

**Date: 20081215**

**Docket: A-132-08**

**Citation: 2008 FCA 402**

**CORAM: NADON J.A.  
BLAIS J.A.  
PELLETIER J.A.**

**BETWEEN:**

**ATTORNEY GENERAL OF CANADA**

**Appellant**

**and**

**NEELAM MAKHIJA**

**Respondent**

Heard at Montréal, Quebec, on November 17, 2008.

Judgment delivered at Ottawa, Ontario, on December 15, 2008.

**REASONS FOR JUDGMENT BY:**

**PELLETIER J.A.**

**CONCURRED IN BY:**

**NADON J.A.  
BLAIS J.A.**

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**REASONS FOR JUDGMENT**

**PELLETIER J.A.**

[1] This is an appeal from the decision of Martineau J. of the Federal Court (2007 FC 327) in which the application judge allowed Mr. Neelam Makhija's application for judicial review of four decisions of the Registrar of Lobbyists on the ground that the Registrar lacked the jurisdiction to investigate since Mr. Makhija had not "registered" as a lobbyist under the *Lobbyists Registration Act*, R.S.C. 1985 (4<sup>th</sup> Supp.), c. 44 (as amended) (the Act).

[2] The substance of the application judge's reasoning is found at paragraph 84 of his Amended Reasons for Order which reads as follows:

[84] An individual who engages in lobbying activities is required to register under the Act and individual who fails to do so is in breach of the Act. However, based on the statutory scheme as it existed during the relevant period, the Registrar was not empowered to investigate an alleged breach of the Act. The Registrar's jurisdiction was confined to investigating alleged breaches of the Code. Given that the applicant [Mr. Makhija], by failing to register, was not subject to the Code, I am of the view the Registrar exceeded his jurisdiction and erred in issuing (and tabling in Parliament) the Four Decisions.

[3] For the reasons which follow, I am of the view that the application judge erred in coming to the conclusion he did with respect to the Registrar's jurisdiction and that the matter must be returned to him for a new hearing on the merits of the application for judicial review.

[4] The purpose of the Act, as set out in its Preamble, is to enable "public office holders and the public [...] to know who is engaged in lobbying activities." Lobbying activities, which give rise to the obligation to file the prescribed form, are defined (in the case of consultant lobbyists) at paragraph 5(1)(a) of the Act in the following terms:

5. (1)(a) communicat[ing] with a public office holder in respect of

(i) the development of any legislative proposal by the Government of Canada or by a member of the Senate or the House of Commons,

(ii) the introduction of any Bill or resolution in either House of Parliament or the passage, defeat or amendment of any Bill or resolution that is before either House of Parliament,

(iii) the making or amendment of any regulation as defined in subsection 2(1) of the *Statutory Instruments Act*,

5. (1)a) à communiquer avec le titulaire d'une charge publique au sujet des mesures suivantes :

(i) l'élaboration de propositions législatives par le gouvernement fédéral ou par un sénateur ou un député,

(ii) le dépôt d'un projet de loi ou d'une résolution devant une chambre du Parlement, ou sa modification, son adoption ou son rejet par celle-ci,

(iii) la prise ou la modification de tout règlement au sens du paragraphe 2(1) de la *Loi sur les textes réglementaires*,

(iv) the development or amendment of any policy or program of the Government of Canada,	(iv) l'élaboration ou la modification d'orientation ou de programmes fédéraux,
(v) the awarding of any grant, contribution or other financial benefit by or on behalf of Her Majesty in right of Canada, or	(v) l'octroi de subventions, de contributions ou d'autres avantages financiers par Sa Majesté du chef du Canada ou en son nom,
(vi) the awarding of any contract by or on behalf of Her Majesty in right of Canada; or	(vi) l'octroi de tout contrat par Sa Majesté du chef du Canada ou en son nom;
(b) arrang[ing] a meeting between a public office holder and any other person.	b) à ménager pour un tiers une entrevue avec le titulaire d'une charge publique.

[5] It is important to recognize that it is the fact of undertaking such activities which gives rise to the obligation to file the prescribed form. This appears, in the case of consultant lobbyists, from the opening words of section 5:

5. (1) An individual shall file with the registrar, in the prescribed form and manner, a return setting out the information referred to in subsection (2), if the individual, for payment, on behalf of any person or organization (in this section referred to as the "client"), undertakes to:	5. (1) Est tenue de fournir au directeur, en la forme réglementaire, une déclaration contenant les renseignements prévus au paragraphe (2) toute personne (ci-après « lobbyiste-conseil ») qui, moyennant paiement, s'engage, auprès d'un client, d'une personne physique ou morale ou d'une organisation :
(a) communicate with a public office holder ...	a) à communiquer avec le titulaire d'une charge publique ...

