forget sent a letter, and a 55-page bound memorandum followed by a 13-page supplementary memorandum. He also prepared alternative verbal formulations of amendments for the Minister's consideration, and argued for less severe anti-combines legislation at length. Mr. Hazen Hansard sent six submissions ranging from telegrams to lengthy letters. His comments were in a similar vein. These submissions had the advantage of coming from lawyers expert in the combines field and persons who were not themselves leading business executives, although they had specialized in defending business firms in combines cases.

Similarly, of the six academic experts who appeared before the Banking and Commerce Committee, all were professors of either economics or law. Mr. Gordon Blair, an expert in combines law, also appeared before the same Committee on behalf of the National Automotive Trade Association, as did the Acting Dean of Law at McGill University, Professor Maxwell Cohen. Generally, as Professor Thorburn concludes, "the lawyers and business executives were heard with great respect."[29]

On the other hand, Professor Thorburn comments on the submissions of various non-lawyers:[30]

> In general they were less persistent than the business spokesmen. Their submissions did not rely on legal arguments but simply stated their objectives respecting anti-combines policy. It was obvious they were not prepared by lawyers specializing in combines cases, as the major business submissions clearly were. . . . [Similarly,] Miss I. Atkinson, the national president [of the Canadian Association of Consumers] appeared (alone) before the Commons Banking and Commerce Committee and presented a brief directed primarily against the resale price maintenance amendments. She was questioned by the members, some of whom asked barely relevant legal questions which she was not trained to deal with.

The revisions to the Combines Investigation Act in 1960 clearly illustrate the large involvement that lawyers as lobbyists have played in the area of competition law. However, the events of 1971 and 1972 in respect of the Bill C-256, the so-called Competition Bill, afford yet another illustration of this role.

Presumably, the methods employed by the lobbyists of 1971-72 were substantially the same as those used by their earlier counterparts. This includes the formal submissions of written representations or briefs. In order to handle the large number of submissions tendered, the Department of Consumer and Corporate Affairs established in Ottawa in 1971 an "Information Secretariat". In this connection, the writer requested from the Secretariat a list of those persons who had made formal written representations respecting the Competition Bill, and as a result of the information obtained, the following chart was prepared.[31] It

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[27] *Supra*, n. 6 at 164.

[28] *Id.*

[29] *Id.* at 166.

[30] *Id.* at 171. *See also* Rosenbluth and Thorburn, *Canadian Anti-Combines Administration, 1952-60*, (1961 27 Canadian Journal of Economics and Political Science at 498, where the authors relate the long history of the lawyers' involvement as lobbyists in this area. In particular, they state at page 499: "In 1889 Mr. G. Wallace, the Conservative member of parliament who introduced the first combines bill, complained of '. . . those men who have formed those illegal combinations and who come down . . . with a great array of lawyers from from Montreal and Toronto with amendments carefully considered, to legislate this bill out of existence'."

[31] Initially, the writer was supplied only with a list of those organizations which had made public their briefs. As a result of further communication, the writer was supplied with a list of those organizations and

Total number of Briefs Submitted—Approximately 300
Number of Briefs Released to the Public [either directly by the authors (16) or, by the Minister having been authorized to do so (161)]—177 Briefs (representing 189 interests)

Interest Groups	*Interest Groups*	*Companies*	*Companies*
Many of these briefs were, most likely, prepared with the assistance of lawyers who are specialists in competition law. 81 briefs were submitted on behalf of 85 interest groups.	These briefs were expressly prepared by lawyers acting on behalf of particular associations and organizations, and in some cases, on behalf of groups of associations. 3 briefs were submitted on hehalf of 6 interest groups.	Presumably, most of the submissions were also prepared with the assistance of either corporate counsel or outside lawyers specializing in this area. 67 briefs.	One brief was expressly prepared by a Montreal law firm on behalf of 6 corporate clients.

Law Firms and Individual Lawyers	*Law Associations*	*Law Professors*	*Government Departments or Agencies*	*Other*
These submissions were tendered by law firms on their own behalf and not as counsel or advisers to particular interest groups. 5 briefs.	(County of York Law Association and the Canadian Bar Association.) 2 briefs.	2 briefs.	4 briefs.	12 briefs.

is interesting to note the significantly large involvement of lawyers in at least this aspect of the lobbying process.

In short, a great many of those parties whose interests were adversely affected by the proposed Bill sought and obtained the counsel and guidance of a select and powerful few members of the legal profession. Clearly, the businessmen knew what they were doing for the Competition Bill was never enacted in the 1971 form. Subsequently, a revised and watered-down version of the original proposal was introduced in the House of Commons in 1973, in 1974, and again (at which time it was finally enacted) in 1975.

VII. CONCLUSION

Clearly, the lawyer as lobbyist performs a function that has far-reaching implications for both business and politics. Because of this, it is important that the public become aware, at the very least, of the existence of widespread lobbying, and more significantly, the extent to which this type of activity is integrated into the political system and into the entire decision-making process.[32]

Generally, the legal profession views itself in terms of certain self-imposed minimum standards. For example, an individual is presently regarded as deserving of disciplinary action if he is guilty of professional misconduct or exhibits conduct unbecoming a member of the profession. All of this suggests a high standard of personal and professional integrity.[33]

To what extent, then, does the lawyer/lobbyist conform to this standard? Presumably there is total conformity providing the lawyer does not breach a particular canon. Since there are no particular canons specifically related to lobbying,[34] the lawyer/lobbyist is allowed greater

individuals who had made representations, and who had authorized the Minister, following a request made by a member of the House of Commons, to release their submissions to the public. Accordingly, of the approximately 300 briefs submitted: 16 had been made public by the authors; and an additional 161 (representing 173 various interests) had been made public by the Minister following his request for authorization to do so. The foregoing raises an important question. To what extent should pressures brought to bear upon decision-makers be made public? The answer, it seems, must balance to opposing interests. On one hand, surely the citizen, be it an individual, organization, or even a corporate citizen, has a right to make its views known to the government on a confidential basis. On the other hand, surely the Canadian people also have a right to know what pressures and influences are being exerted on their elected representatives.