[6] Consequently, the obligation to file the prescribed form arises every time a person undertakes to engage in lobbying activities on behalf of a client.

[7] The Act also authorizes the Registrar General of Canada to designate a person as the Registrar who is responsible for maintaining a registry of the prescribed forms filed by persons

undertaking lobbying activities: see section 8 of the Act. The Act directs the Registrar, in consultation with persons or organizations having an interest in the subject matter, to develop a *Lobbyist's Code of Conduct* "respecting the activities described in subsections 5(1) and 7(1)": see section 10.2 of the Act. The activities described in subsections 5(1) are those described in paragraphs 5(1)(a) and (b) of the Act. Subsection 7(1) deals with in-house lobbyists – the activities with respect to those lobbyists are substantially the same as those described in paragraph 7(1)(a) of the Act.

[8] Since it is the agreement to undertake lobbying activities which gives rise to the obligation to file the prescribed form, it is not surprising that it is this same agreement which gives rise to the obligation to comply with the Code:

10.3(1) The following individuals shall comply with the Code:	10.3(1) Doivent se conformer au code :
(a) an individual who is required to file a return under subsection 5(1);	a) la personne tenue de fournir une déclaration en application du paragraphe 5(1);
and	
(b) an employee who, in accordance with paragraph 7(3)(f) or (f.1), is named in a return filed under subsection 7(1).	b) l'employé qui, aux termes des alinéas 7(3) f) ou f.1), est nommé dans une déclaration fournie en application du paragraphe 7(1).

[9] It follows from this that the application judge erred when he found that Mr. Makhija "by failing to register, was not subject to the Code... : see paragraph 84 of the application judge's reasons. If Mr. Makhija was required to file the prescribed form because he agreed to undertake lobbying activities, he was, by the same token, required to comply with the Code.

[10] The Registrar's powers of investigation, which were the subject of the application for judicial review, are set out in section 10.4 of the Act:

10.4(1) Where the registrar believes on reasonable grounds that a person has breached the Code, the registrar shall investigate to determine whether a breach has occurred.

10.4(1) Le directeur fait enquête lorsqu'il a des motifs raisonnables de croire qu'une personne a commis une infraction au code.

[11] As a result, assuming that the Registrar had reasonable grounds for believing that a breach of the Code had occurred, he was entitled to conduct an investigation, whether or not the person concerned had filed a prescribed form with respect to the lobbying activities in question, to see if the person had complied with the terms of the Code.

[12] The application judge's error with respect to the application of the Code to a person who had not filed a prescribed form in relation to his lobbying activities caused him to cut short his consideration of Mr. Makhija's application for judicial review without considering the merits of the application. The matter must therefore be returned to him so as to allow him to conclude the task which was before him.

[13] I would therefore allow the appeal, set aside the orders of the application judge:

- 1) allowing the application for judicial review from each of the four decisions which were under review;
- 2) quashing each of the four decisions under review;
- 3) directing the registrar to take all necessary steps with the President of the Treasury Board to have removed the four decisions that were tabled in the House of Commons and the Senate on March 19, 2007 and March 20, 2007 respectively;
- 4) allowing Mr. Makhija the costs of the application;

and remit the matter to the application judge with a direction that he decide the application for judicial review on the basis that the Registrar had the jurisdiction to undertake an investigation as to whether a breach of the Code had occurred.

[14] Since the Attorney General of Canada has not asked for costs of the appeal, none will be granted.

"J.D. Denis Pelletier"

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J.A.

"I agree  
M. Nadon J.A."

"I agree  
Pierre Blais J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-132-08

**APPEAL FROM AN ORDER OF THE HON. MR. JUSTICE MARTINEAU, FEDERAL COURT, DATED MARCH 10, 2008 AND AMENDED ON MARCH 25, 2008, T-662-07**

**STYLE OF CAUSE:** *Attorney General of Canada and Neelam Makhija*

**PLACE OF HEARING:** Montréal, Quebec

**DATE OF HEARING:** November 17, 2008

**REASONS FOR JUDGMENT BY:** PELLETIER J.A.

**CONCURRED IN BY:** NADON J.A.  
BLAIS J.A.

**DATED:** December 15, 2008

**APPEARANCES:**

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