[32] Where there is greater public awareness, there is greater regulation. For example, in Canada, there are presently no laws regulating the activities of lobbyists. On the other hand, in the United States where lobbying is conducted far more openly, there is some regulation at the federal level (pertaining to the registration of Congressional lobbyists) as well as additional state regulation imposed by various state legislatures. For a review of these various enactments, reference may be made to the following articles: Engstrom and Walker, *Statutory Restraints on Administrative Lobbying—'Legal Fiction'* (1970) 19 Journal of Public Law 89; *Public Disclosure of Lobbyists' Activities* (1970) 38 Fordham Law Review 524; *Application of the Sherman Act to Attempt to Influence Government Action* (1968) 81 Harv. L. Rev. 847; and Committee on Standards of Official Conduct, *Regulations of Lobbying*, House of Representatives, Ninety-First Congress (1970). In addition, it was recently suggested that new restrictions on lobbying in the U.S. would be forthcoming. *See* the U.S. News & World Report, Dec. 27, 1976.

[33] The particulars of acceptable conduct for Canadian lawyers are presently codified in the various provincial codes or canons of legal ethics, rulings of the various provincial law societies, and the disciplinary standards set out in the various enabling statutes establishing the provincial law societies. In this connection, reference may be made to the following treatise: Orkin, *Legal Ethics: A Study of Professional Conduct*, (1957).

[34] The Canadian Bar Association Code of Professional Conduct does contain, however, the following rule:

> The lawyer who engages in another profession, business or occupation concurrently with the practice of law must not allow such outside interest to jeopardize his professional integrity, independence or competence.

Following that rule, note 5 states:

> Further examples of outside interests which could, unless clearly disclosed and defined, confuse or mislead persons dealing with a lawyer engaging in them include:
>
> —professions such as accountancy and engineering:
> —occupations such as those of merchant, land developer or speculator, building contractor, real estate, insurance or financial agent, broker, financier, property manager, or public relations adviser.
>
> If a lobbyist can be regarded as a "public relations adviser", then perhaps lobbying will be covered by

liberties than perhaps he properly deserves, particularly in light of the clandestine manner in which he conducts his affairs and the far-reaching consequences of his activities.

Interestingly, in the United States, the American Bar Association has expressly included provision for lawyer/lobbyists in its Canon of Professional Ethics. In particular, Canon 26 states as follows:[35]

> A lawyer openly, and in his true character may render professional services before legislative or other bodies, regarding proposed legislation, and in advocacy of claims before departments of government, upon the same principles of ethics which justify his appearance before the Courts; but it is unprofessional for a lawyer so engaged to conceal his attorneyship, or to employ secret personal solicitations, or to use means other than those addressed to the reason and understanding, to influence action.

Lawyer/lobbyists are not ordinary lawyers. Nor, however, are they particularly unique. They are neither flamboyant nor dramatic, unless of course one finds drama in cleverness and subtlety. They are not generally known to the public, nor are they known to a good proportion of their own profession. Not unlike many lawyers, they are well-respected by the business community, have the right contacts in high places, possess superior intellectual capacity, and are well remunerated. They do not necessarily specialize in any particular area of the law, although many do. Ultimately, their specialty is the art of influence, but then the art of influence is a talent that many lawyers share. What does set apart the lawyer/lobbyists is their ability to alter the course of legislative history through no less than a skilful manipulation of the decision-making process.[36] For this reason alone, the lawyer as lobbyist should not be regarded casually.

—GERALD L. GALL*

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the above canon. Moreover, many provincial law societies are considering the adoption of the C.B.A. Code of Professional Conduct as part of the formal rules governing the conduct of lawyers within their respective jurisdictions.

[35] For a review of the lawyer as lobbyist from an American point of view, reference may be made to the following articles: Hoffman, *Lawyer as a Lobbyist*, (1963) University of Illinois Law Forum 16; Satter, *The Lawyer as a Legislative Lobbyist*, (1960) 34 Connecticut Bar Journal 38; Crow, *Considerations of the Compatibility of Legal Standards of Ethics and Lobbying Activity*, (1966) 18 Alabama Law Review 425; and Hakman, *Lobbying the Supreme Court—An Appraisal of "Political Science Folklore"*, (1966) 35 Fordham Law Review 15.

[36] Probably, the most recent example in Canada of the lawyer as lobbyist surfaced in Ontario with the throwaway soft drink container issue. *See* the Globe and Mail, dated Feb. 28, 1977.

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THE ENVIRONMENT AND THE LAW IN CANADA'S NORTH

As the capital of the Northwest Territories, Yellowknife, enters its second annual arsenic scare, it is an understatement to say that the environment generally and the delicate ecological balance of the Arctic have attracted wide public attention.

With the pressure in recent years to explore for oil and gas in the Arctic, legislation and its enforcement by both the Federal and Territorial Governments has received top priority. By way of example, yet not intending to produce an exhaustive list, the Fisheries Act, the Territorial Land Use Regulations[1] passed pursuant to the Territorial Lands Act, the Northern Inland Waters Act, the Arctic Waters Prevention Pollution Act and the Clean Air Act are all Federal

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[1] These Regulations are dated 2 November, 1971, SOR/71-580 by P.C. 1971-2287.